Case number: NST-E22-81227

Case Title: H v Tennis Australia

Determination

National Sports Tribunal
Appeals Division

sitting in the following composition:

Panel Member Mr Simon Philips

in the arbitration between

Mr H (Appellant)

Represented by Mr Omar Seoud, solicitor, and Ms Gayann Walker of counsel

And

Tennis Australia (Respondent)

Represented by Mr Daniel Stuk

PARTIES

1. The parties to this dispute (**Parties**) are:

    - Mr H who is a parent of a participant in boys tennis tournaments and was involved in an incident which occurred on 28 December 2021.
    - Tennis Australia (**TA**) which is the national sporting body for the sport of tennis in Australia.

INTRODUCTION

2. On 28 December 2021, Mr H and Mr K were involved in an incident which occurred during a boys tennis tournament being conducted at a suburban tennis club. Mr K lodged a complaint with TA about Mr H under the TA Member Protection Policy (**TA MPP**).
3. On 28 February 2022, TA convened a Tribunal to hear the complaint (**the Original Tribunal**).
4. The Original Tribunal found that Mr H had breached Clauses 8.2, 8.9(a), 8.9(c) and 8.19 of the TA MPP and ordered as follows (**the TA Determination**):

    - Mr H is banned from attending any tennis facilities and/or venues or premises of any Australian Tennis Organisation (**ATO**) for two years from 23 January 2022;
    - In addition, Mr H is placed on a suspended sentence effective for one year from 23 January 2024. If during this one year period Mr H breaches the Policy the suspension of the additional one year ban will cease and a further one year ban from attending any tennis facilities and/or venues or premises of any ATO will commence from the date that he is found to have breached the Policy.

5. Mr H appeals the TA Determination on sanction and seeks a reduced sanction on the (sole) ground that the sanction imposed by the Original Tribunal under clause 15.3 of the TA MPP was manifestly disproportionate to the breaching conduct.

NST JURISDICTION

6. The jurisdiction of the National Sports Tribunal (**NST**) is engaged by section 35(1) of the *National Sports Tribunal Act 2019* (**NST Act**) and Clause 16.2(b)(i) of the TA MPP.

7. As an appeal of a decision made by a sporting tribunal, this dispute has been heard as an arbitration in the Appeals Division of the NST (**the Appeal**).

8. On 29 April 2022, the Parties signed an Arbitration Agreement (**Agreement**) by which they agreed and acknowledged that:

   - the named NST Member (Simon Philips) (**NST Member**) had been appointed to hear the Appeal
   - the Appeal would be governed by and conducted in accordance with the NST Act, the National Sports Tribunal Rule 2020 and the National Sports Tribunal Practice and Procedure Determination 2021 (**NST Practice and Procedure Determination**)
   - the outcome of the Appeal (that is the decision of the NST Member) would be binding and enforceable.

FACTUAL BACKGROUND

9. The incident giving rise to these proceedings occurred at a Tennis Centre in suburban Melbourne on 28 December 2021. It arose during a tennis match involving the teenage sons of both Mr K and Mr H. At an early point in the match, an issue arose between the two players (who, it can be inferred, were jointly umpiring the match) as to whether a point should be replayed.

10. A heated argument and physical altercation then ensued between Mr H and Mr K, while the latter was attempting to call the tournament Referee over to intervene in the dispute between the two players.

11. The Original Tribunal's findings (which are not challenged by Mr H) with respect to the incident included the following:

> 15. The location of the events is of significance. The events took place during a 14/U boys' tennis match at a suburban tennis club, with many young children and adults in the immediate area. Mr H's repeated swearing and name calling was so loud that it could be clearly heard by Mr Pettitt, 25 metres away. Further

attention was drawn to the events due to the necessity for an ambulance and Victoria Police to attend.

16. Mr H's repeated name calling and racial abuse of Mr K combined with him following closely behind Mr K as he went to get the Referee amounts to Harassment.

17. Hitting Mr K, causing him to fall to the ground amounts to Physical Abuse.

    a. Mr H alleges that he acted in self-defence.
    b. The Tribunal finds that Mr H's own conduct, including repeated name calling, repeated racial abuse and following closely behind Mr K as he went to get the Referee, contributed to Mr K's actions and further that Mr H's hitting of Mr K, causing him to fall to the ground was not a reasonable response in the circumstances.

18. Mr H's repeated name calling, racial abuse and taunting of Mr K amounts to Emotional abuse and/or Psychological abuse.

19. Mr H's repeated name calling, racial abuse of and swearing at Mr K, with many young children and adults in the immediate area, in such a loud voice that it could be clearly heard 25 metres away amounts to Vilification.

    .....

24. Mr K pushed Mr H three times and before the third time put the items in his hand on the ground and, in Mr Pettit's words, 'squared up to [Mr H] like he wanted a fight. He had his fists clenched, with his hands up around his head like a boxer.' 'He acted aggressively'.

