Case number: NST-E23-375291

Case Title: Member v Sporting Body

Determination

National Sports Tribunal

General Division

sitting in the following composition:

Panel Member Mr Robert Heath KC

in the arbitration between

Member Applicant

Represented by a legal representative

– and –

Sporting Body Respondent

Represented by an authorised representative

1. This determination is in nine parts, namely:

I Introduction and parties

1. This arbitration is subject to the *National Sports Tribunal Act* 2019 (Cth) ('**the NST Act**'). It concerns a disciplinary dispute arising from a complaint against a member of a Sporting Body; and it has been conducted in the General Division of the National Sports Tribunal ('**NST**' or '**Tribunal**').

2. The Applicant is a member of the Respondent. He is represented in this arbitration by counsel.

3. The Respondent is the governing body for the sport in Australia; and it is the sole Australian member of the sport's International Federation ('IF'). The IF is recognised as the sole sporting body with global authority to make and enforce regulations for the encouragement and control of the sport; and the IF recognises the Respondent as the sole body for the control of the sport in Australia. The Respondent is represented in this arbitration by the National Integrity Officer of that body.

4. This proceeding arises from an application of the Respondent to the NST dated 22 November 2023 ('**NST Application**'). By this application, the Respondent referred the matter to the NST General Division for arbitration. This case arose from that referral.

5. In short, this case relates to the following: (i) a sanction that the Respondent imposed on the Applicant on 24 October 2023 ('**2nd Sanction**'); and (ii) the Applicant's desire to dispute the 2nd Sanction. The 2nd Sanction arose from the Applicant's failure to comply with a Breach Notice dated 25 August 2023 ('**Relevant conduct**').

6. In this case, there are three matters about which there is no dispute.

7. First, there is no dispute that the Relevant conduct was "Prohibited Conduct" as defined in clause 6 of the Complaints, Disputes and Discipline Policy dated 18 April 2023 ('**CDDP – April 2023**').

8. Second, there is no dispute that the CDDP – April 2023 governs the determination of the issues raised in this arbitration. The parties accepted as much in an exchange of emails on 8 December 2023, being an exchange into which the NST Case Manager was copied.[1] At the hearing on 18 December 2023, the parties confirmed that the Tribunal should determine the issues on this basis. Moreover, the parties and the Tribunal have conducted the case on this basis.

9. Third, there is no dispute concerning the nature and scope of the Tribunal's role. The parties agreed that: (i) the Tribunal was empowered to reach a fresh sanction-related decision; (ii) the Tribunal's sanction-related decision may or may not accord with the decision to impose the 2nd Sanction; and (iii) the Tribunal's power to make a fresh sanction-related decision did not depend upon the existence of error in respect of the decision to impose the 2nd Sanction. At the hearing on 18 December 2023, the parties confirmed their agreement in this regard.

II The issues and a summary of the Tribunal's determinations

10. Against this background, in the written and oral submissions, the substantive issues raised were as follows:

    (a) **Issue 1**: In the circumstances of the case, in respect of the Relevant conduct, should the Tribunal impose a sanction?

    (b) **Issue 2**: If yes, what sanction should the Tribunal impose?

11. In relation to these issues, for the reasons set out below, the Tribunal has determined as follows:

Issue	Determination
Issue 1	Yes
Issue 2	A. It is appropriate to suspend the Applicant from participating in any activities under the rules of the sport. B. It is appropriate to suspend the Applicant from participating in any sporting activities. In the circumstances of this case, a fair and reasonable period of suspension is two weeks. C. There is no suspension of the Applicant's sporting qualifications or accreditations.

[1] Specifically, in his email dated 8 December 2023 (sent at 2.04pm), the Respondent's representative said that he was content to proceed on the basis that the CDDP – April 2023 would govern the determination of the matter.

	D. Pursuant to the 2nd Sanction, the Applicant has served a suspension of almost two months, in which case has already complied with the Tribunal Sanction. Accordingly, he is now free to participate in any sporting activities.

III Background

A Events leading to the NST Application

12. By way of introduction, in this section, I have set out a chronology of relevant events and correspondence leading to the NST Application.

13. In early 2023, in a letter sent to the Respondent, the complainant made a complaint against the Applicant.

14. In summary, the complaint alleged that the Applicant made unwanted sexual advances towards her. Specifically, the complainant alleged that:

    (a) On the evening on 5 January 2023, the Applicant put his hand on the complainant's knee, saying "I think we should have a relationship". In response, the complainant said as follows: "No thank you".

    (b) On the morning of 6 January 2023, the Applicant sent the complainant a text message with a suggestion that they engage in sexual relations. She did not respond to this message.

    (c) On 12 January 2023, the Applicant sent the complainant another text message. In this message, the Applicant again stated his wish to engage in sexual relations with the complainant. In her response, the complainant said that she was not interested in a romantic or sexual relationship.

15. The Respondent determined that the alleged conduct gave rise to a National Integrity Framework matter. In those circumstances, the Respondent proceeded to deal with this complaint in accordance with the relevant provisions of the CDDP – April 2023.

16. By email to the Applicant dated 19 May 2023:

    (a) The Respondent noted that a written complaint had been made against him ('**First complaint**');

    (b) The Respondent provided him with a copy of the written complaint;

    (c) The Respondent invited the Applicant to provide a written response to the complaint, although it noted that he was "not required to do so";

(d) The Respondent noted that it would convene an internal panel to assess the complaint and make findings in respect of the allegations; and

(e) The Respondent provided a link to the CDDP – April 2023.

17. By email to the Applicant dated 4 June 2023:

(a) The Respondent noted that the Applicant had not provided a written response to the complaint; and

(b) The Respondent said that it would proceed with the complaints process.

18. On 5 June 2023, the Applicant requested a further two weeks to provide a response to the complaint. The Respondent granted this request.

19. The Applicant did not provide a written response to the complaint before the new deadline.

20. Subsequently, on 19 June 2023, the Respondent sent a letter to the Applicant. In this letter, the Respondent said relevantly as follows:

(a) The Respondent had convened a panel to investigate the complaint.

(b) As The Applicant had not provided evidence to contradict the complainant's allegations, the panel made findings to the effect that he had engaged in the conduct as alleged.

(c) The panel found that such conduct was "Prohibited Conduct" within the meaning of the CDDP – April 2023.

(d) Further, the panel found that such conduct constituted "Harassment" and "Sexual Misconduct" as defined in the relevant Member Protection Policy of the Respondent ('**MPP**').

(e) In determining the appropriate sanction, the panel considered the nature of the conduct, noting that it was "at the lower end of seriousness for behaviour of this type". The panel also considered the following: (i) the relatively short period over which the conduct occurred; (ii) the fact that it did not appear to be part of a pattern of conduct; and (iii) the length and breadth of his service to the sport.

(f) In determining the appropriate sanction, the panel also had regard to the idea that "all instances of sexual harassment are inherently serious and must be treated as such".

(g) In light of these matters, as to the appropriate sanction, the panel determined as follows:

For two years, the Respondent must not contact the Complainant in writing or otherwise, unless directly related to the [Club] or the sport. Any such contact must occur in the presence of at least one other adult (for example, by copying that person on an email).

(h) This letter constituted a Breach Notice for the purposes of the CDDP – April 2023.

(i) Under the CDDP – April 2023, the Applicant had fourteen days in which to lodge an appeal against the sanction described above (`**1st Sanction**').

21. By email to the Respondent dated 7 July 2023, the Applicant communicated his intention to appeal against the 1st Sanction. In the same email, the Applicant requested an extension of time for lodging an appeal.

22. By letter to the Applicant dated 10 July 2023, the Respondent refused to grant the extension request. The Respondent noted that the Applicant had never provided a substantive response to the complaint.

23. In late July and early August 2023, the Applicant and the complainant were serving as elected members of a Club.[2] Further, at this time, each one was an "Officer" within the meaning of the Club's Constitution.[3]

24. On 31 July 2023:

(a) At 8.45am, the Applicant sent a "group" email to other members of the general Committee of the Club, including the complainant. This email related to the business of the Club. Specifically, by this email, the Applicant asked for volunteers to help run a course.[4]

(b) At 9.37am, Club Member 1sent a "reply all" email to the Applicant's earlier email. This responsive email related to the business of the Club.

(c) At 9.47am, the Applicant sent a "reply all" email to Club Member 1's earlier email. This responsive email related to the business of the Club.

(d) At 4.50pm, by way of "reply all" email to the Applicant's 9.47am email, Club Member 2 sent a message to his fellow members of the Committee. This responsive email related to the business of the Club. Specifically, Club Member 2 said that he was unavailable to participate in the course on the relevant day.

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2 As to the Committee, and as to the election of Committee Members, the Tribunal refers to clauses 25, 26 and 47 of the Club's Constitution. A copy of the Constitution is available for download on the governance page of the club's website. It was approved at the Club's AGM in September 2021.

3 See clauses 25 and 26 of the Club's Constitution.

4 According to the activity's program recorded on this page of the Club's website, the Club planned to hold a course.

(e) At 5.01pm, by way of "reply all" email to Club Member 2's 4.50pm email, Club Member 1 sent a message to fellow members of the Committee. This responsive email related to the business of the Club. Specifically, Club Member 1 said that he was unavailable to participate in the course on the relevant day.

(f) At 6.48pm, by way of "reply all" email to Club Member 1's 5.01pm email, the complainant sent a message to her fellow members of the Committee, including the Applicant. This responsive email related to the business of the Club. The email states relevantly as follows:

> **From:** The Complainant
> **Date:** Monday, 31 July 2023 at 6:48pm
> **To:** Club Member 1
> **Cc:** Club Member 2, the Applicant, Committee Email, Club Member 3
> **Subject:** Re: [The Course]
>
> Hi
>
> I'm a mentor so will be there on Sunday. Can you please advise what help is needed, as I assumed the same people as last year had been organised before now to deliver?
>
> Nobody has requested the relevant material from me and at this late stage, I can't access it.

