



## Background

1. The Mangere United Football Club (Mangere United) has brought two appeals to the Tribunal against two decisions of the NZ Football Appeals Committee which affirmed the forfeiture by the Club of a Chatham Cup tie match and fine and the forfeiture of seven matches and fines in the Northern Regional Football League (NRFL) Division One competition.
2. The matches were ordered to be forfeited under Rule 34.1 of the NZF Disciplinary Code because the Club fielded a player, Jamie Birch, who had not been appropriately registered and transferred under the NZF Regulations and hence was ineligible to play for the Club in both competitions.
3. Rule 34.1 provides:
 

If a person takes part in an Official Match despite being ineligible, their team will be sanctioned by forfeiting the match and paying a minimum fine of \$25.
4. New Zealand Football (NZF) has detailed regulations on the status and transfer of players. Certain of these regulations are specifically required by FIFA regulations. The registration regulation is one of these. It provides that a player must be registered with NZF and that only registered players are eligible to participate in Organised Football. It also provides that all players must be registered in GoalNet and must be so registered before the player may participate in Organised Football.
5. Regulation 7.4 provides:
 

If a player is registering with a Club for the first time, or for the first time with a New Club, that Player must provide the Club with evidence of name and age, by producing appropriate documentation, for instance an original birth certificate, passport or drivers licence.
6. The 2016 NRFL competition regulations provided in respect of eligibility:
  7. **Player Eligibility**  
Clubs shall ensure that a player is eligible to play and is properly registered using their legal name as recorded on a legal document such as a birth certificate or passport, with their club's own federation using the National registration form in GoalNet and be marked active in 2016 season, and that all necessary clearances from previous clubs are obtained ... prior to taking the field.
7. Regulation 8 provides:
  8. Any Player not correctly transferred in accordance with the regulation, will be deemed to be ineligible.
8. The Chatham Cup Regulations provide at 7.2:
 

Unless otherwise stated in this Regulation, players shall be duly qualified according to NZF Regulations on the Status and Transfer of Players and those of the appropriate affiliated Regional Association.
9. To effect a transfer of a player, a club needs to know the player's national ID number or the name of the club for whom the player was previously registered so it can both effect registration and also a transfer clearance for the player. The birth date of the player is displayed within the GoalNet record.

10. Finally, Regulation 3.2 of the Disciplinary Code provides:

Unless otherwise specified, infringements are punishable regardless of whether they have been committed deliberately or negligently.

### **Grounds for Appeal**

11. The grounds for appeal that were pursued were:

- (a) That there was no complaint within the 5 day period mandated in Rule 77.2 and accordingly there was no jurisdiction to proceed with the charges;
- (b) That the competition rules for both the Chatham Cup and the NRFL competition were ambiguous or not sufficiently clear to impose a mandatory penalty of forfeiture in the circumstance of this case;
- (c) That the principle of proportionality was applicable to the interpretation of either or both the competition rules and the Disciplinary Code so that mandatory forfeiture was an inappropriate penalty in the circumstances of this case.

### **The Facts**

12. The coincidence of facts that led to the claimed ineligibility of Jamie Birch were unusual in the extreme. Jamie Birch was at the relevant time an 18 year old football player who had in the previous season played with Western Springs. In 2016 he decided to join Mangere United to play in that Club's premier team. Players at all levels are subject to the registration and transfer requirements referred to above.
13. At around the time Jamie Birch sought to join Mangere United Cyclone Winstone struck Fiji. The Club's history has been closely entwined with Fiji and a number of the Club's key figures went to assist with aid recovery and relief work in Fiji. Among those was Mr Daud, the Vice President of the Club, who had principal responsibility for the registration and transfer of the players.
14. Mr Daud attempted to continue supervising this work while in Fiji but communication was difficult and ultimately others had to step in to administer the registration and transfer processes. It was accepted as a matter of fact that these volunteers struggled with the processes.
15. The regulation and transfer processes should have been founded on a clear identification of the particular player's name, date of birth and previous club. Unfortunately it appears that somebody at Mangere United identified Jamie Birch as having played for Central United in the previous season. That led a Mangere United official to check GoalNet for Central United and to wrongly equate Jamie Birch with a James Birch registered in the previous season to Central.
16. An application for transfer was therefore made to Central which approved the transfer without anybody identifying the confusion between Jamie and James. The close coincidence of names was compounded by the fact that James Birch had opted not to play for Central in the 2016 season, accordingly was not registered as active with Central, and so there was no reason for anybody at Central to see anything odd in the transfer request. At the Mangere United end the errors were in not obtaining full identification for Jamie Birch, including his past club; not recognising the name difference, and not recognising the age discrepancy on GoalNet (Jamie Birch was born in 1998 and James Birch in 2002).