25. The Tribunal accepts that Mr K was subjected to repeated name calling and racial abuse by Mr H and that Mr H followed close behind him as he went to get the Referee but is nevertheless of the view that his response was not reasonable. He could have proceeded to get the Referee without turning around to confront and then push Mr H three times and doing so in an aggressive manner.

12. Thus, the Original Tribunal made unchallenged findings which included findings that Mr H had engaged in repeated name calling, racial abuse, taunting and swearing with respect to Mr K and that Mr H struck Mr K causing him to fall to the ground.

13. There was also objective eye-witness evidence before the Original Tribunal (including from the tournament referee) to the effect that Mr H struck Mr K (in the jaw or cheek) causing Mr K to (immediately) fall to the ground and lay unconscious for a number of minutes while ambulance and police were called.

14. The incident was the subject of an investigation by Victoria Police. The precise status of this investigation was unclear as at the hearing of this matter.

15. On about 6 January 2022, TA notified Mr H that a complaint had been made against him under the TA MPP (the complainants being Mr K and his son).

16. On 17 January 2022, TA notified Mr K that a complaint had been made against him under the TA MPP (the complainant being Mr H).

17. On 24 January 2022, Mr H was informed by TA that he was provisionally suspended (pursuant to s 12.10 of the TA MPP) pending a hearing of the complaints.

18. The complaints against Mr H and Mr K were heard (concurrently) by the Original Tribunal on 28 February 2022. Soon after the conclusion of this hearing, the Original Tribunal delivered the TA Determination (which included the Original Tribunal's reasons and orders) which was dated 28 February 2022.

19. While the NST Member has considered all the facts, allegations, legal arguments and evidence submitted by the parties, he refers in this Determination only to the submissions and evidence which he considers necessary to explain his reasoning.

PROCEEDINGS BEFORE THE NST

20. Mr H commenced this appeal on 23 March 2022 by lodging an Application Form with the NST. In the Application Form, Mr H indicated he was seeking (through arbitration leading to resolution through a binding decision) a re-hearing of the matter which he hoped would result in a reduction of the penalty imposed by TA.

21. As noted above, the Parties signed the (Arbitration) Agreement (which confirmed the appointment of the NST Member) on 29 April 2022. The Agreement noted that:

    - a preliminary issue had arisen as to the manner in which the Appeal would proceed, and in particular whether new evidence could be admitted in the Appeal and whether the Appeal should be a re-hearing (including consideration of new evidence) or a re-consideration of the evidence and submissions from the Original Tribunal

    - preliminary procedural directions had been made requiring Mr H to file and serve submissions by 21 April 2022 as to why the Appeal should proceed by way of a re-hearing (and the basis of his case) and why and what new evidence should be admitted, and TA to file submissions in reply by 4 May 2022.

22. The NST Member confirmed acceptance of his appointment on 2 May 2022.

23. On 21 April 2022, Mr H filed (preliminary) Submissions in accordance with the directions made at the Preliminary Conference. In these submissions, amongst other things, Mr H:

    - sought leave to amend the grounds of appeal, such that the (sole) ground of appeal was that the sanction imposed by the Original Tribunal was manifestly disproportionate to the breaching conduct;
    - sought to have 4 additional documents made available to the NST Member for the purposes of hearing submissions on penalty.

24. On 9 May 2022, TA filed Submissions in reply to Mr H's (preliminary) Submissions which largely addressed the issue as to what documents should be made available to the NST Member for the purposes of hearing the Appeal.

25. On 13 May 2022, the NST Member conducted a Pre-Hearing Conference. On that occasion, and throughout the remainder of these proceedings, Mr H was represented by Ms Gayann Walker of counsel (instructed by Mr Omar Seoud, solicitor) and TA was represented by Messrs Daniel Stuk and Jarrod Growse, lawyers for TA.

26. At the Pre-Hearing Conference, following oral submissions, the NST Member confirmed that, consistent with s 95 of the *NST Practice and Procedure Determination*[1], the determination would be on the basis of a re-hearing, based on all material that was available to the Original Tribunal and certain, limited further material and made directions to the following effect:

    - Mr H to have leave to amend the grounds of appeal so that it relies exclusively on cl 16.1(c) of the TA MPP, that is that the sanction imposed by the Original Tribunal was manifestly disproportionate to the breaching conduct
    - The NST will consider all documents before the Original Tribunal, as well as the recording of the Original Tribunal Hearing and three specified documents sought to be relied upon by Mr H.

[1] s 95 of the *NST Practice and Procedure Determination* provides that, unless the parties agree that an appeal can be decided without a hearing, or the document constituting the appeal provides otherwise or the basis of the appeal is such that a re-hearing would be inappropriate, then the Tribunal is to conduct the appeal by way of a rehearing, and may admit new evidence in certain circumstances. The circumstances in which new evidence may be admitted on the appeal include where all parties agree or the Tribunal is satisfied that exceptional circumstances warrant such admission.