25. On the following day:

(a) At 8.59am, the Applicant sent a reply email to the email identified in subparagraph 24(f) above. However, the Applicant did not send a "reply all" email. Rather he sent this email to the complainant alone. Given the importance of this email, which related to the business of the Club, the full document is reproduced below:

> **From:** The Applicant
> **Subject:** Re: [The Course]
> **Date:** 1 August 2023 at 08:59
> **To:** The Complainant
>
> Hi [complainant name]
>
> We decided not to do the course this year. If you could help with the registration and transition between groups that would be great.
>
> Thanks [Applicant name]

(b) At 11.00am, the complainant sent a reply to the Applicant's 8.59am email. However, she did not send this email to the Applicant alone. She sent this email to the Applicant and Club Member 1. The full email is reproduced below:

> **From:** The Complainant
> **Date:** Tuesday, 1 August 2023 at 11:00
> **To:** The Applicant
> **Cc:** Club Member 1
> **Subject:** Re: [The Course]
>
> Hi [Applicant name]
>
> That's grand!
> What time do I need to be there? Who will provide the lists? What locations will the groups be rotating through?
>
> Kind regards,
> The Complainant

(c) At 11.21am, the Applicant sent a reply email to the email identified in the preceding subparagraph. However, the Applicant did not send a "reply all" email. Rather he sent this email to the complainant alone. Given the importance of this email, which related to the business of the Club, the full document is reproduced below:

> **From:** The Applicant
> **Subject:** Re: [The Course]
> **Date:** 1 August 2023 at 11:21
> **To:** The Complainant
>
> Plan on 8:30 I waiting on the course girls to register, once I have those details I will send around the students lists and the run sheet. I have attached last years run sheet with some details updated
>
> The Applicant

26. The Tribunal refers to the emails identified in subparagraphs 25(a) and 25(c) above ('**Contravening emails**'). These are the only emails to which the 2nd Sanction relates. In relation to these emails, there is no dispute that: (i) each one related to the business of the Club; and (ii) by sending each one to the complainant alone, the Applicant contravened the 1st Sanction.

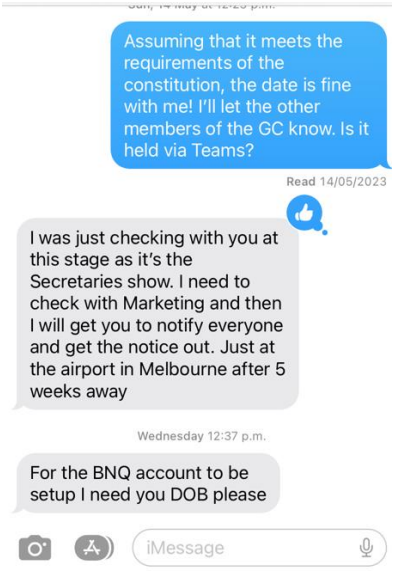
27. The Applicant gave evidence that he did not intend to send the Contravening emails to the complainant alone – mistakenly, in each case, he pressed "reply" rather than "reply all".[5]

[5] See his letter to the Respondent dated 6 November 2023.

By way of contrast, the Respondent contended that the sending of each email was an intentional act by which the Applicant demonstrated his "disdain" for the 1st Sanction.[6]

28. For the reasons explained in Part VII below, the Tribunal finds that: (i) at the time of sending each Contravening email, the Applicant was aware of the terms of the 1st Sanction; (ii) in sending each Contravening email, the Applicant did not intend to express any form of disdain for that sanction; and (iii) the Applicant had intended to send each Contravening email to the complainant and some other members of the Committee of the Club.

29. Returning to the narrative, at 12.37pm on 2 August 2023, the Applicant sent a text message to the complainant (and the complainant alone) ('**Contravening text message**'). There is no dispute that: (i) the Applicant sent this text message in his capacity as an "Officer" at the Club; and (ii) this message related to his efforts to establish, on behalf of the Club, a new bank account in the name of that club. This text message is the final one in the following screenshot:



30. There is no dispute that, for the same banking-related purpose, the Applicant sent identical text messages to other members of the General Committee of the Club.[7] The Respondent's representative objected to the Tribunal's use of this evidence; and, alternatively, he asked the Tribunal to give him an opportunity to make submissions in respect of this evidence.[8] At the hearing on 18 December 2023, the Tribunal refused to

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6 See paragraph 12 of the submissions of the Respondent dated 13 December 2023 ('**the Respondent Submissions**').

7 See the following: (i) subparagraph 17(b) of the Applicant's reply submissions – a subparagraph in which these text messages are discussed; and (ii) Appendix 1 to the Applicant's reply submissions (for copies of these text messages).

8 In his email to the NST dated 14 December 2023, he urged the Tribunal to strike out this evidence on the basis that it was irrelevant. Alternatively, he asked for permission to make submissions in respect of this evidence.

strike out this evidence (and other things to which the Respondent had objected), although it did give him an opportunity to make submissions in respect of this evidence (and other things to which the Respondent had objected).

31. As to the Contravening text message, the Applicant provided the following statement:

> In terms of the text message that was sent to the Complainant, the Club's IT policy for communicating potentially sensitive information is to be done by individual text. As the club was opening a new bank account at the time of the breach, in my role I needed the Complainant to send me sensitive information by return text to open the account. I was placed in a situation where I was subject to two conflicting policies. The inadvertent communication between us has only been about the business of the Club. To be clear, I categorically deny any implication that my error in communication was anything other than conducting business of the club and apologise if offense was taken. That was not my intention.

32. The reference to "the Club IT Policy" is a reference to the "Best Practice Information Technology procedures" followed within the Club.[9] The chair of the IT sub-committee outlined these procedures in his email to the Applicant dated 8 December 2023.[10] This email states relevantly as follows:

> Never sending Confidential Identity information via a single electronic medium. Email is not secure so to reduce the risk of Identity Fraud, we do not transmit several details of Identity Information (Full Name, Address, Drivers Licence Number, Password Number, Date of Birth, Medicare Card Number, Bank Account Number) via a single email.

33. Subsequently, the complainant made a further complaint against the Applicant ('**Second complaint**'). This complaint related to the Contravening text message and the Contravening emails. The Respondent has never disclosed the email or letter by which the complainant made this complaint.

34. The Respondent determined that the alleged conduct of the Applicant gave rise to a National Integrity Framework matter. In those circumstances, the Respondent proceeded to deal with the Second complaint in accordance with the relevant provisions of the CDDP – April 2023.

35. By letter to the Applicant dated 25 August 2023:

    (a) The Respondent noted that it had received the Second complaint.

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[9] At the hearing on 18 December 2023, the Respondent objected to the description of these IT procedures as "a policy". However, he did accept that these procedures were "practices" to which the Club subscribed. Importantly, he did not dispute that these practices applied at the relevant time – that is, when the Applicant prepared and sent the Contravening text message. In the Tribunal's view, nothing turns on the disagreement concerning the label one should apply to the procedures in question.

[10] This email is Appendix 5 of the Applicant's primary submissions.

(b) The Respondent outlined the nature and gravamen of the complaint in the following terms:

> *… you have communicated directly with the Complainant on multiple occasions, by both SMS message and email, without including another adult in the correspondence. A copy of these communications is enclosed for your reference.*

(c) The Respondent enclosed copies of the Contravening emails and the Contravening text message ('**Relevant communications**').

(d) The Respondent informed the Applicant that:

(i) he was entitled to provide a written response to the Second complaint, although he was "not required to do so"; and

(ii) if he wished to provide a response, he had until 8 September 2023 to do so.

(e) The Respondent noted that it would assess the complaint and make findings in respect of the allegations.

36. The Applicant did not provide a written response to the Second complaint before the relevant deadline, being fourteen days from his receipt of the Breach Notice dated 25 August 2023.[11]

37. Subsequently, on 24 October 2023, the Respondent sent a letter to the Applicant. In this letter, the Respondent said relevantly as follows:

(a) As the Applicant had not provided evidence to contradict the complainant's allegations, the Respondent made findings to the following effect:

(iii) contrary to the 1st Sanction, he had communicated directly with the complainant, and he had done so without including another adult in those communications; and

(iv) this conduct was "Prohibited Conduct" for the purposes of the CDDP – April 2023.

(b) In determining the appropriate sanction, the Respondent considered the following matters:

(i) the "unwelcome and inappropriate" nature of the conduct, being matters of which the Applicant ought to have been aware;

(ii) the relatively short period over which the conduct occurred;

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[11] See clause 9.5(c)(iii) of the CDDP – April 2023.

(iii) "the seemingly innocuous content of the communications";

(iv) the "inherently serious" nature of the matter, being something of which the Applicant ought to have been aware; and

(v) the conduct in question demonstrated disregard for the disciplinary policies and the authority of the Respondent.

(c) In light of these matters, the Respondent had decided to suspend the Applicant from (i) participating in any sporting activities conducted under the Rules of the sport for a period of twelve months and (ii) holding any relevant sporting qualification or accreditation for the same period.

(d) This letter constituted a Breach Notice for the purposes of the CDDP – April 2023.

(e) Under the CDDP – April 2023, the Applicant had fourteen days in which to lodge an appeal against the sanction (that is, the 2nd Sanction).

38. On 3 November 2023, the Complaints, Disputes and Discipline Policy dated 3 November 2023 ('**CDDP – November 2023**') replaced the CDDP – April 2023. This change is a matter to which the Tribunal shall return. For present purposes, though, the Tribunal notes two things. First, the earlier policy is the one pursuant to which the Respondent issued the Breach Notice identified in subparagraph 24(e) above. Second, the earlier policy is the one pursuant to which the Respondent imposed the Sanction.

39. By email dated 6 November 2023, the Applicant:

(a) lodged his "appeal of sanctions imposed by the Respondent";[12] and

(b) sent a letter to the Respondent.[13]

40. The email stated relevantly as follows:

> I note that I have taken this matter very seriously and I sincerely apologise to the Complainant for any distress I many have caused.
>
> The Sport not only as a competitor but as a trainer and director etc is my life, and to have this taken away from me has been detrimental to my health and well-being. I have resigned from the Club committee and will no longer need to interact with the Complainant.
>
> I ask that you consider my appeal and should have any queries or require further clarification please let me know.

[12] At this point, the Applicant was seeking to challenge the the Sanction. Subsequently, in his written submissions dated 11 December 2023, he confirmed that the dispute was confined to an appeal against the Sanction.

[13] The email and the letter are attached to this Determination – see **Annexure C**.

41. Plainly, in this email, the reference to "the Club committee" is a reference to the Committee of the Club.[14]

42. In the letter, the Applicant explained the circumstances in which he sent the Relevant communications to the complainant. The Tribunal shall address the substance of the Applicant's explanation in Part VII below.

43. Following the receipt of this email, by the NST Application, the Respondent's Complaint Manager referred the dispute to the NST.