17. Finally, Jamie Birch played his first game for Mangere United on 25 March 2016 before the transfer had been delivered on 27 March 2016. This in itself was a breach of the Rules.
18. The misidentification of Jamie with James did not become apparent until Jamie received a red card, as a result of two yellow cards, in a match at the end of May 2016. Administrative steps to process that misconduct charge against Jamie revealed the error. The consequent charges and forfeiture orders made against the Club resulted in the loss of the Chatham Cup tie, a match which Mangere United had won, seven matches in the NRFL competition and ultimately the relegation of the Club's first team from the premier competition.
19. There was no question before the Tribunal that the error that was made was other than innocent. Nor that, had a proper transfer been lodged for Jamie Birch, it would have been approved by Western Springs with Jamie Birch then being an eligible player for Mangere United. Accordingly it is not altogether surprising that Mangere United feels that the forfeiture of matches and the resulting relegation are unduly harsh consequences of that innocent error.
20. This Tribunal has considerable sympathy for Mangere United in all of the circumstances. However, for the reasons submitted on behalf of NZF, the Tribunal cannot identify an applicable jurisdiction applying to these facts which allows it to moderate that impact.

### **Discussion**

21. The first ground of appeal relied on regulation 77.2 of the NZF Disciplinary Code which provides:

Any person or body may report conduct that they or it considers incompatible with the Statutes or Regulations of NZF or the Regional Associations to the Competition Administrator or the Disciplinary Committee. Such complaint should be made in writing within 5 working days or the timeframe specified in the Competition Regulations, whichever is the earliest.
22. It was submitted for Mangere United that the Chatham Cup tie was on 14 May 2016, the Competition Administrator received the report on ineligibility on 2 June 2016 and made his decision on 8 June 2016. In respect of the NRFL competition it was submitted that the date of decision on ineligibility of 2 June 2016 was more than five days later than all of the forfeited matches other than the match on 28 May 2016.
23. The Mangere United submission depended on a proposition that the five working day period ran from the day of the occurrence of the event that was the basis of the complaint. That interpretation might well be applied in respect to a third party complaint brought to the attention of the Competition Administrator or the Disciplinary Committee that involved a matter within the knowledge of a third party. However, it could not sensibly apply to unknown matters, eg Rule 40 applies to forging and falsification of documents where the event occurs at the time of the forgery or falsification but obviously in most circumstances are not known to any third party at the time. A mandatory five day period from the date of the event would effectively negate the purpose of Rule 40. Similarly in respect to ineligibility. A player's ineligibility, whether arising from status or inappropriate process, may be unknown for a considerable period. Again, it would negate the purpose of the

eligibility rules if the passing of a five day period insulated a club which knowingly or unknowingly fielded an ineligible player from any consequence.

24. In the Tribunal's view, the purpose of Rule 77.2 is to require third parties who do have knowledge or wish to pursue a complaint to do so within the five day window. However, the five day limitation cannot be applied to potential breaches which are not known within that period or to disciplinary processes not initiated by third party complaint but by the internal processes of NZF. Again the examples of forged and falsified documents or ineligibility are likely examples of breaches that would be initiated within NZF in protection of the underpinning standards of its registration, transfer and competition rules. In our view regulation 77.2 does not apply in the present circumstances which are not circumstances of third party complaint.
25. The second ground was that the NZF Rules are not sufficiently clear and predictable to permit the imposition of the sanction of the forfeiture and fine under Regulation 34. Mr David correctly submitted that the rules for sporting organisations which impose sanctions on members are required to be clear in that, at least in a general sense, an uncertainty may tell against the application of the rule in particular circumstances.
26. The essence of the submission was that regulations 7 and 13 of the NRFL competition regulations do not clearly provide that every failure to register a player on GoalNet results in Rule 34.1 of the NZF Disciplinary Code applying. The underlying proposition is that because ineligibility can arise in a wide variety of circumstances, some innocent and some not innocent, that any ambiguity or lack of clarity in the Rules should favour restricting or eliminating any sanction.
27. Mr David pointed to the first schedule to the NRFL competition regulations which provides as a penalty for playing an ineligible/unregistered player a fine of \$100 plus "Loss of match points". An asterisk draws attention to that penalty following "NZ Football Regulation on the Status and Transfers of Players".
28. Mr David also submitted that whether or not the principle of proportionality can be applied by this Tribunal to negate an otherwise apparently mandatory sanction it can inform the Tribunal's approach to interpretation and its decision as to whether a sanctioning provision is sufficiently clear.
29. As a general proposition the Tribunal is sympathetic to Mr David's analysis. However it cannot properly be said that the NZF Rules are insufficiently clear in defining the requirements for eligibility and the consequences of fielding an ineligible player.
30. As previously noted in paragraph 4, there is a full section of the NZF Rules which deals with the status and transfer of players and expressly provides that only registered players are eligible to participate in Organised Football. That definition of Organised Football encompasses "Association Football organised under the auspices of FIFA, the Confederations, NZF and/or the Regional Associations, or authorised by them". There is no question that both the Chatham Cup and the NRFL are competitions falling within this definition. Both sets of competition rules relate eligibility to the NZF Regulations on the Status and Transfer of the Player.
31. There can be no doubt that Jamie Birch was ineligible under the applicable rules for both competitions. The question then is whether there was any lack of clarity as to the application of Rule 34.1 of the Disciplinary Code and mandatory forfeiture given his ineligibility.