- Parties to confer in relation to Parties to issue of inclusion of 2020 TA determination re Mr K in material before the Arbitrator
- Timetable for filing of further written submissions by the Parties
- Hearing to be scheduled for 16 June 2022

27. Mr H filed his substantive submissions on the Appeal on 26 May 2022.

28. TA filed its substantive submissions on the Appeal on 9 June 2022.

29. Mr H filed submissions in reply on 14 June 2022.

30. The hearing proceeded (by way of audio-visual link) on 16 June 2022. As noted above, at the hearing, Mr H was represented by Ms Walker and TA was represented by Mr Stuk. At the hearing, the Parties' representatives spoke to their written submissions (which submissions are summarised in detail below) and responded to the arguments and contentions put by the opposing side, as well as addressing questions posed by the NST Member.

31. At the conclusion of the hearing, directions were made for the filing of short supplementary submissions by the Parties. In accordance with those directions, TA provided supplementary submissions on 27 June 2022 and Mr H provided supplementary reply submissions (which attached further (new) evidentiary material) on 11 July 2022. On 14 July 2022, TA provided (without leave or directions) supplementary submissions in reply.

APPLICABLE RULES

32. As noted above, in both the Application and the Agreement, as well as in his principal substantive submissions provided on 26 May 2022, and throughout the Appeal, Mr H relied upon the TA MPP (in particular cl 16.1 and 16.2) as providing jurisdiction to the NST for the determination of his appeal. This (strongly) indicated, at least implicitly, that Mr H accepted that he was subject to and bound by the TA MPP.

33. However, as noted below, at a relatively late stage in the course of his appeal, Mr H advanced a contention that the TA MPP did not apply to him (but instead that the TA Code of Behaviour exclusively applied to him). For the reasons set out below, I do not accept this contention, and instead find that the TA MPP did apply to Mr H.

34. In any event, there was no dispute that the TA MPP was the source of jurisdiction for the NST to determine Mr H's appeal. Set out below are relevant clauses of the TA MPP.

Extracts from the TA MPP

1.3 The purpose of the Member Protection Policy (**Policy**) is to protect the health, safety and well-being of those who participate in the activities of tennis, including those delivered by TA, Member Associations, Affiliated Organisations, Member Affiliated Organisations, Regional Associations and Affiliated Clubs (**Australian Tennis Organisations,** or hereafter **ATOs**).

1.4 TA and all ATOs will not tolerate any form of abuse, neglect, harassment, unlawful discrimination, vilification, victimisation, indecency or violence against any adult or child by Personnel, and such conduct is a breach of this Policy.

1.5 TA takes seriously its responsibility and commitment to provide a safe environment for those participating in the activities of ATOs, particularly individuals at a disadvantage and children and young people. TA and all ATOs have a zero tolerance approach to child abuse. All ATOs are committed to ensuring children are safe when participating in tennis activities, and ensuring that services are delivered in the best interests of their young participants. This commitment is endorsed and approved by the Board of TA.

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2.1 This Policy applies to the following individuals and organisations:

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(g) any other person who is member or user of, or affiliated to, an ATO (including life members or service award holders); and

(h) any other person or entity (for example a parent/guardian, spectator or sponsor) who or which agrees, in writing (whether on a ticket, entry form or otherwise), to be bound by this Policy; and

4.1 The terms below have the following meanings in this Policy:

Affiliated Clubs means those tennis clubs, which are a member of, or affiliated to, a Regional Association and/or a Member Association.

Affiliated Organisations means those organisations (other than Member Associations, Regional Associations and Affiliated Clubs) which are affiliated with Tennis Australia or an MA from time to time in accordance with the TA or MA constitution (as the case may be).

Australian Tennis Organisation (ATO) includes Member Associations, Affiliated Organisations, Regional Associations and Affiliated Clubs.

Member Association/s (MA or **MAs)** means members of Tennis Australia in accordance with its constitution.

Regional Associations means those regional or metropolitan tennis associations which are members of, or affiliated to, a Member Association.

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16.1 With respect to a Category A Complaint, the Respondent or the ATO may appeal (**Appellant**) a decision of a Tribunal at first instance (**Original Tribunal**) on the following grounds:

(a) that the Original Tribunal relied on a clear error in their decision making process;

(b) that the Original Tribunal failed to comply with the procedures outlined in Part IV of this Policy; or

(c) the sanction imposed by the Original Tribunal under clause 15.3 of this Policy is manifestly disproportionate to the breaching conduct; or

(d) no reasonable decision maker in the position of the Original Tribunal, based on the material before them, could reasonably make such a decision.

(**Appeal**).