B Relevant Policies

44. Prior to April 2023, commendably, the Respondent adopted the National Integrity Framework designed by Sport Integrity Australia ('**Framework**').[15] As noted in the CDDP – April 2023, the Framework was adopted to make the sport "a safe and fair space for all participants".[16]

45. There are four core policies that make up the Framework ('**Core policies**'). For present purposes, the only relevant Core policy is the Member Protection Policy ('**MPP**'). For members of the Respondent, the MPP identifies unacceptable conduct. Such conduct is defined as "Prohibited Conduct".

46. The Framework also includes a Complaints, Disputes and Disciplines Policy ('**CDDP**'). The CDDP underpins the Core policies. In essence, the CDDP explains how people are held accountable for contraventions of Core policies. As noted above, the Respondent adopted the CDDP.

47. This determination assumes that the reader is familiar with the terms of the CDDP – April 2023. For present purposes, in the following paragraphs, the Tribunal has emphasised some provisions in this policy.

48. Section 9 of the CDDP – April 2023 is headed "Findings and Resolution Process".

49. Under clause 9.2(c) of the CDDP – April 2023, the Respondent was ultimately responsible for the following: (i) issuing Breach Notices; and (ii) applying and administering sanctions as it saw fit. This clause also stated that, in applying and administering sanctions, the Respondent could refer to SIA's "Case Categorisation Model" ('**CCM**'). This model is

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[14] The Club is and was at all relevant times an incorporated association operating under the *Associations Incorporation Reform Act* 2012 (Vic). According to history pageof the club's website, the Club is a member club of the Respondent.

[15] An explanation of the Framework appears on this page of the website of Sports Integrity Australia ('**SIA**').

[16] See section 1 of the CDDP – April 2023.

recorded in a SIA document titled "Case Categorisation & Guidance for Sanctions" ('**SIA Guidance document**').[17]

50. Clause 9.4(a) of the CDDP – April 2023 authorised the Respondent to impose sanctions. Clause 9.4(b) also relates to the imposition of sanctions. It provides as follows:

> When deciding on an appropriate sanction, the Respondent may refer to the Sport Integrity Australia Guidance for Sanctioning and may consider:
> i. The seriousness of the behaviour;
> ii. Whether it was a one-off incident or part of an overall pattern of behaviour;
> iii. Whether it was an honest and reasonable mistake;
> iv. The potential impact on public confidence in the integrity of the sport;
> v. The views and opinion of the Complainant;
> vi. Any relevant aggravating or mitigating factors; and
> vii. Any other matter it considers relevant.

51. The reference to "the Sport Integrity Australia Guidance for Sanctioning" is a reference to the sanction-related parts of the SIA Guidance document.

52. Clause 9.6(a) of the CDDP – April 2023 provides relevantly that, if the Respondent (Applicant in this matter) disputed the sanction, the Complaint manager was bound to do one of the following things: (i) refer the matter to the NST General Division for arbitration; or (ii) refer to the matter to "an Internal Hearing Tribunal".

53. For present purposes, and in terms of shedding light on the Tribunal's role, clause 9.7(b)(ii) is important. It provides as follows (highlighting added):

> If arbitration is sought in either the NST General Division or an Internal Hearing Tribunal, the Tribunal will, as appropriate:
> i. determine whether any Provisional Action imposed is disproportionate; or
> ii. make the findings required by clause 9.1 and determine whether a Sanction will be imposed.

54. In this case, the Tribunal is not required to make findings of the sort described in section 9.1(a)(i). In this case, the Applicant has not challenged the finding of the Respondent to this effect: the Second complaint was substantiated. However, the Applicant has challenged the Sanction. Clause 9.7(b)(ii) does empower the Tribunal to "determine whether a Sanction will be imposed". This suggests that, where the Respondent has imposed a sanction, and where the Complaint Manager has referred a sanction-related challenge to the NST, the Tribunal is entitled to deal afresh with the question of sanction (and without the need to demonstrate error in respect of the original sanction-related decision). In other words, in this scenario, the Tribunal is entitled to make a fresh sanction-related decision which may or may not accord with the original sanction-related decision of the Respondent.

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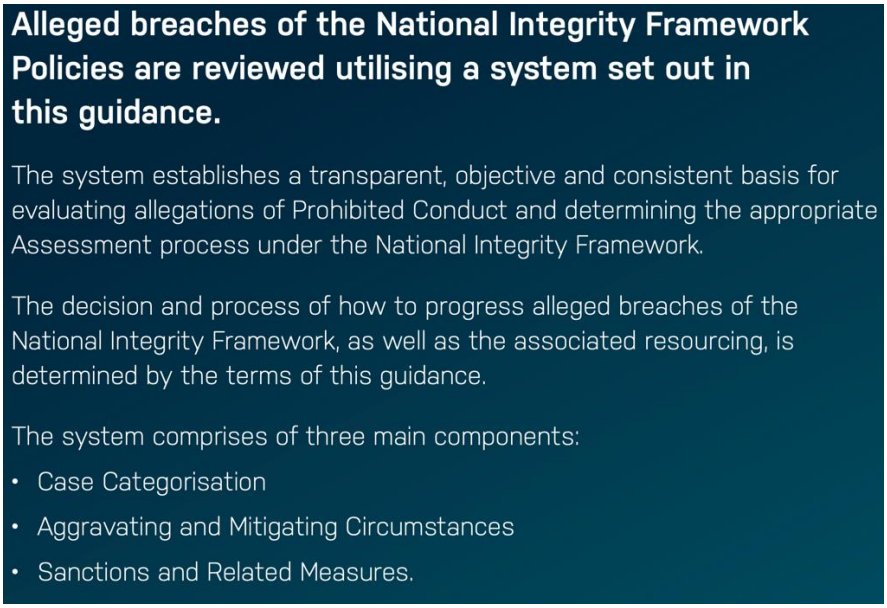
[17] A copy of this document appears on this page of SIA's website.

55. Next, the Tribunal refers to the SIA Guidance document.

56. Page 3 of the SIA Guidance document is reproduced below:



Alleged breaches of the National Integrity Framework Policies are reviewed utilising a system set out in this guidance.

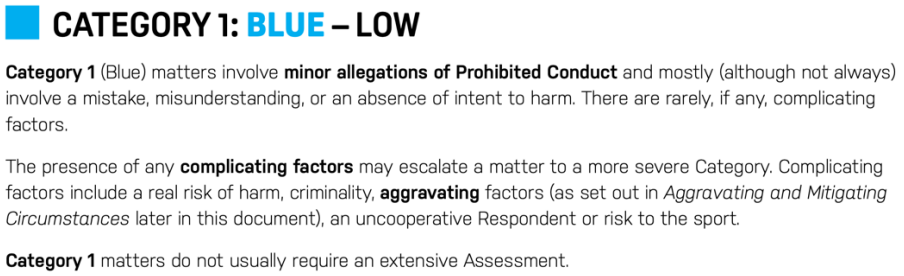
The system establishes a transparent, objective and consistent basis for evaluating allegations of Prohibited Conduct and determining the appropriate Assessment process under the National Integrity Framework.

The decision and process of how to progress alleged breaches of the National Integrity Framework, as well as the associated resourcing, is determined by the terms of this guidance.

The system comprises of three main components:

- Case Categorisation
- Aggravating and Mitigating Circumstances
- Sanctions and Related Measures.

57. In relation to Case Categorisation, page 4 refers to "Category 1" matters. It states relevantly as follows:



CATEGORY 1: BLUE – LOW

Category 1 (Blue) matters involve **minor allegations of Prohibited Conduct** and mostly (although not always) involve a mistake, misunderstanding, or an absence of intent to harm. There are rarely, if any, complicating factors.

The presence of any **complicating factors** may escalate a matter to a more severe Category. Complicating factors include a real risk of harm, criminality, **aggravating** factors (as set out in *Aggravating and Mitigating Circumstances* later in this document), an uncooperative Respondent or risk to the sport.

Category 1 matters do not usually require an extensive Assessment.

58. Page 5 refers to "Category 2" matters. It states relevantly as follows::

CATEGORY 2: AMBER – MEDIUM

Category 2 (Amber) matters allege Prohibited Conduct violations, and may involve the risk of moderate or reasonable harm, or repeated, more severe or more complex **Category 1** allegations.

Category 2 matters may also allege more severe prohibited conduct violations, or complicating factors, having regard to frequency, intensity, number of reported incidents or complaints received, or where the circumstances indicate a reasonable possibility for escalation (and may require referral to law enforcement).

The presence of any **complicating factors** may escalate a matter to a more severe Category. Complicating factors include a real risk of harm, criminality, aggravating factors (as set out in *Aggravating and Mitigating Circumstances*), an uncooperative Respondent or risk to the sport.

59. Page 6 refers to "Category 3" matters. It states relevantly as follows::

CATEGORY 3: RED – HIGH

Category 3 (Red) matters may involve criminal behaviour and/or immediate risk of harm, and includes child abuse, sexual abuse and includes sexual misconduct, as well as serious assault, doping and corruption.

Category 3 matters may include more severe **Category 1 or 2** allegations where there is the presence of significant complications.

Whether a matter is more severe is determined on the specific circumstances, including the frequency, intensity, number of reported incidents or complaints received.

The presence of any **complicating factors** may escalate a matter to a more severe Category. Complicating factors include a real risk of harm, criminality, **aggravating** factors (as set out in *Aggravating and Mitigating Circumstances*), an uncooperative Respondent or risk to the sport.

Category 3 matters must be reported to law enforcement/child protection, as mandated. Restrictive measures or provisional safety plans may be imposed as appropriate.

60. Page 7 refers to aggravating and mitigating circumstances. It states relevantly as follows:

> The following guiding principles are intended to outline the aggravating and mitigating circumstances that should be taken into account when evaluating and assessing a matter under the Case Categorisation System and before determining the appropriate response.
>
> The relative level of aggravating and mitigating circumstances may impact on the ultimate re-categorisation of a matter as well as the appropriate sanction (if any).
>
> In addition to aggravating or mitigating circumstances, there may be other factors to consider that increase the relative complexity of a matter.

