



Arbitration CAS 2008/A/1603 Jahangir Shagaev v. Australian Water Polo Incorporated (AWPI), award of 16 December 2008

Panel: The Hon. Allan McDonald QC (Australia), President; The Hon. Robert Ellicott QC (Australia); Mr Malcolm Holmes QC (Australia)

Aquatics (water polo)

Misconduct of a coach toward a referee during a match

Determination of the rules applicable to a coach's misconduct

Right to amend a referee report made at the conclusion of a match

Validity of the charges against a coach and disciplinary sanction

1. The set of regulations which provides the rules upon which a national water polo league is conducted creates a range of separate and interlocking contractual arrangements between federations members and persons who include individual members, officials, referees, team officials (including coaches) whose regulated participation in water polo matches enables water polo league matches to be conducted fairly and properly. A team official having participated in a water polo league match is bound by such contractual arrangements. It is therefore those contractual arrangements that regulate the proceedings and provide for the disciplinary sanctions that may be applicable to an official found liable of misconduct. In this respect, the provisions headed "Players" shall be applied *mutatis mutandis* to coaches and officials as they do to players. To imply such a term is reasonable, equitable and consistent with the principles laid down by the courts. Indeed, the contractual arrangements should not be complete without such a term. By necessity it gives efficacy to such contractual arrangements particularly having regard to their nature.
2. According to the applicable regulations, the report made by a referee at the conclusion of a match where there has been an incident may be amended verbally or in writing, prior to or at the commencement of the oral hearing before the competent adjudicating body to allow any correction in the form of amendment, clarification and particularisation as may be necessary to allow a fair hearing of the allegations.
3. According to the construction of the applicable regulations, the charges of hitting (in the sense of assaulting), (2) language, (3) misconduct, and (4) bringing the game into disrepute shall be held against the coach of a team who slapped a referee and who further used abusive, insulting, threatening and obscene language towards the referee at the conclusion of a match. By such conduct, a coach has breached the term of the applicable regulations whether explicitly or impliedly. The possible range of sanctions for coaches who have engaged in such conduct is a suspension from the sport from two matches to life.

Jahangir Shagaev (the Appellant) was at the relevant time an employee of Sydney University Sport, a Member of the Sydney University Water Polo Club and was the coach of the Sydney University Water Polo team, known as the Sydney University Lions which played competition in the National Water Polo League.

The Australian Water Polo Incorporated (AWPI) (the Respondent) is the national controlling body of water polo in Australia.

On 2 March 2008 at the Sydney University swimming pool a water polo match took place between the Sydney University Lions team and the Hunter Hurricanes team. The match was part of competition in the National Water Polo League which was competition conducted by the Respondent and managed by the National Water Polo League Commission. The coach of the Sydney University Lions team was the Appellant. The referees for the match were Mr Alex Zlatkovic (Zlatkovic) and Mr Nick Hodggers (Hodgers).

The officials table was situated on the pool deck on a side of the pool at about one end of the pool and about a metre and a half or thereabouts from the side of the pool.

The position of the Sydney University Lions Team bench was on the opposite side of the pool to the officials table.

The match was conducted in accordance with the then FINA Rules except for competition rules set out in the then current Australian National Water Polo League, 2008 Season, Operations Manual (the Operations Manual), which *“details the rules upon which the National Water Polo League is conducted”*.

By Section 9 of the Operations Manual it is provided

“The league and all clubs, officials, coaches, referees and players will observe AWPI’s Code of Conduct”.

Clause 24. 1 of the AWPI Constitution provides

“The code of conduct set out in the By-Laws shall be binding on all Members”.

By Clause 2 of the AWPI Constitution, *“Member”* is defined to mean

“Member” means a Member Body being a State or Territory Water Polo Association that has been granted the right of membership with AWPI.

Further by that clause of the AWPI Constitution *“Individual Member”* is defined to mean *“individual member of a Club under the jurisdiction of a Member”*. The Appellant was an *“Individual Member”* as so defined.

“Coach’s Code of Behaviour” is contained in Clause 7. 5 of the AWPI By-Laws. As relevant Clauses 7. 5. 12 and 7. 5. 13 provide:

“7. 5. 12 Be a positive role model for your sport and athletes. Abuse and insults directed at officials or parents.

7. 5. 13 Refrain form (sic) inappropriate behaviour towards officials and parents”.