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16.2 The process for an Appeal is as follows:

(a) the Appellant must, within 72 hours of the Original Tribunal delivering its decision give written notification to the TAICU of the Appellant's intention to Appeal (**Notice of Intention to Appeal**);

(b) as soon as practicable following receipt of the Notice of Intention to Appeal, the TAICU must determine the appropriate body to convene the Appeal. The following principles apply:

(i) In the case of the Original Tribunal being a tribunal convened by TA: the Appeal will be heard by the Appeals Division of the National Sports Tribunal (which is the Australian tribunal established by the National Sports Tribunal Act 2019 (Cth)) in accordance with the National Sports Tribunal's rules and procedures;

35. Set out below are extracts from the TA Code of Behaviour (**Code**).

Extracts from the TA Code of Behaviour

1. Purpose

1.1 Tennis Australia (**TA**), together with all Australian Tennis Organisations (**ATOs**), is committed to providing all members of the Australian tennis community with a welcoming, safe and inclusive tennis environment that promotes the physical, social and emotional wellbeing of all participants.

1.2The Code of Behaviour: Competitive Play (**Code of Behaviour**) sets out the standards of behaviour expected of players, coaches, parents/guardians and any other spectators when participating in or attending Tournaments and Competitions in Australia.

1.3 The Code of Behaviour seeks to:

(a) promote sporting conduct among players, coaches, parents/guardians and spectators, and respect for the spirit of tennis;

(b) establish a framework for violations of behaviour standards;

(c) put in place processes to manage incidents at Tournaments and Competitions involving players, coaches, parents/guardians and spectators;

(d) increase public confidence by consistently and efficiently dealing with behaviour incidents; and

(e) protect the image, reputation and integrity of tennis in Australia.

1.4 The behaviours adopted by all stakeholders can assist in connecting more people to tennis. All tennis stakeholders are encouraged to contribute to a safe, welcoming and inclusive environment for all and maintain standards of excellence, professionalism, humility and integrity at all times.

1.5 This is the case not only for competing players, but for all members of the tennis community (coaches, parents, guardians, spectators, etc). Poor spectator behaviour is considered as serious as poor player behaviour.

2. Definitions

2.1 Please be aware when reading this Code of Behaviour that you may come across terms that are capitalised (for example “Tournaments”, “Competitions”, “Officials”, etc). Capitalised terms have the following meaning in this Code of Behaviour:

“Australian Tennis Organisation” (**ATO**) refers to TA, Member Associations, affiliated organisations, member affiliated organisations, regional associations and affiliated clubs as defined in the Member Protection Policy;

“Code Violation” means a penalty issued and reported by an Official as consequence for a breach of this Code of Behaviour.

“Entourage” means any coach, trainer, parent, guardian, relative, family member, friend, attendee or support person or spectator at the Venue associated with a player.

“Member Association” (MA) refers to the governing body for tennis in each state/territory in Australia as defined in the TA Constitution.

“Official” means the person performing the role of Referee, assistant referee, court supervisor, court monitor, line umpire or chair umpire, whether paid or voluntary.

"Participant/s" refers to all registered or entered players, coaches, parents, guardians, spectators, Tournament directors, Competition and other event organisers and ATO committee members and directors.

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8. Application

8.1 The Code of Behaviour applies to Participants whilst participating in, as well as before and after, a Tournament or Competition. The key factor to determine whether this Code of Behaviour applies is whether there is a clear connection between the conduct in question and the Tournament or Competition.

8.4 The Code of Behaviour operates in conjunction with all of Tennis' National Policies (which include the Member Protection Policy and Disciplinary Policy). A full list of Tennis' National Policies is available at http://www.tennis.com.au/about-tennis-australia/reports-and-policies/policies). If there is an alleged breach of the Code of Behaviour and another Tennis National Policy, action may be taken under this Code of Behaviour and/or any other applicable Tennis National Policy.

MAIN SUBMISSIONS OF THE PARTIES

36. Set out below is a summary of the principal submissions made by the Parties. Given the scope of the submissions, and the iterative way in which they emerged, it is by no means exhaustive. However, it seeks to summarise all of the submissions which were germane to the determination of the Appeal.

Principal Submissions of Mr H

37. The principal submissions advanced, refined and ultimately pressed by Mr H in the Appeal can be summarised as follows.

38. *First*, given that the maximum suspension that can be imposed under the TA disciplinary framework is 2 years, and when Mr H's conduct is objectively viewed in context and considering principles of proportionality, parity and purposes of imposing a sanction, the sanction imposed by the Original Tribunal is manifestly disproportionate.

39. *Second*, as both the TA MPP and the Code were applicable to the incident, and both operate in conjunction with each other, they should be read in a way which does not create inconsistent outcomes and, as the maximum suspension which can be imposed under the Code is 2 years, the Original Tribunal, hearing a matter under the TA MPP, should not have imposed a sanction which was more than what would have been possible under the Code.