61. Page 7 also sets out a list of aggravating circumstances. The relevant text is reproduced below:

Aggravating circumstances include consideration of:

- The presence of criminality, including sexual abuse.
- Actual or threatened use of violence.
- Breach was committed in the presence of a child under 18 years of age.
- Victim's vulnerability, for example, because the victim was very young or very old or had a disability, or because of the geographical isolation of the victim.
- Behaviour that is malicious, or targets vulnerable people.
- Behaviour that is coordinated or operating as part of a group.
- Behaviour that targets multiple parties or results in multiple victims.
- Breach motivated by race, religion, ethnicity, nationality, sexual identity, disability, gender.
- Gratuitous cruelty.
- Injury, emotional harm, loss or damage was substantial, including the level of embarrassment, distress or humiliation by the victim.
- Previously similar conduct or related breaches, previous sanctions.
- Failure to comply with provisional action.
- Breach whilst on probation or a sanction.
- Ongoing and sustained offending over a period of time.
- Abuse of position of power or trust.
- Attempting or disposing of evidence.
- Lack of cooperation.
- The breach was premeditated (rather than spur of the moment).
- The Respondent has previously undertaken education in relation to the particular type of conduct.

62. Page 8 sets out a list of mitigating circumstances, including the following: (i) unplanned behaviour; (ii) level of harm suffered by the victim or the sport; (iii) acceptance of

responsibility for the breach (and the level of remorse / contrition); and (iv) whether the breach was uncharacteristic.

63. Pages 9 and 10 relate to sanctions. Page 9 states relevantly as follows:

> Rather than seeking to punish, sanctioning misconduct is primarily aimed at protecting an individual from harm with a secondary aim of protecting the integrity of sport.
>
> Sanctions are also designed to provide a clear message that the behaviour was unacceptable, thereby acting as a deterrent.
>
> The decision about whether to apply a sanction needs to be considered carefully on the facts and context of each case having regard to the following:
>
> - the seriousness of the conduct
> - whether it was a one-off incident or a part of an overall pattern of behaviour
> - whether it was an honest and reasonable mistake
> - the potential impact on public confidence in the integrity of the sport
> - the views, if any, of the Complainant (for example, merely seeks an apology).
>
> Aggravating and Mitigating circumstances (as set out in *Aggravating and Mitigating Circumstances*) should be taken into account before determining the appropriate sanctions, if any. Aggravating circumstances refers to the factors particular to a breach, the victim or the offending party that increase the severity or culpability.
>
> For example, whether a person acted maliciously, or made an honest and reasonable mistake.
>
> As a general rule, the more serious the alleged behaviour, the more appropriate it is to use sanctions.

64. Page 10 states relevantly as follows:

> **Range of Sanctions and Related Measures** include one or a combination of any of the following:
>
> **Category 1 Breaches**
>
> The following range of measures may be appropriate:
>
> - Awareness of NIF Policies.
> - Mandatory awareness and education requirements.
> - Formal Warning and /or Reprimand.
> - Requiring an apology.
>
> **Category 2 Breaches**
>
> The following range of sanctions could be considered (in conjunction with Category 1 measures):
>
> - Formal conciliation or mediation.
> - Counselling.
> - Restricted duties or access.
> - Supervision and mandatory oversight.
> - Mandatory education and programs.
> - Temporary suspension from relevant event /entity /club.
>
> **Category 3 Breaches**
>
> The following range of sanctions could be considered:
>
> - Formal and mandatory awareness and education requirements.
> - Formal Reprimand.
> - Requiring an apology.
> - Formal conciliation or mediation.
> - Counselling.
> - Role change /restricted duties or access.
> - Supervision and mandatory oversight.
> - Mandatory education and programs.
> - Temporary suspension from relevant event /entity /club.
> - Withdrawal of accreditation from the relevant sporting event.
> - Permanent suspension /exclusion from the event /entity /club.
> - Return of awards.

65. Page 11 refers to the principle of proportionality. It states relevantly as follows:

> Sanctions and other measures must be applied in accordance with the principle of proportionality – that is, in proportion to the severity of the violation(s) in any given matter. This will include taking into account any aggravating and mitigating circumstances (see earlier).

66. This is a principle to which the Tribunal shall return.

IV Appointment of the Arbitral Tribunal

67. On 6 December 2023, the CEO of the NST nominated me to act as the arbitrator in respect of the matters arising from the NST Application. The parties did not object to my appointment as the arbitrator responsible for determining this matter.

V Procedural history

68. In the early stages of this proceeding, in late November 2023, the parties cooperated with the NST Case Manager to produce procedural orders in respect of the following:

    (c) the application of the Applicant for an order staying the execution of the Sanction pending the determination of the substantive issues in the arbitral proceeding;

    (d) the application of the Applicant for an order requiring the Respondent to suppress all Sanction-related publications pending the determination of the substantive issues in the arbitral proceeding; and

    (e) the steps required to deal with the determination of the substantive issues, including the exchange of written submissions and evidence on which each party wished to rely.

69. As to the procedural orders, they included the following orders:

    (a) The Applicant to file with the NST Registry and serve on the other Party his written submissions and any witness statement(s), evidence, and all other documents he wishes to rely on by 5:00pm AEDT on 11 December 2023.

    (b) The Respondent to file with the NST Registry and serve on the other Party its written submissions and any witness statement(s), evidence, and all other documents it wishes to rely on by 5:00pm AEDT on 13 December 2023.

    (c) The Applicant to file with the NST Registry and serve on the other Party his written submissions and any witness statement(s), evidence, and all other documents he wishes to rely on in reply by 5:00pm AEDT on 14 December 2023.

70. By an email to the parties dated 8 December 2023, the NST supplied the Tribunal's written reasons for dismissing the interim applications described in the preceding paragraph.

71. In early December 2023, the parties could not agree on the scope of the arbitration. Through his counsel, the Applicant said that he wished to challenge the following: (i) the Breach Notice dated 19 June 2023; (ii) the 1st Sanction; and (iii) the 2nd Sanction. The Respondent challenged the Applicant's ability to challenge the Breach Notice dated 19 June 2023 and the 1st Sanction. The matter was resolved consensually on the basis that the Tribunal would determine whether, in this proceeding, the Applicant was entitled to challenge the Breach Notice dated 19 June 2023 and the 1st Sanction.

72. Ultimately, on 11 December 2023, this "scope" dispute fell away. So much was apparent from the Applicant's written submissions dated 11 December 2023. According to those submissions, being submissions that dealt with substantive issues, the Applicant no longer pressed his challenge to the Breach Notice dated 19 June 2023 or the 1st Sanction.

73. Each party filed and served the written submissions and other materials on which he or it wished to rely. In this regard, the Tribunal notes as follows:

(a) On 11 December 2023, the Applicant filed and served the written submissions and other materials on which he wished to rely

(b) On 13 December 2023, the Respondent filed and served the written submissions on which it wished to rely (that is, the Respondent submissions).

(c) On 14 December 2023, the Applicant filed and served reply submissions and other materials on which he wished to rely.

74. On 14 December 2023, the Respondent's representative sent an email to the Applicant's counsel and the NST. In that email, on behalf of the Respondent, he articulated some objections to parts of the Applicant's reply submissions ('**Objections**'). For convenience, the Tribunal has reproduced the key parts of this email in the following screenshot:

> The Respondent objects to several paragraphs of the Applicant's submissions in reply, as follows:
>
> - Paras 1, 3, 4, 5, 7, 8, 9, 12, 17(b) and 18 do not address any new issues raised in the Respondent's submissions and should be struck, or, at the very least the Respondent should be given the opportunity to make further submissions (given that the Applicant's submissions raise issues to which the Respondent has not been able to reply).
> - Paras 5, 6, 14 and 16 are contradictory and irrelevant, in that the Applicant criticises the Respondent for not addressing the primary sanction and then criticises the Respondent's submissions regarding the primary sanction. These paragraphs should be struck.
> - Additionally, para 7 is factually incorrect in that the complaint is addressed to the Club, not the Respondent. The timeline in the Respondent's submissions is correct. This paragraph should be struck.

75. Having received this email, and in order to deal with some other issues, the Tribunal made arrangements to convene a hearing on the morning of 18 December 2023. In making

these arrangements, through the Case Manager, the Tribunal flagged its intention to address the following issues at the hearing:

(a) whether the Tribunal had the power to impose a Tribunal Sanction in place of the Sanction ('**Topic 1**');

(b) the way in which the Tribunal should deal with the Objections ('**Topic 2**'); and

(c) the merits of the substantive issues ('**Topic 3**').

76. The hearing took place on the morning of 18 December 2023.

77. As to Topic 1, at the hearing, the parties confirmed the agreed approach recorded in the relevant email exchange on 8 December 2023. The gist of this exchange is described in paragraph 8 above. In short, the parties confirmed their agreed position that the Tribunal had the power to impose a sanction in place of the Sanction. [18]

78. As to Topic 2, the Tribunal refused to "strike" paragraphs from the Applicant's reply submissions. In order to address his concerns, the Tribunal invited the Respondent to make submissions in respect of any matters, including any "fresh" matters raised in the reply submissions. the Respondent made such submissions.

79. As to Topic 3, at the hearing, each party made oral submissions. Neither party called any witnesses.[19] On behalf of the Applicant, his counsel tendered an additional character reference. The Respondent objected to parts of that document in which the author expressed conclusions. In short, the Respondent argued that the author's conclusions on matters of substance were irrelevant. According to this argument, it was the sole responsibility of the Tribunal to reach conclusions in respect of such matters. The Applicant's counsel did not dispute these points.

80. In the course of this hearing, each party made oral submissions in respect of matters of substance. The Tribunal deals with some of these submissions in Part VII below.

81. I am very grateful to the Applicant and the Respondent for the considerable assistance that they provided to the Tribunal at this hearing.

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[18] Absent such agreement, for the reasons touched upon in paragraph 8 above, I would have ruled that the Tribunal did have this power. All relevant events, conduct and decisions had occurred before the CDDP – November 2023 was in play; and the CDDP – November 2023 says nothing in respect of transitional arrangements relating to challenges to a sanction issued under the provisions of the CDDP – April 2023.

[19] In the early stages of this proceeding, the parties agreed that: (i) the parties would have an opportunity to file and serve documents, including statements on which they wished to rely; and (ii) the parties did not require the opportunity to cross-examine witnesses. At the hearing on 18 December 2023, the parties confirmed their agreement in respect of point (ii).

VI The nature and scope of the Tribunal's review

82. I refer to the matters set out in paragraph 54 above. At the hearing on 18 December 2023, the parties accepted these matters. Accordingly, the parties accepted that: (i) the Tribunal was empowered to reach a fresh sanction-related decision; (ii) the Tribunal's sanction-related decision may or may not accord with the Sanction; and (iii) the Tribunal's power to make a fresh sanction-related decision did not depend upon the existence of error in respect of the original sanction-related decision of the Respondent.