By Section 5. 2 of the Operations Manual which is headed “*Reports of excluded players/ coaches/ officials*” it is provided in part

“All exclusions for the remainder of the match for Grade 1 and for Grade 2 offences (refer 10. 1. 3 of the Manual) must be reported by the referee on the appropriate Report Form (in Document Section of this Manual)”.

It is provided by Section 5. 2. 1 that the Referee on completing such form is required to give it to the host club game day delegate/ manager and that the host club is required to fax it to the National Water Polo League office.

Section 10 of the Operations Manual is headed “*Judiciary*” and sets out the “*judiciary policy [that] will apply to all matches*”. Section 10. 1 is headed “*Players*”.

It is further provided by Section 10. 1. 1 of the Operations Manual that players ejected from a match have two options. The first option is “*accept the decision and*” the period of suspension set out in the Operations Manual. If the offence is “*Misconduct – Disrespect/ Disobedience*” and it is a first offence for a grade 2 offence the penalty is suspension for 1 match and for “*Misconduct – Violence*” for a first offence grade 2 the penalty is 2 matches. The second option is that a player may appeal the suspension to the National Water Polo League Judiciary Committee, which requires that Committee to apply penalties set out in a scale provided. That scale provides that for an offence of Misconduct – Violence for a grade 2 offence the penalty is 4 matches. It is noted in Section 10. 1. 2 –that:

“Should the referee/ official who reported the player consider the matter should be referred to the Judiciary then he/ she has the right to do so. All charges of assaulting an official (or threat to assault an official) shall be referred to the Judiciary for bearing”.

The scale of penalties provided for a first offence of Assault of Official (including Threat to Assault) shall be a suspension for the period of 1 year to life.

Section 10. 1. 3 deals with the “*Grading of Offences*”. It is provided that Grade 2 offences include “*Threats of Violence against official*” and “*Violence against official*”.

Section 10. 2 of the Operations Manual is headed “*Coaches and Team Officials*” and provides that referees will use a yellow and red card system for all coaches and officials.

Section 10. 4. 1 of the Operations Manual under the heading “*General*” provides:

“If a charge of bringing the game into disrepute or charges that relate to FINA/ AWPI rules outside the charges of Misconduct or Brutality is made against any player, coach or club or league official, The NWPL Judiciary Committee will determine the matter”.

It is to be observed that in the AWPI Constitution it is provided by Clause 20. 1:

“The Association has the power to reprimand, fine, suspend, disqualify, expel or otherwise deal with a Member, Club, Individual Member or Affiliate Member which, in its opinion, has been guilty of conduct warranting such action”.

By Clause 2 of the AWPI Constitution “*Association*” is defined to mean “*Australian Water Polo Incorporated*”.

Further pursuant to Clause 4. 2 of the AWPI Constitution it is provided:

“In addition to the powers conferred by Clause 20 AWPI shall have the power to fine, reprimand, suspend, expel or otherwise deal with a Member, Club, Individual Member or Affiliate Member which or who in the opinion of the Disciplinary Committee:

4. 2. 1 is or has been in breach of this Constitution; or

4. 2. 2 is or has been guilty of misconduct of any kind, including but not limiting the generality thereof, of unfair practice relating to water polo or action which denigrates the sport of water polo”.

The composition of the Disciplinary Committee and procedures to be followed by it are provided by Clause 23 of the AWPI Constitution.

After the conclusion of the match referred to, which Sydney University Lions lost, which on the evidence meant that it would not reach the finals and after the occurrence of events, dealt with in further detail hereafter, Zlatkovic completed a report using the form set out in the Operations Manual. The Report related to the Appellant, the coach of the Sydney University Lions team. In the part of the printed form of the report which stated “*Charge – see rules at foot of sheet – specify rule number*”, Zlatkovic wrote “*21. 9 – Hitting referee and language*”. At the foot of the first page of the report, there appears, *inter alia* “*W. P. 21. 9 To be guilty of misconduct including the use of foul language, violent or persistent foul play, etc. The offending player shall be excluded from the remainder of the game, with substitution after the earliest occurrence referred to in WP 21. 3*”. In that part of the printed form which provides a box to be completed after the words “*Grade of offence 1 and 2*” and which also stated after the “*box*” provided “*see Sec 10. 3 Operations Manual*”.

That clause of the Operations Manual deals with complaints against referees/officials, which must be in writing and delivered to the Chairman of the National Water Polo League, Judiciary Committee within the time provided.