40. *Third*, given the context of the offending, and applying the principles of proportionality and parity, the penalty imposed by the Original Tribunal is manifestly disproportionate to the offending conduct in the following respects:

    - there is a sufficient nexus and common features of the incident between Mr H and Mr K such that a similar sanction would be appropriate for both men, and, given that the conduct of both men was similar in terms of name calling, shouting and the physical nature of their contact, their ought be some parity in the way their conduct was evaluated by the Original Tribunal
    - the difference in sanction imposed on Mr H compared to that of Mr K (a 6 month ban and 6 months suspended ban in comparison to a 2 year ban and 1 year suspended ban) is so marked that it would produce a legitimate and justifiable sense of grievance in an objective observer

41. *Fourth*, the Original Tribunal failed to consider the context of the offending and the reasonable state of mind of Mr H at the time of the incident, and in particular failed to take into account a history of animosity between the H family and the K family and failed to find that Mr H's actions in attempting to defend himself were reasonable.

42. *Fifth*, a submission was made in writing, but was not fully developed (or the subject of any evidence), to the effect that because Victoria Police had informed Mr H that they were taking no further action as a result of their finding that Mr H acted in self defence, Mr H's appeal should be adjourned until the Victoria Police matter has been finalised.

43. *Sixth*, the way in which the charges of breaches of the TA MPP were laid meant that similar or the same conduct was classified as multiple breaches, resulting in Mr H being punished multiple times for the same conduct (resulting in a penalty that is manifestly disproportionate to the offending behaviour).

44. *Seventh*, an appropriate penalty, having regard to the Code and how other sporting codes punish such behaviour, would be a full 9 month ban with a further 3 month period of suspended penalty.

45. *Eighth*, submissions were made by Mr H, after the hearing of the Appeal, in reply to supplementary submissions made by TA, to the following effect:

    (a) that the TA MPP did not apply to him on the day of the incident (but the Code did) because:

- Mr H had not agreed in writing that the TA MPP applied to him
- Mr H was not a "user" of an Australian Tennis Organisation (**ATO)** (as contemplated by cl 2.1(g) of the TA MPP) because the tennis centre at which the relevant tournament was being conducted was not an ATO for the purposes of the TA MPP (because the Club which operates out of the centre may be an ATO but the centre is not) and Mr H's presence (as a spectator) at the tennis centre did not make him a user of an ATO.

(b) that because the TA MPP did not apply to Mr H, the appeal should be upheld because TA has sanctioned him under an inapplicable policy or the arbitration should be terminated (and TA directed to commence a (fresh) disciplinary process under the Code).

Principal submissions of Tennis Australia

46. The principal submissions advanced by Tennis Australia in the appeal can be summarised as follows.

47. *First*, given that Mr H's conduct of harassment, physical abuse, emotional abuse and vilification amounted to not only severe breaches of TA's MPP but also one of the more serious instances of offending reported to TA over the last several years, the Original Tribunal's sanction was proportionate and could be seen as lenient.

48. *Second*, Mr H was afforded procedural fairness and the complaint against him was handled in accordance with TA policies and natural justice.

49. *Third*, any prior conduct of, or penalty imposed on, Mr K has no relevance to this appeal, or, in the alternative, if it is relevant, then so is Mr H's prior conduct and previous sanction imposed by the Original Tribunal.

50. *Fourth*, Mr H is and was at the time of the subject incident bound by the terms of the TA MPP as a user of an ATO, or having agreed in writing to be bound by the TA MPP, and in any event, by dint of clause 8.4 of the Code (extracted above). Further, the issue of jurisdiction is outside of the scope of the Appeal, as it was not covered by the (sole) ground of appeal on which Mr H relies.

MERITS

51. For the reasons set out below, I accept and prefer the submissions of TA over those of Mr H. In particular, I accept TA's submission that, given the gravity of the (unchallenged) findings of the Original Tribunal with respect to Mr H's conduct, and taking into account all of the objective and subjective circumstances of the subject incident, and Mr H's prior conduct and previous sanction, the Original Tribunal's sanction was proportionate to the offending conduct (and, on one view, could be seen as lenient).

52. In the balance of this determination, I will address the submissions of the Parties, and my reasons for accepting those of TA over those of Mr H, by reference to the three main issues which arise for consideration and determination in this appeal, namely:

- whether the TA MPP applied to Mr H
- whether the penalty imposed by the Original Tribunal was manifestly disproportionate to the offending conduct
- whether the Original Tribunal failed to consider the context of the offending and the reasonable state of mind of Mr H at the time of the incident

Issue 1 - Did the TA MPP apply to Mr H ?

53. While TA was, prima facie, correct to submit that the issue of jurisdiction is outside the scope of this appeal (because Mr H did not identify, as a ground of appeal, that he challenged the jurisdiction of the Original Tribunal to deal with the complaint the TA MPP), it is nevertheless necessary for this issue to be resolved in the Appeal. This is because Mr H submitted, on the question of proportionality, that because it was only the Code, and not the TA MPP, which applied to his conduct, the Original Tribunal's sanction lacked proportionality because it was at (or exceeded) the uppermost limit of sanction which the Original Tribunal had the power to impose under the Code.