VII The applicable rules and relevant fact-finding principles

83. In terms of procedural matters, and in terms of evidentiary matters, the parties accepted that the Tribunal should exercise its decision-making powers in accordance with the relevant provisions of the following documents: (i) the NST Act; and (ii) the *National Sports Tribunal (Practice and Procedure) Determination* 2021 ('**P&P Determination**').[20]

84. The starting point is section 40 of the NST Act. For present purposes, I note the following parts of this section:

(a) According to section 40(1)(a), subject to the NST Act, procedural matters are within the discretion of the Tribunal.

(b) Section 40(1)(c) provides that "*the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate*".[21] This provision frees the Tribunal from the rules of evidence. However, this freedom does not absolve the Tribunal from a core duty – namely, the duty to make findings of fact based on material which is logically probative.[22] Put another way, as a matter of law, the Tribunal is bound to act on the basis that any conduct alleged against a person should be established to its satisfaction by some rationally probative evidence.

85. Next, the Tribunal refers to section 55 of the P&P Determination. This section relates to hearings in the General Division of the NST. In particular, this provision deals with "*the burden and standards of proof and methods of establishing facts and presumptions*" in such hearings.[23] Under section 55(1), the "*the burdens and standards of proof and*

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[20] The P&P Determination took effect on 23 July 2021.

[21] Section 28(1) of the P&P Determination is to like effect.

[22] See *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 at [4] to [16] (Logan J), a case relating to the conduct of a merits review in the Administrative Appeals Tribunal ('**AAT**'). It is noted that, in exercising decision-making powers, the NST operates under a materially similar statutory charter to that under which the AAT operates.

[23] Section 55 of the P&P Determination provides as follows:

> *(1) For a dispute before the General Division, the burdens and standards of proof and methods of establishing facts and presumptions are to be as set out in the constituent documents of the sporting body, or in the separate agreement between the parties to the dispute referring the dispute to the Tribunal.*

methods of establishing facts and presumptions are to be as set out in the constituent documents of the sporting body, or in the separate agreement between the parties to the dispute referring the dispute to the Tribunal". If these documents do not address the standard of proof, such matters, the balance of probabilities is the default standard of proof.[24]

86. Clause 8.6 of CDDP – April 2023 provides that, for findings of fact made *under* that policy, the balance of probabilities is the applicable standard of proof. It is unclear whether, in the present case, the Tribunal's findings are made *under* CDDP – April 2023. Ultimately, this debate is irrelevant. In each case, the standard of proof is the balance of probabilities.

87. Where the standard of proof is the balance of probabilities, substantiation of an allegation requires actual persuasion – nothing more and nothing less.[25]

88. In this context, the Tribunal refers to the *Briginshaw* principle.[26] According to this principle, a decision-maker should approach his or her task with caution, having regard to the following: (i) the seriousness of the allegations made; (ii) the inherent unlikelihood of an occurrence of a given description; and (iii) the gravity of the consequences flowing from a particular finding.

89. In light of section 40(1)(c) of the NST Act, strictly speaking, the *Briginshaw* principle does not apply to the Tribunal's exercise of its decision-making power in this case. Notwithstanding this technical position, however, the factors underpinning this principle are relevant to the question whether an allegation is made out to the reasonable satisfaction of the Tribunal. For example, adopting the language of Dixon J in *Briginshaw*, reasonable satisfaction should not be produced by "*inexact proofs, indefinite testimony, or indirect inferences*", especially where the allegations are serious and where grave consequences will flow from a particular finding.[27]

90. Next, I refer to the burden of proof. This burden involves these two aspects: (i) the burden of adducing evidence (that is, the legal burden of proof); and (ii) the burden of convincing the decision-maker of the material facts (that is, the evidential burden of proof). In litigation, the legal burden rests on the party asserting the claim or cause of action to prove all facts essential to such claim. In this case, there are no rules or other documents dealing with this topic; and the P&P Determination does not identify a default position in this scenario.

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(2) Where neither the constituent documents nor the separate agreement set out a standard of proof, the default standard of proof is to be the balance of probabilities.

24 Section 55(2) of the P&P Determination.

25 See *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at [136].

26 As to this evidentiary principle, see *Briginshaw v Briginshaw* (1938) 60 CLR 336 (`**Briginshaw**').

27 *Briginshaw* at p. 362.

91. In these circumstances, the Tribunal raised this matter at the hearing on 18 December 2023. Each party made brief submissions; and each party suggested that, given the nature of the enquiry (that is, one directed to a determination of an appropriate sanction), no party carried a legal burden of proof.

92. In the course of the discussion, the Tribunal suggested that a party may carry an evidential burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, having regard to the standard of proof.[28] For example, if the Respondent contended that the Applicant intended to do something, the Respondent would carry the evidential burden of tendering or pointing to evidence demonstrating this alleged intention. The parties did not disagree with this suggestion, and, in the circumstances, the Tribunal has proceeded on that basis.

93. Other principles also bear on the Tribunal's fact-finding role. In particular, the Tribunal refers to the following principles:

(a) First, a decision-maker must not take irrelevant evidence into account.

(b) Second, a decision-maker cannot draw conclusions from the absence of evidence. This principle applies to findings of fact and the discounting of facts otherwise open to be found.

(c) Third, a decision-maker should not lightly dismiss the evidence of a corroborative witness that bears directly on the allegations.

(d) Fourth, a decision-maker must avoid the misuse of evidence through illegitimate, irrational, unsound or prejudicial forms of reasoning.

(e) Fifth, the inherent improbability of an event having occurred will, as a matter of common sense, be a relevant factor in deciding whether it did in fact occur.[29]

(f) Sixth, evidence on an issue is to be weighed according to the relative capacity of the parties to adduce the relevant evidence – that is, in accordance with the proof which it was in the power of one side to produce and the power of the other side to contradict.

94. Lastly, it is necessary to note that: (i) the Tribunal received documentary evidence, including letters and notes prepared by the Applicant and the Respondent; (ii) at the

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[28] In other words, "he or she who asserts must prove". See *Purkess v Crittendon* (1965) 114 CLR 164 at 168 per Barwick CJ, Kitto and Taylor JJ.

[29] In *Jones v Birmingham City Council* [2023] UKSC 27 at [51], Lord Lloyd-Jones made this basal point. The Law Lord went on to say this: "*… proof of an improbable event may require more cogent evidence than might otherwise be required*".

hearing, the parties did not adduce any oral evidence; and (iii) the parties did not use cross-examination to test the documentary evidence.

95. In the absence of oral testimony, and in the absence of cross-examination, how has the Tribunal assessed the probative value of a person's evidence? In short, in assessing the weight and reliability of a person's evidence, the Tribunal has examined the following matters: (i) the consistency of his or her evidence with what is agreed, or clearly shown by other evidence, to have occurred; (ii) the internal consistency of his or her evidence; and (iii) the consistency of his or her evidence with what he or she has stated on other occasions. The Tribunal has also had regard to the logic of the circumstances in question, the overall probabilities of the matters in question, and the motives of witnesses.[30] For obvious reasons, as a general proposition, the Tribunal has afforded weight to direct evidence compared with indirect evidence.

96. In analysing of the evidence, and in assessing whether the available material enabled me to reach logical and rationally probative decisions, I have had regard to the principles described above. For each contested matter, on the question of where the truth lies, the Tribunal has applied the above rules and principles to reach a conclusion concerning what happened in contested circumstances.

VIII Determination of the substantive issues

A Issue 1

A.1 Decision on Issue 1

97. Having regard to the nature of the Relevant conduct, and in the circumstances of the case, it is fair and reasonable to impose a sanction.

A.2 Discussion of Issue 1

98. The Applicant has acknowledged the serious nature of the conduct described in paragraph 14 above ('**Initial conduct**').

99. The Applicant accepts that:

(a) the Initial conduct was unacceptable;

(b) the Relevant conduct was unacceptable; and

(c) the Relevant conduct amounted to a clear contravention of the 1st Sanction.

[30] *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep. 1 at 57 (Goff LJ). The reference to "*overall probabilities*" picks up the inherent probability or improbability of an event having occurred.

100. In the circumstances, in respect of his contravention of the 1st Sanction, it is fair and reasonable for the Tribunal to impose a sanction (that is, a Tribunal Sanction).

B Issue 2

B.1 Decision on Issue 2

101. Having regard to the nature of the Relevant conduct, and in the circumstances of the case, it is appropriate to impose a Tribunal Sanction in the terms set out in Part II above.

B.2 Discussion of Issue 2

B.2.1 Summary of the competing submissions

102. The Applicant contends that a fair and reasonable sanction is a two month suspension from his participation in any sporting activities.

103. Paragraph 20 of his written submissions summarise the key facts and matters on which he relies.[31] This paragraph states as follows (footnotes omitted):

> The Applicant's explanation of the circumstances is contained within his 6 November 2023 letter. In short:
>
> a. Around the time the primary and secondary sanction was imposed, the Applicant was going through a time of serious personal upheaval having separated from his wife and moving from one place to another;
> b. In relation to all three of the communications, the Applicant was conducting business of the Club;
> c. The communications are of a professional nature and do not contain any inappropriate or untoward content;
> d. In relation to the emails, the Applicant made an innocent and honest mistake of clicking on "reply" rather than "reply all;"
> e. He had no intention of breaching the primary sanction and had been in compliance with the primary sanction from its inception in June 2023;
> f. Between June 2023 and August 2023 with both the Applicant and the Complainant being on the Committee, there were a significant number of communications and business being conducted in which he was in compliance with the primary sanction;
> g. The Club's IT policy requires personal information to be communicated via text message;
> h. In these communications, the Applicant had no intention to cause the Complainant any further angst as he was trying to conduct the business of the Club within its own policies;
> i. Now that the Applicant is no longer on the Committee there exists little to any chance that the Applicant will be in contact with the Complainant; and
> j. The Applicant refers the Arbitrator to his letter of 6 November 2023 for full details of his explanation.

[31] This paragraph also refers to the Applicant's letter to the Respondent dated 6 November 2023, a copy of which appears in **Annexure C**.

104. In his reply submissions, by way of summary only, the Applicant advanced the following submissions (among others):

(a) The Applicant did not set about deliberately to breach the 1st Sanction. Rather he was seeking to conduct the ordinary, valid business of the Club.