32. It is clear from the consistency and combined effect of the NZF Regulations, the Disciplinary Code, the Chatham Cup competition rules and the NRFL Competition Rules that eligibility is the foundation for the entitlement to actively participate in NZF competitive football. Indeed the Disciplinary Code provides:
- 1.2 This Code describes infringements of the Rules in FIFA, NZF and Regional Association regulations and codes, determines the sanctions incurred, regulates the organisation and function of the bodies responsible for taking decisions and the procedures to be followed before these bodies. The purpose of the Code is to ensure compliance by NZF with the Statutes and Regulations of FIFA, including ensuring that NZF has included in its Regulations the mandatory provisions as required by FIFA in the FIFA Disciplinary Code.
  - 1.3 This Code applies to every match and competition organised by NZF or its Regional Associations ....
33. As previously noted, the FIFA Disciplinary Code mandates the forfeiture provisions of Rule 34.1 in the case of ineligibility. The Code is expressly stated to apply to "every match and competition."
34. There is no ambiguity in the Rules as to the underpinning importance of the concept of eligibility or the intention of the Rules to apply the sanction of mandatory forfeiture to breaches of eligibility and competition.
35. However, on Mr David's argument, that conclusion is not necessarily conclusive. Mr David strongly urged the Tribunal to adopt the principle of proportionality recognised in Swiss and EU law that may be applied in appropriate circumstances to mitigate or potentially even negate an otherwise applicable sanction. Mr David's proposition was that given the innocence of the breach and the fact that Jamie Birch would otherwise have been eligible that the forfeiture sanction was unduly disproportionate.
36. As Mr David correctly submitted proportionality as a principle has been adopted in various CAS decisions, although not to date directly in any decision of this Tribunal.
37. A number of issues arise as to the jurisdiction of this Tribunal to apply proportionality as a principle that can amend the application of specific rules of a sporting organisation. Proportionality, although at times discussed, is not directly recognised in New Zealand law. We say "directly" because proportionality, although not under that head, is always a consideration when a court or this Tribunal has a discretion to assess the penalty appropriate to a particular set of facts. But that application of proportionality is within the context of a sanctioning rule that allows for such an assessment.
38. It is, of course, significantly different to apply proportionality in a way that alters or negates the specification of a defined sanction for a particular category of breach. Swiss/EU law, at least theoretically, provides for that possibility in particular circumstances. As we note, the application of that principle has been accepted in a number of CAS decisions. But CAS decisions are specifically governed by Swiss law. And the context for the application of proportionality by CAS has been in respect to individual sanctions applying to breaches of the doping laws.
39. Mr David urged on the Tribunal the submission that this Tribunal stood in the shoes of CAS in exercising this particular appeal jurisdiction and so could in effect apply

the law applicable to CAS or, alternatively, that CAS decisions constituted a body of international sporting law that this Tribunal should apply.

40. As NZF submitted it is not strictly correct that the Tribunal stands in the shoes of CAS in exercising this appeal jurisdiction but rather that the Tribunal is an alternative to CAS. And, as we have noted, the Tribunal Rules expressly provide for the application of New Zealand law by this Tribunal. New Zealand law has not adopted the principle of proportionality as a basis for qualifying or voiding an otherwise specified sanction.
41. Accordingly it does not follow that this Tribunal is required by CAS decisions to apply proportionality as a qualifying or voiding concept.
42. The proposition that CAS decisions constitute an international sporting code of law is also controversial<sup>1</sup>. Undoubtedly they are persuasive where determinations are made in respect to particular rules which are internationally applied. But it is a step further to suggest that they constitute a code of law that a decision making body, such as the Tribunal, constituted by national statute must apply.
43. Accordingly the Tribunal is not persuaded that either the principle of proportionality or principles of a *lex sportiva* are required to be applied by this Tribunal. Even were they, the Tribunal would accept the NZF submission that NZF, following FIFA direction, was entitled to the view that eligibility including a mandatory forfeiture rule was a fundamental underpinning to achieving the purpose of the integrity of its competitions<sup>2</sup>.
44. For the above reasons the appeals are dismissed.
45. NZF raised the question of costs. It was agreed that issues of cost should not be considered until the outcome of the appeals was determined. If costs are to be pursued then NZF should make a formal application on notice. Without expressing any concluded view the Tribunal does suggest that NZF may feel sympathetic to the particular unhappy circumstances which underlie these appeals.

Dated 21 December 2016



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Alan Galbraith QC

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<sup>1</sup> See the CAS Advisory Opinion 2005/C/976 & 786 FIFA & WASA, 21 April 2006, para. 1.24.

<sup>2</sup> We note that FIFA is a Swiss association. We understand mandatory forfeiture for ineligibility to be a requirement of the FIFA code. It would seem that at least to date the Swiss law as to proportionality has not affected that FIFA requirement.