54. I do not accept Mr H's submission that his conduct was not governed by the TA MPP and that the Original Tribunal only had jurisdiction to sanction his conduct under the Code, not the TA MPP. I do so for the following reasons.

55. *First*, I accept TA's submissions that Mr H was bound by the TA MPP because, by attending the subject tournament (as a spectator to watch and support his teenage son) he was a **user** of an ATO. This is because I am satisfied that: (i) the Tennis Club, at which

the subject tournament was conducted, was an affiliated club within the meaning of the TA MPP and therefore was and is an ATO for the purposes of the TA MPP, and (ii) Mr H, by attending the tournament conducted at the club as a spectator, was a user of an ATO. On this basis, I am satisfied and find that Mr H was a user of an ATO and therefore, by dint of cl 2.1(g) of the MPP, the TA MPP applied to him.

56. *Second*, I do not accept Mr H's submission that, because the Tennis Centre (as opposed to the Club) may not be an ATO, and the Centre is a public facility which is open to members of the public who are not members of the Club, and because he is not a member of the Club and was not a user of the Club on the day in question, he was not a "user" of an ATO as contemplated by cl 2.1(g) of the TA MPP. Instead, for the reasons set out above, I am satisfied that as a spectator at the tournament (supporting his son who was competing in that tournament) conducted by the Club, Mr H was within the concept of a "user" of an ATO as contemplated by cl 2.1(g) of the TA MPP. The reality is that Mr H had not attended the Centre as a member of the public unconnected to the tournament being conducted by the Club. To the contrary, he attended the Centre for the purpose of watching and supporting his son competing in the tournament being conducted by the Club, which is an ATO.

57. Contrary to Mr H's submissions, it is not apparent that TA was seeking to regulate the conduct of any and all members of the public who attended at or near public tennis courts. Rather, by cl 2.1(g) of the TA MPP, TA seeks to bring under the auspices of the MPP all users of ATO's (including spectators at tournaments conducted by an ATO) and thereby (legitimately) seek to regulate the conduct of all attendees at such tournaments.

58. *Third*, in my opinion, a proper reading of both the Code and the TA MPP, and in particular cl 8.4 pf the Code and cl 2.1(h) of the TA MPP, leads to the conclusion that the TA MPP applied to Mr H. Cl 2.1(h) of the TA MPP provides that it applies to any person (including a parent/guardian or spectator) who agrees, in writing (whether on a ticket, entry form *or otherwise*) to be bound by the Policy. In my view, by participating as a parent and spectator at the tournament and thereby being bound by the Code, which was reduced to writing and was also linked directly (through cl 8.4) to the TA MPP, Mr H could be said to have agreed, in writing, to be bound by the TA MPP through cl 8.4 of the Code (which expressly operates in conjunction with the TA MPP).

59. *Fourth*, I accept TA's submission that, as Mr H accepts that he was bound by the Code, then by dint of cl 8.4 of the Code, action could be taken against Mr H under the TA MPP. This is because Cl 8.4 of the Code expressly provides that the Code operates in conjunction with all of TA's National Policies (which includes the MPP) and that where there is an alleged breach of the Code and another National Policy (including the MPP), action may be taken under the Code and/or any other applicable National Policy. Thus, the Code itself expressly recognises that it operates in conjunction with, and thereby incorporates by reference the terms of, the TA MPP and provides that if there is an alleged breach of (both) the Code and the MPP, then action may be taken under the TA MPP.

60. Thus, even if the TA MPP did not apply to Mr H expressly as a user of an ATO, it would still, in my view, have been open to TA to bring a complaint against Mr H under the TA MPP because cl 8.4 of the Code expressly enables it to do so. I do not accept Mr H's submission that cl 8.4 of the Code does not give TA the option of which policy to implement or that it may only select an "applicable" policy (in the sense of a policy which expressly applies to the person who is subject to the Code). To the contrary, cl 8.4 of the Code expressly enables TA to choose which National Policy to apply, if there is an alleged breach of the Code and another National Policy (as there was in this case).

61. *Fifth*, I am fortified in reaching this conclusion by some of Mr H's own submissions. In his initial written submissions on the Appeal, Mr H submitted (correctly) that the Code expressly operates in conjunction with the TA MPP and both should be read in a way which does not create inconsistent outcomes. The logical corollary of this submission is that TA was correct to pursue the complaint against Mr H under the TA MPP, given the very serious allegations made against him which may warrant sanctions in excess of the maximum available under the Code. In so doing, TA was, in my view, ensuring that inconsistent outcomes were avoided.