(b) By reason of their respective roles within the Club, the Applicant and the complainant were required to work together.

(c) For around two months prior to the Relevant communications, the Applicant had complied with the 1st Sanction.

(d) As to the mistakes described in subparagraph 20(d) of his written submissions ('**Email mistakes**'), they were honest and reasonable mistakes.

(e) As to the Contravening text message, the Applicant formed the view that he was required to comply with the relevant Club IT procedure – even if that caused him to contravene the 1st Sanction. This was an error of judgment on his part ('**Text message error**').

(f) The Relevant conduct was not part of an overall pattern of conduct. Rather it was confined to three messages within a twenty-four hour period in early August 2023.

(g) The Relevant conduct has not impacted adversely on public confidence in the integrity of the sport.

(h) There is no evidence that the Relevant conduct caused any harm to the complainant. Looking at the nature and purpose of the communications in question, it is unlikely that they could have caused any harm to the complainant. Further, the Relevant conduct did not involve any real risk of harm.[32]

(i) Prior to the imposition of the 1st Sanction, in terms of disciplinary and other matters, the Applicant had an unblemished record. Looking at this record, the Initial conduct and the Relevant conduct were uncharacteristic.

(j) The Applicant has accepted responsibility for the Relevant conduct; and he has expressed remorse for engaging in that conduct.

(k) When the Applicant engaged in the Relevant conduct, he was suffering from the stress associated with the breakdown of his marriage, and this stress made him

[32] In this context, the Tribunal refers to paragraph 16.2 of the submissions of the Respondent. This paragraph refers to the alleged impact of the Initial conduct on the complainant. The author of the submissions *appears* to quote from a written communication that the Respondent had received from the complainant, although the source of the quotations is not exposed.

prone to making mistakes such as the Email mistakes and the Text message mistake.

(l) The 2nd Sanction is wholly disproportionate to the contraventions in question.

(m) Moreover, a lengthy suspension from the sport would impact adversely on his mental health, interfering unnecessarily with activities central to his daily life and identity.

105. The Applicant has also submitted statements from others. As to these statements:

(a) Some refer to the different ways in which the Applicant has served the sport. The statement of Person A refers to the adverse impact of the 2nd Sanction on him. As a result of that sanction, according to Person A, he was compelled to take on some of the Applicant's responsibilities with the Club. Person A said that this damaged the club and damaged him personally.

(b) Others make the point summarised in subparagraph 104(m) above.

106. Next, I refer to the Respondent submissions. Paragraph 3 states as follows (footnote omitted):

> Clause 9.4 of the CDDP provides that the Respondent may refer to the Sport Integrity Australia Guidance for Sanctioning (Guidance for Sanctioning), and may consider the factors listed therein and any other matter it considers relevant. The Respondent is not required to consider any matter, nor is it barred from considering any matter. Nonetheless, many of the aggravating factors listed in the Guidance for Sanctioning are present.

107. The reference to the "Guidance for Sanctioning" is a reference to the sanction-related part of the SIA Guidance document. The "aggravating factors" page is reproduced under paragraph 61 above.

108. By way of summary only, by reference to the non-exhaustive list of aggravating factors listed on p. 7 of the SIA Guidance document, the Respondent makes the following points (among others):

(a) The 2nd Sanction arose from three separate breaches of the 1st Sanction.

(b) By breaching the 1st Sanction, the Applicant showed contumelious disregard for the policies, sanctions, and authority of the National Sporting Organisation with which he is affiliated.

(c) The three separate breaches took place over several days in early August 2023, and they occurred against a backdrop of the previous complaint and the 1st Sanction.

(d) The Applicant's position within the Club and the sport's wider community, and the consequent trust placed in him by the complainant and others, enabled him to engage in the Initial conduct and the Relevant conduct.[33]

(e) Given the length and breadth of the Applicant's involvement in the sport, he should have been aware of the importance of acting appropriately and complying with the relevant rules and policies. This is an aggravating factor.[34]

(f) In relation to the investigation of each complaint, the Applicant did not cooperate with the Respondent. This is an aggravating factor.

(g) As to the Relevant conduct, in each case it was premeditated and intentional.[35] Specifically:

(i) The sending of each email was an intentional act. In each case, he had ample time in which to correct his "mistake".[36] Further, in failing to copy other adults into these emails, the Applicant behaved in a "troublingly reckless" manner, demonstrating "the disdain" with which he treated the 1st Sanction.[37]

(ii) The sending of the text message "required the specific intention" to contact the complainant alone, "so there can be no suggestion that this was not intentional (indeed, the Applicant made no such submission)".[38]

(iii) When corresponding with the complainant, the Applicant failed to exercise "proper caution".

(h) The Applicant's expressions of remorse "are of extremely limited value, if any". He did not express any remorse until 6 November 2023, casting doubt on the genuineness of his eventual expressions of remorse.

(i) The Initial conduct was serious offending on the Applicant's part.

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33 This submission appears under the heading "Abuse of position of power or trust". The clear implication of this submission is that, by engaging in the conduct in question, the Applicant abused his position of power and trust.

34 See paragraph 21 of the submissions of the Respondent.

35 See paragraphs 11 to 14 of the the Respondent submissions.

36 The Respondent submissions use quotation marks around this word (see paragraph 11), indicating a submission to the effect that the mistake was not genuine.

37 See paragraph 12 of the the Respondent submissions.

38 In fact, the Applicant submitted that his sending of the text message arose from his mistaken understanding of a Club policy. In this sense, according to paragraph 23 of his primary submissions, the sending of the text message was an error of judgment.

(j) The Relevant conduct was also serious offending on the Applicant's part – "it evidences a [sic.] unwillingness to accept the sanction imposed".[39]

109. As to the mitigating factors on which the Applicant relies, by way of summary only, the Respondent makes the following points (among others):

(a) The Tribunal should give little weight to these mitigating factors. The Applicant did not raise any of these matters prior to the imposition of the 2nd Sanction – notwithstanding that the Applicant was given an opportunity to respond to the allegations of contravention. These matters cast doubt on the genuineness of the Applicant's expressions of remorse.

(b) There is no scope for leniency based on a supposedly "clean record" – the Applicant was a repeat offender, having committed four breaches within twelve months.

(c) As to the sole text message:

> *As [the Applicant] has not provided the actual IT policy, the Tribunal should disregard his submission on this point. In any event, the email in Appendix 5 does not refer to any Club IT Policy", but rather to the practices of the IT Sub-Committee; and furthermore [the Applicant] could have obtained [the Complainant]'s date of birth in myriad other ways (such as through a third party) or simply delegated that task.*

110. By reference to the matters on which the Respondent relies, the key ones of which are summarised above, the Respondent makes the following submissions:

> **SUMMARY**
> 25. The circumstances described in these submissions, which are largely uncontested by the Applicant, indicate that the Secondary Sanction was entirely reasonable in the circumstances.
> 26. This matter is not merely a dispute between two individuals. This is a matter in which an experienced and knowledgeable participant in the sport has, on multiple occasions, knowingly breached a sanction imposed on him by the sport's peak body.
> 27. By flagrantly disregarding the Primary Sanction, the Applicant actively undermined the Respondent's authority and, by extension, public confidence in the respondent's ability to enforce its own rules for the benefit of the wider community.
> 28. It is imperative that the Respondent maintain the ability to set and enforce appropriate standards of behaviour in the sporting community. This requires robust policies backed by appropriate sanctions for breaches of those policies.
> 29. A suspension of less than 12 months would not be sufficient to meet these objectives, nor would it accurately reflect the seriousness of the Applicant's breaches.
> 30. Given the Applicant's proven disregard for sanctions previously imposed against him, the Tribunal can have little confidence that he would comply with the terms of any suspended sanction.
> 31. Accordingly, it would not be appropriate to suspend any sanction imposed in this matter.
>
> **ORDERS SOUGHT**
> 32. The Respondent seeks an order that the Secondary Sanction is upheld.
> 33. The Respondent makes no submissions as to costs.

[39] See paragraph 22 of the Respondent submissions.

111. At the hearing on 18 December 2023:

(a) first, the Respondent made oral submissions;

(b) next, the Applicant's counsel made oral submissions, some of which responded to the Respondent's oral submissions; and

(c) finally, the Respondent made oral submissions, some of which responded to the Applicant's oral submissions.

112. In his first set of oral submissions, on behalf of the Respondent, the Respondent's representative made the following concessions (and he did so correctly, in the Tribunal's view):

(a) The Applicant did not engage in the contravening conduct for any improper purpose. Rather he engaged in that conduct for the proper purpose of conducting and facilitating the business of the Club ('**Proper purpose concession**').

(b) By engaging in the contravening conduct, the Applicant did not abuse his position within the Club ('**Abuse of position concession'**).

(c) The Applicant did not engage in the contravening conduct with a deliberate intention to undermine the authority of the Respondent ('**Intention concession**').[40]

(d) There is no evidence showing that the complainant, the Respondent or the sport had suffered any actual harm as a result of the contravening conduct ('**No evidence of harm concession**').[41]

113. In his oral submissions, by way of summary only, the Respondent advanced the following key submissions:

(a) The contravening conduct was very serious – it reflected a refusal to adhere to the rules of the Respondent, and it had the effect of harming the Respondent and the sport (see footnote 42).[42]

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[40] However, according to the Respondent's argument, the Applicant did engage in that conduct with full knowledge of the 1st Sanction, and this contributed to the seriousness of the conduct.

[41] However, notwithstanding the lack of evidence of actual harm, the Respondent urged the Tribunal to infer that the Respondent and the sport did in fact suffer harm as a result of the contravening conduct. According to the argument, this inference was a matter of "common sense and logic".

[42] See footnote 42.

(b) On a scale of 1 to 10, with 1 representing the most minor forms of Prohibited Conduct (such as a swearing without any intention to harm) and 10 representing the most egregious forms of Prohibited Conduct (such as the sexual abuse of minors), the Respondent placed the contravening conduct of the Applicant at 5 or 6. He put the conduct at the "higher end" of Category 2 (see the text under paragraph 58 above).

(c) Even though the Applicant did not intend to undermine the authority of the Respondent, the contravening conduct had that effect. Moreover, he sent each message with the knowledge of the 1st Sanction.

(d) Further, by engaging in the contravening conduct, the Applicant intended to disobey the 1st Sanction (and, by extension, he intended to disobey the Respondent).

(e) The Applicant's expression of remorse occurred at the "last second". The late nature of this expression of remorse casts doubt on its genuineness.

(f) In the circumstances, given the Applicant's deliberate disobedience, the Tribunal should impose a Tribunal sanction in the same terms as the 2nd Sanction.

(g) Such a sanction was required to:

(i) send a clear message to the Applicant and others that the Respondent will not tolerate such conduct;

(ii) punish the Applicant;

(iii) rehabilitate the Applicant – in the sense of protecting him from engaging in like conduct in the future; and

(iv) protect the sport from future conduct of this sort.

114. On behalf of the Applicant, his counsel made oral submissions. She emphasised some matters, including the following:

(a) the innocuous nature of the contravening conduct, being a point that the Respondent had appeared to make in its letter dated 25 August 2023;

(b) the Applicant engaged in the contravening conduct for the purpose of conducting the business of the Club, and he did so in his capacity as an officer of that club;

(c) the Applicant did not intend to harm the complainant (and the Tribunal cannot conclude that she was in fact harmed as a result of the conduct in question);

(d) the Applicant did not intend to harm the Respondent or the sport (and the Tribunal cannot conclude that either one was in fact harmed as a result of the conduct in question);

(e) there is no evidence showing that the Applicant intended to flout the 1st sanction or undermine the authority of the Respondent – indeed, the evidence shows that the Applicant made two mistakes and one error of judgment;

(f) there is no evidence showing that the complainant suffered any harm as a result of this conduct, noting that the Respondent had never disclosed the document recording the Second complaint;

(g) there is no evidence showing that the Respondent suffered any harm as a result of this conduct;

(h) there is no substance in the argument that the contravening conduct necessarily harmed the authority and prestige of the Respondent – the conduct occurred in a private setting, and the Respondent was responsible for publicising the conduct; and

(i) the 2nd Sanction had created difficulties for the Applicant in his capacity as an officer of the Club – by reason of membership of the Committee, and by reason of the complainant's membership of the same committee, they were obliged to work together, and, to a large degree, the Applicant had managed to work with the complainant and comply with the terms of the 1st Sanction.

115. By way of reply to the Respondent's submissions, and oral submissions, the Applicant's counsel also made submissions. The key submissions were as follows:

(a) The Respondent did not seek to cross-examine the Applicant, in which case it did not challenge his evidence, including his evidence concerning the Email mistakes and the Text message error.

(b) The Respondent had submitted that, by engaging in the contravening conduct, the Applicant had abused his position as an office holder of the Club. However, on behalf of the Respondent, the Respondent's representative made the Proper purpose concession. This concession was inimical to the "abuse" submission.

(c) The Respondent had submitted that the Applicant's failure to respond to the Second complaint was an aggravating factor for the purpose of determining an appropriate Tribunal Sanction. However, the Tribunal should reject that contention. In its letter to the Applicant dated 25 August 2023, the Respondent said that he was "not required" to provide a response.

(d) There was a relevant disciplinary case involving a physical fight in Hong Kong – a participant in that fight had received a twelve month suspension ('**HK incident**'). This demonstrated that the 2nd Sanction was disproportionate to the contravening conduct.

116. In reply, the Respondent made further submissions. In summary, in addition to re-iterating some of his major points, he said relevantly as follows:

(a) There was no reliable evidence relating to the circumstances surrounding the HK incident. In the circumstances, the reference to this matter did not assist the Tribunal, and the Tribunal should not engage in speculation in that regard.

(b) The Applicant was not required to respond to the Second complaint (see the letter of the Respondent dated 25 August 2023). However, if the Applicant did not plan to respond, he should have said as much to the Respondent.

(c) The 2nd Sanction was proportionate to the contravening conduct. That conduct was very serious.[43]

B.2.2 Resolution of disputes concerning matters of fact

117. In relation to disputed factual matters, and leaving to one side the contest concerning the conclusions which one can draw from factual matters, the Tribunal notes as follows:

(a) Notwithstanding the Intention concession, there is a residual dispute concerning the intention with which the Applicant sent each message (that is, the two emails and the single text message) ('**Intention dispute**'). The Respondent asserts that, by sending each message, the Applicant intended to disobey the 1st Sanction. The Applicant disputes this assertion.

(b) There is a dispute concerning the actual impact of the Relevant conduct upon the Respondent and the sport ('**Impact dispute**'). The Respondent asserts that, notwithstanding the No evidence of harm concession, the contravening conduct did in fact cause such harm. The Applicant disputes this assertion.

(c) There is a dispute concerning the genuineness of the Applicant's expressions of remorse ('**Remorse dispute**').

118. As to each one of these disputes, the Respondent carries the evidential burden. The Respondent is the proponent in each case. To discharge its evidential burden, it must tender (or point to) sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.

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[43] In relation to this point, the Respondent expressed reluctance to engage in a discussion whether a shorter period of extension could also serve the aims of sanctioning the Applicant.

119. In short, in each case, the Respondent did not discharge this burden.

120. This conclusion rests on the following matters:

(a) Leaving the Applicant's evidence to one side, and leaving the Proper purpose concession to one side, the other evidence provides an insufficient foundation to draw the three inferences for which the Respondent contends. Such other evidence is circumstantial in nature; and, in the Tribunal's opinion, such evidence gives rise to conflicting inferences of equal degrees of probability "so that the choice between them is mere matter of conjecture".[44]

(b) In relation to the Intention dispute, if one takes the Proper purpose concession into account, that concession is impossible to reconcile with the inference for which the Respondent contends.

(c) Further, if one takes the Applicant's evidence into account, it becomes reasonable to find a balance of probabilities in favour of the conclusions for which the Applicant contends. In this context, it is important to note that the Respondent did not seek to cross-examine the Applicant. Accordingly, it made a forensic decision to refrain from challenging the Applicant's evidence, including his evidence in respect of the disputed matters. The Tribunal accepts his evidence in respect of the disputed matters.

121. In the above circumstances, and having regard to the evidence, the Tribunal makes the following findings of fact:

(a) By sending each message, the Applicant did not intend to disobey the 2nd Sanction or the Respondent. Rather, he sent the emails because of the Email mistakes, and he sent the text message because of the Text message error. There was no deliberate intention to disobey the Respondent; and there was no intention to cause harm to anyone or anything.[45]

(b) It follows that the conduct did not stem from an unwillingness to accept the 1st Sanction (compare paragraph 22 of the Respondent submissions). Indeed, putting the contravening conduct to one side, the Applicant was careful to comply with the terms of the 1st Sanction.

(c) In sending the messages, the Applicant did not abuse his position within the Club.

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44 See *Luxton v Vines* (1952) 85 CLR 352 at 358.

45 There is some evidence that the Applicant is dyslexic – see the statement of X dated 6 December 2023. This statement is appended to the Applicant's primary submissions. This condition may have contributed to the Email mistakes and the Text message error. In the absence of evidence concerning the precise extent and effects of the Applicant's condition, though, the Tribunal is not prepared to make any such "contribution" finding.

(d) When the Applicant expressed remorse for his conduct, that expression of remorse was genuine and sincere.

122. Contrary to the Respondent's submissions, given the state of the evidence, and given the No evidence of harm concession, the Tribunal cannot infer that the Respondent has suffered any actual harm. As noted in subparagraph 93(b) above, the Tribunal cannot draw conclusions from the absence of evidence.

123. Lastly, there is no real dispute that: (i) at the time of the Relevant conduct, the Applicant was going through a stressful marriage separation; and (ii) over many years, the Applicant has made sustained and valuable contributions to the sport, including the training of competitors. In the circumstances, the Tribunal shall make formal findings to this effect.

124. Against this background, the Tribunal turns to the question of sanction.

B.2.3 Analysis

125. In the context of the Framework, the imposition of sanctions have three aims:

(a) protecting an individual from harm;[46]

(b) protecting the integrity of sport;

(c) sending a clear message that the conduct in question was unacceptable.

126. In relation to this issue, the Tribunal has considered the SIA Guidance document. The relevant part of that document directs attention to the following factors:

(a) the nature and gravity of the Prohibited conduct ('**Factor 1**');

(b) the contravener's culpability and degree of responsibility for the conduct in question ('**Factor 2**');

(c) any injury, loss or damage resulting directly from the conduct ('**Factor 3**');

(d) whether the contravener admitted that he or she engaged in the relevant conduct ('**Factor 4**');

(e) the contravener's previous character ('**Factor 5**'); and

(f) any aggravating or mitigating factors ('**Factor 6**').

[46] According to the SIA Guidance document, harm includes injury, emotional harm, and loss or damage, and emotional harm includes embarrassment, distress and humiliation (see p. 7).

127. When weighing up the nature and gravity of the Prohibited conduct, the Tribunal has considered the following matters:

(a) the contravener's intention ('**Matter 1**');

(b) the consequences of the conduct ('**Matter 2**');

(c) any breach of trust or abuse of position ('**Matter 3**');

(d) the contravener's history of contravening conduct, including an assessment of the nature and extent of such conduct ('**Matter 4**');

(e) the contravener's response to previous sanctions ('**Matter 5**'); and

(f) the personal circumstances of the contravener ('**Matter 6**').

128. Aggravating factors increase the seriousness of the offence or the contravener's culpability. Mitigating factors reduce the seriousness of the conduct or the contravener's culpability.

129. The Tribunal commences with an analysis of the **Factors 3**, **4** and **5**. For convenience, this analysis is set out in the following table:

Factor	Assessments / determinations
Factor 3	There is no evidence that the complainant suffered any harm as a result of the conduct. Similarly, there is no evidence that the Respondent or the sport suffered any harm as a result of the conduct. Accordingly, this factor is neutral.
Factor 4	The Applicant has accepted responsibility for his conduct. Accordingly, this factor weighs in his favour.
Factor 5	Until the imposition of the 1st Sanction, the Applicant had an unblemished record; and, over many years, he had made considerable contributions to the sport. The conduct underpinning the 1st Sanction was less than satisfactory, which the Applicant has accepted. However, that conduct was aberrant. As to the conduct underpinning the 2nd Sanction, the character of that conduct was wholly different from the conduct underpinning the 1st Sanction. These matters do not weigh heavily against the Applicant.