62. Given the conclusion I have reached in relation to this issue, it is not necessary for me to decide whether (as TA contended) Mr H may (also) have been bound by the TA MPP because he agreed, in writing, to be so bound by virtue of his son agreeing, in writing, to the tournament entry conditions and/or Mr H (or his wife) making a declaration, as part of the tournament entry form, that they agreed to the tournament entry conditions (which included a condition that the tournament would be conducted in accordance with all relevant TA policies, including the TA MPP).

Issue 2 - Was the penalty imposed by the Original Tribunal manifestly disproportionate to the offending conduct ?

63. In my opinion, for the following reasons, the penalty imposed by the Original Tribunal was not manifestly disproportionate, but rather was entirely proportionate, to the gravity of the offending conduct by Mr H.

64. *First*, as I have set out above, I accept TA's submission that, given the gravity of Mr H's conduct (as reflected in the Original Tribunal's unchallenged findings), the Original Tribunal's sanction was proportionate to the offending conduct. The Original Tribunal found that Mr H's conduct involved harassment, physical abuse, emotional abuse and vilification. These findings were not challenged in the Appeal (properly in my view given that, on the materials which were before me, there can be no doubt that such findings were available to the Original Tribunal and were properly made). Each of these findings are serious matters which, in my view, warrant the imposition of a significant sanction. In my view, in light of these findings, involving as they do extremely serious breaches of the TA MPP, and given that there does not appear to be an upper limit with respect to the period of time for which a sanction (such as a ban on participation or attendance) can be imposed under cl 15.3 of the TA MPP, the sanction of a two year ban and a further 12 month suspended ban imposed by the Original Tribunal was not manifestly disproportionate to the offending conduct. To the contrary, in my view, the sanction imposed by the Original Tribunal was entirely proportionate to the gravity of Mr H's offending conduct.

65. *Second*, I do not accept Mr H's submission that, given the context of the offending, the principles of proportionality, parity and the rationale for imposing a sanction suggest that the sanction imposed was manifestly disproportionate to the offending conduct. A significant aspect of this submission was the contention by Mr H that there was a sufficient nexus and common features of the incident such that a similar sanction should be applied for both Mr H and Mr K, and there should be some parity in the way their conduct was evaluated by the Original Tribunal. In other words, Mr H submitted that the Original Tribunal was in error in imposing a significantly more severe sanction against Mr H in comparison to that imposed on Mr K. I do not accept this submission for these reasons:

    - on any view, Mr H's conduct was, at an objective level, significantly more serious than that of Mr K

- the Original Tribunal found that Mr H engaged in repeated name calling, racial abuse and harassment with respect to Mr K, as well as, most significantly in my view, physical abuse by hitting Mr K, causing him to fall to the ground (as to which the Original Tribunal observed (correctly) that whenever anyone's head hits the ground there is risk of serious injury or even death)
- the Original Tribunal also found that Mr H engaged in emotional and/or psychological abuse and vilification towards Mr K
- the Original Tribunal also took into account the fact that a six month suspended sentence had previously been imposed by Tennis Victoria on Mr H for similar conduct but Mr H still did not seem to accept that such behaviour is completely unacceptable
- the findings of the Original Tribunal with respect to Mr K were that he had engaged in abuse (with respect to Mr H), had pushed Mr H three times, squared up to Mr H (like a boxer ready to fight) and had acted aggressively. However, significantly in my view, there was no finding by the Original Tribunal that Mr K had struck or hit Mr H or engaged in physical abuse, nor had Mr K (apparently) been the subject of any previous sanction with respect to similar (or other) conduct
- the sanction imposed against Mr K (an attendance ban of nearly 6 months and a further suspended ban of another 6 months) was not insignificant and reflects (appropriately in my view) the level of culpability and gravity involved in Mr K's own conduct, which on the Original Tribunal's findings, and on any view, was significantly less serious than that of Mr H
- in all of these circumstances, in my view, the Original Tribunal was not in error in imposing a significantly more severe sanction against Mr H in comparison to that imposed on Mr K.

66. *Third*, I do not accept Mr H's submission that the Original Tribunal failed to consider the context of the offending and the (reasonable) state of mind of Mr H at the time of the incident and, in effect, that Mr H's actions amounted to (reasonable) self defence. To the contrary, in my view, the Original Tribunal carefully considered and weighed up the context of the respective conduct of Mr H and Mr K and found that Mr H's conduct in hitting Mr K, causing him to fall to the ground, was not a reasonable response in the

circumstances. In so finding, the Original Tribunal determined that Mr H was not acting reasonably, including by defending himself.

67. In his submissions, Mr H contended that given the history between the two families and Mr K's conduct on the day, the Original Tribunal ought to have found that Mr H attempting to defend himself was a reasonable action to take. I do not accept this submission. I do not accept that there is sufficient evidence to warrant a finding (by me) that the Original Tribunal was wrong in its findings or that Mr H acted reasonably and in self defence when he struck Mr K (in the head). Even bearing in mind that this appeal involves a hearing de novo, I am not prepared to find that Mr H has established that the Original Tribunal erred in its findings or that I should make a different finding. In this regard, it should be remembered that the sole ground of appeal advanced by Mr H is with respect to the severity of sanction and this does not involve a challenge to the finding of breaches made by the Original Tribunal.