130. The Tribunal refers to **Factor 1** – namely, the nature and gravity of the conduct in question. As to these things, the Tribunal notes the following matters:

(a) **Matter 1**: The purpose for which the Applicant sent each message is obvious. Each one related to the valid business of the Club; and it is clear that, when he sent each message, the Applicant was discharging his statutory duties as an office

holder of the Club.[47] So much is clear from (i) the contents of each message and (ii) the capacity in which the Applicant sent each message. The Proper purpose concession recognises these matters.

(b) In this context, in relation to the Applicant's intention, the findings recorded in subparagraphs 121(a) and (b) above are significant.

(c) In the Tribunal's view, on the scale of 1 to 10 (see above), the contravening conduct is a 1 or 2. Using the categorisation system in the SIA Guidance document, it is a Category 1 case.

(d) **Matter 2**: There is no evidence concerning difficult or adverse consequences arising from the contravening conduct. In particular, there is no evidence that anyone or anything suffered any harm as a result of such conduct. The No evidence of impact concession is also relevant in this regard.

(e) **Matter 3**: The finding recorded in subparagraph 121(c) is relevant to this matter. There was no breach of trust or abuse of position.

(f) **Matter 4**: In paragraphs 7 and 8 of the Respondent's submissions, the Respondent highlights that the Applicant committed four separate breaches over an eight-month period. That is correct, of course, but it ignores the nature and gravity of each contravention. As noted above, the Initial conduct was unsatisfactory. But the Relevant conduct is not comparable with the Initial conduct. Contrary to the relevant submission of the Respondent, the Tribunal will not assume that each breach carries the same weight.

(g) **Matter 5**: Contrary to the submissions of the Respondent, this matter is not significant. In this regard, the findings recorded in subparagraphs 121(a) and (b) above are important.

(h) **Matter 6**: The findings recorded in paragraph 123 above are relevant to this matter, as are the findings concerning the existence of the Email mistakes and the Text message error.

131. The Tribunal refers to the question of aggravating circumstances. In this regard, the Tribunal has considered the factors listed in the table on p. 7 of the SIA Guidance document (see the table under paragraph 61 above). In relation to the Relevant conduct, many of those factors are not present, and, if any factors are present, they are not as significant as suggested.

132. For convenience, the Tribunal's analysis of these factors is set out in the following table:

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[47] See section 84 and section 85 of the *Associations Incorporation Reform Act* 2012 (Vic).

Factor	Assessments / determinations
The nine factors listed on the left-hand side of the box	None present
Substantial injury, emotional harm, loss or damage	Not present – no evidence of such injury, harm, loss or damage
Previously similar conduct or related breaches, previous sanctions	No previously similar conduct or breaches, noting that the Relevant conduct occurred within a 24 or 25 hour window, and noting that the Applicant engaged in the Relevant conduct for a proper purpose, as the Respondent conceded. There is a previous sanction – namely, the 1st Sanction. However, the Applicant has accepted responsibility for the Initial conduct, that is, the conduct leading to the imposition of that sanction.
Breach whilst on probation or sanction	The Tribunal rejects the submission of the Respondent that, by breaching the 1st Sanction, the Applicant showed "contumelious disregard for the policies, sanctions and authority" of the Respondent (see paragraph 5 of the Respondent submissions). Rather, as found, the Applicant made the Email mistakes, and he made the Text message error. Further, as conceded, the Applicant engaged in the Relevant conduct for a proper purpose.
Ongoing and sustained offending over a period of time	Not present – having regard to the proper purpose concession, the nature / content of each message, and the short window in which the Applicant sent each message, the Tribunal rejects the submission that this factor is present.
Abuse of position of power or trust	Not present – this accords with the Abuse of position concession
Attempting or disposing of evidence	Not present
Lack of cooperation	In its letter dated 25 August 2023, the Respondent told the Applicant that he was not required to respond. In the circumstances, in relation to the investigation and other related matters, this is not an aggravating factor. It is irrelevant that the Applicant did not inform the Respondent that he was not planning to respond. That may or may not have been discourteous, but it is not a lack of cooperation.
The breach was premeditated (rather than spur of the moment).	The Tribunal refers to the findings in respect of the Applicant's intention and the Email mistakes. In essence, the Applicant did not plan to contravene the 1st sanction. Accordingly, in relation to the sending of the emails, this factor is not present. In respect of the Text message, the position is different. Faced with a difficult choice, the Applicant made a conscious decision to send the text message, and he did so in the knowledge that it would constitute a contravention of the 1st Sanction. Accordingly, in respect of the Text message, this factor is present. However, in assessing the weight to give to this factor, the Tribunal has considered the Text message error, the purpose for which the Applicant sent the text message, and the fact that he sent identical text messages to other members of the general Committee of the Club.
The Respondent has previously undertaken education in relation to the particular type of conduct.	Not present – there is no evidence in this regard.

133. In addition to these factors, the Respondent also pointed to the following factors: (i) the Applicant's lack of genuine remorse;[48] (ii) the seriousness of the Initial conduct;[49] (iii) the length and breadth of the Applicant's involvement in the sport;[50] and (iv) the fact that, in his other communications with the complainant, the Applicant complied with the 1st

48 See paragraph 15 of the Respondent submissions.

49 See paragraph 16 of the Respondent submissions.

50 See paragraph 21 of the Respondent submissions.

Sanction, thereby demonstrating the ease with which he could have avoided the contravening conduct.[51]

134. As to the first of these factors, it is addressed by the finding of fact recorded in paragraph 121(d) above.

135. As to the second of these factors, the Applicant has accepted the seriousness of the Initial conduct, he was sanctioned in this regard, and the Relevant conduct is very different from the Initial conduct.

136. As to the third of these factors, the submission of the Respondent is unnecessarily harsh and over-zealous, diminishing the value of the Applicant's contributions over many years. Further, the submission ignores the obvious purpose of the messages, the absence of evidence of harm, and the manifestly plausible explanation concerning mistakes on the part of the Applicant. In the Tribunal's view, this is not an aggravating factor.

137. As to the fourth of these factors, the submissions of the Respondent are unnecessarily harsh and unreasonable. They ignore the substantial level of compliance with the 1st Sanction; they give no credit whatsoever for that level of compliance; and they ignore the obvious point, namely, the Relevant conduct was aberrant. In the Tribunal's view, this is not an aggravating factor.

138. The Tribunal turns to the question of mitigating factors.

139. The Respondent argued that, as the Applicant had not raised any such matters prior to the imposition of the 2nd Sanction, the Tribunal should give these matters little weight. This submission is difficult to follow. The Respondent appears to argue that, by reason of the belated identification of mitigating factors, the Tribunal should conclude that they are unsound or not genuine. The Tribunal rejects this argument. It reflects an unwarranted degree of zeal on the part of the Respondent. Plainly, the Applicant engaged legal representation to help him. If the legal representative helped the Applicant to identify the mitigating factors, so be it. But the provision of such help does not necessarily diminish the soundness or genuineness of the factors on which the Applicant relies. Similarly, the delay in the identification of these factors does not lead automatically to the conclusion that such factors are unsound or not genuine.

140. There are numerous mitigating factors. These factors reduce the seriousness of the Relevant conduct and the Applicant's culpability. The concessions of the Respondent reinforce some of the key mitigating factors, including the nature and purpose of the

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[51] See paragraph 23 of the Respondent submissions. This paragraph refers to "the possible existence of other communications (about which the Applicant has adduced no evidence)". In the course of the hearing, however, the Respondent accepted that: (i) after the imposition of the 1st Sanction, in relation to the business and affairs of the Club, the Applicant sent around twenty emails per week to the complainant and others (and doing so without contravening that sanction); and (ii) the complainant lodged only one complaint in respect of communications she had received from the Applicant, indicating that most communications were not contravening communications.

contravening messages, the limited number of messages, and the absence of any intention to harm anyone or anything.

141. There are some mitigating factors in respect of which the Tribunal makes some specific observations. First, the contravening conduct did not occur in a public forum. It was something of which, initially, only the complainant was aware. Second, it was the Respondent that determined to publicise the contravening conduct. The Applicant did not set about to actively undermine the authority of the Respondent and public confidence in the ability of the Respondent "to enforce its own rules for the benefit of the wider community".[52]

142. Next, the Tribunal notes the following matters:

(a) The Tribunal accepts the Respondent's submissions in respect of the HK incident. Accordingly, in determining Issue 2, it has ignored the HK incident, including the sanction imposed in respect of the conduct relating to that incident.

(b) In determining Issue 2, the Tribunal has also considered the "time served" to date. The suspension has run since the imposition of the 2nd Sanction – around two months ago.

143. In light of these matters, the Tribunal finds as follows:

(a) Looking at the SIA Guidance document, this case falls into Category 1.

(b) In order to achieve the aims identified in paragraph 125 above, and in order to sanction the Applicant for his deliberate (but misguided) decision to send the Contravening text message, it is necessary to impose a period of suspension.

(c) A twelve month suspension would be wholly disproportionate to the contraventions.

(d) A twelve month suspension is not required to achieve to achieve the relevant aims.

(e) A two week suspension will achieve those aims; and a two week suspension is proportionate to the nature and purpose of the contravening conduct.

IX Disposition

144. In relation to the issues arising for determination:

(a) I have read the written evidence;

[52] See paragraph 27 of the submissions.

(b) I have read the parties' submissions;

(c) I have heard their oral submissions; and

(d) I have carefully considered these things.

145. For the reasons stated above, I **DETERMINE** as follows:

(a) In respect of the Relevant conduct, it is fair and reasonable to impose a sanction on the Applicant, and impose that sanction in place of the 2nd Sanction.

(b) As to the Tribunal Sanction:

(i) It is appropriate to suspend the Applicant from participating in any sporting activities.

(ii) A fair and reasonable period of suspension is two weeks.

(iii) Pursuant to the 2nd Sanction, the Applicant has served a suspension of almost two months, in which case has already complied with the Tribunal Sanction. Accordingly, he is now free to participate in any sporting activities.

(iv) The sanction does not involve any suspension of the Applicant's sporting qualifications or accreditations.

146. There are two final matters.

147. First, the submissions of the Respondent – including the oral submissions – reflected a surprising level of zeal. The circumstances of the case did not warrant that level of zeal.

148. Second, the Tribunal refers to all of the Respondent's notices and publications relating to the 2nd Sanction ('**Notices**'). Given the Tribunal's determination of Issue 2, the Tribunal expects that the Respondent shall without delay: (i) remove or delete all Notices; and (ii) publish a notice recording the Tribunal Sanction.

Signed:

Robert Heath

22 December 2023