68. *Fourth*, I do not accept Mr H's submission that the fact that the incident may be the subject of an ongoing investigation by Victoria Police, or alternatively that Victoria Police may be taking no action against Mr H on the basis that he was acting in self defence, has a bearing on the sanction to be given to Mr H or should result in this appeal being adjourned. The reason for this is that, in my opinion, even if Mr H could establish that the Victoria Police had made a decision not to take any action against him on the basis that he was acting in self defence (which he has not done), this would have no bearing on the question at issue in this appeal, which is whether the sanction imposed against Mr H is manifestly disproportionate. This is because any decision taken by the Victoria Police, and the reasons for taking any such decision, would be a matter for the police which cannot be determinative of, or even relevant to, the approach to be taken with respect to sanction for established breaches of the TA MPP by the Original Tribunal (or the NST in this appeal).

69. *Fifth*, I do not accept the submission by Mr H that the way in which the charges of breaches of the TA MPP were laid means that the same conduct was classified as multiple breaches, resulting in Mr H being punished multiple times for the same conduct. In my view, if anything, the opposite result has occurred in that Mr H has received a sanction which is less than what might have been (reasonably) imposed had the appropriate sanction for each of the various charges and breaches been considered separately. For

example, in my view, if the sole charge which had been brought and established had been the physical abuse (in the form of Mr H striking Mr K in the head) then the sanction imposed by the Original Tribunal would have been appropriate with respect to this individual breach alone (especially given that Mr H had previously received a suspended sanction for breaches of the MPP).

70. In my view, it would not have been unreasonable for the Original Tribunal to impose separate or additional sanctions with respect to the other breaches (such as the harassment, emotional and psychological abuse and vilification), although a question would then have arisen as to whether such sanctions should be served concurrently, and I accept that, as submitted by Mr H, there was some degree of overlap between the conduct characterised as Harassment, Emotional Abuse and Vilification. In any event, I do not accept that Mr H has been punished multiple times for the same conduct. Rather, in my view, if anything, Mr H has been punished only once for multiple breaches, arising from a course of (escalating) conduct which occurred over a period of many seconds if not (substantially) more than a minute and involved multiple different and distinct actions on the part of Mr H.

71. *Sixth*, I do not accept Mr H's submission that in determining an appropriate penalty, regard should be had to the way in which other sports may punish similar behaviour. It should be remembered that each different sport is conducted in a different context and may be subject to different codes of conduct and disciplinary rules and policies, with different attitudes and standards for the imposition of appropriate sanctions. It is a trite proposition to say that, even in the context of the same sport, each and every incident will have differentiating and distinguishing features and aspects such that each and every incident must be considered separately and on its own particular merits. This proposition has even greater force in the case of different incidents occurring in the context of different sports.

72. Mr H seeks to rely on a decision of the NST in *Parker v Motorcycling NSW* NST-E21-33523 in which a participant was found guilty of making physical contact with the back of the head of a race official and received a sanction (imposed by the NST) of a fine of $1,500 for the incident involving the race official. In my view, even if the observations I have made with respect to decisions regarding sanctions in different sports are put to one side, the decision in *Parker* provides no assistance to Mr H or to the NST in this appeal, because it is distinguishable from the current appeal in several material respects.

73. In *Parker*, the NST accepted that Mr Parker did make contact with the Clerk of the Course, but found that contact was of low force and contact, and that it was evident from all witnesses that the Clerk of the Course did not stumble or fall, was not injured and the only consequence was that his hat fell from his head. In imposing a fine of $1,500 for this aspect of the incident, the NST took several exculpatory factors into account, including admissions and multiple apologies and expressed remorse by the participant, that there was no evidence of previous similar offending, that the fine would be a significant financial burden on the participant, who was an amateur rider, and who had already served a suspension of over 7 months arising from other aspects of the incident. These circumstances, including the early admissions, remorse, absence of previous similar offending and the imposition of a pecuniary penalty, are materially different to those pertaining to Mr H. Consequently, the decision in *Parker* has, in my view, little or no relevance, significance or application to the current appeal.

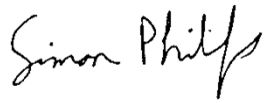
Did the Original Tribunal fail to consider the context of the offending and the reasonable state of mind of Mr H at the time of the incident ?

74. In my opinion, for the reasons set out in paragraphs 66 and 67 above, the Original Tribunal did not fail to consider the context of the offending and the reasonable state of mind of Mr H at the time of the incident.

THE TRIBUNAL THEREFORE DETERMINES:

75. Mr H's appeal is unsuccessful and should be dismissed.

Date: 10 August 2022



Simon Philips