By Clause 4. 7. 2 of the AWPI By-Laws it is provided:

“A referee or official reporting a player (or team official) for misconduct among other offences shall do so in writing within one (1) hour of the completion of the match to the Secretary-General or to the duly appointed representative of the AWPI present at the event ...”.

Clause 4. 7. 3 provides that:

“A player or team official charges with disrespect, misconduct or any other offence by a referee or an official is not suspended until the player or team official appears before the Judiciary Committee convened to hear the charge”.

Zlatkovic wrote in the “*box*” for the “*Grade of Offence*” the figure “*2*”. He set out in the report details of the “*incident*” as follows:

~~Player~~ *Coach was yellow carded in Quarter 2: Was done for saying “You are a fucking idiot, do you want to take this outside?” Coach was ignored. At end of the game, coach approached table whilst card was looked at.*

He said "you are a fucking disgrace. How dare you yellow card me at my pool". Referee put hand on coach gently and said "please relax and leave".

Coach slapped referee and shoved him on chest. He was restrained by Bruce Hammond, Nick Hodggers and others.

He proceeded to say the following:

~~You~~ Don't you ever touch me. I will fucking kill you ...

My dad coached you when you were small. I ~~thought~~ taught you everything you know, you'd be a piece of shit if it wasn't for me.

I will kill you, you fucking Serbian piece of shit, I will crucify you.

You dickhead how there (sic) you yellow card me at my pool. No one can do that".

All this was said whilst being restrained.

Referee was 3 metres away from him.

At this stage Larry Cargill started clapping for the coach.

Referee was in fear of being hit and still is after writing card as he was physically ~~W-o-a-s-s-a~~ slapped".

At 10:46 pm, Hodggers sent an email to Mr Greg Turner (Turner), who was the Treasurer and National League Manager of the Sydney University Men's Water Polo Club and was present at the match earlier that day. He stated that he had received a copy of the report compiled by "Aleks" and said he would refer to it as he went, if needed. He stated:

"I concur that Jahangir received a yellow card in during the game for verbally abusing Aleks regarding a decision Aleks made on his side of the pool closest to the officials table (opposite side to the team bench) at the S. U. defensive end of the pool. I was close enough to hear Jahangir make comment in regards to "taking it outside after the game".

He further stated in his email that his account of the events after the game were:

"Aleks and I had just begun reviewing the card at the table after the game and Jahangir approached and said "you are a f#%king disgrace", I was on Aleks' right and furthest away from Jahangir, however, we both turned and said to Jahangir words to the effect that he couldn't talk to the referees immediately after the game. Jahangir continued with his tirade not listening to my/our requests and those of Syd Uni officials for him to leave. While initially unsighted behind Aleks (I didn't see Aleks place his hand/s on Jahangir) as I attempted to step between Aleks and Jahangir, Jahangir reacted by forcefully pushing Aleks in the chest area knocking Aleks backwards almost into me (probably about one foot in distance) Jahangir's action making a loud thumping noise as he connected with Aleks and Jahangir saying "don't you touch me you piece of Serbian sh#t". I stepped between them to prevent Jahangir from moving any closer to Aleks.

At this point I put my hands on Aleks' shoulders and moved away from the table with him towards the shallow end of the pool. Jahangir continued with his abuse making comments such as "how dare you yellow card me in my pool, you cant do that" "my father coached you when you were young" "taught you everything you know" "you piece of Serbian sh#t, I will crucify you". As I moved Aleks away, I told the Syd Uni officials "you need to take care of him" (Jahangir) and this they did, making sure he (Jahangir) could not follow Aleks and I down

the pool deck. There was a significant amount of commentary from Jahangir with the whole situation lasting approximately 2-3 minutes.

As the situation subsided, I noted Larry Cargill particularly as well as several other Syd Uni spectators situated on the balcony either making comment yelling across the pool pointing to where Aleks and I were standing or in Larry's case clapping, possibly in support of Jahangir's actions given his (Larry's) derogatory commentary throughout the game.

I have sent this report via Greg Turner who will copy me in on the email being sent to the NWPL Judiciary as I am without fax capabilities. Foul language has been doctored to ensure it makes it through filters".

Having regard to the report of Zlatkovic and the account of Hodgers as set out above, reference should be made to Section 5. 5 of the Operations Manual which provides:

"5. 5. Post Match Protocol

Team players/ officials and referees may not discuss the match in any detail for at least a 30-minute "cooling off" period after each match. Of course, a simple thank you or acknowledgement from team officials/players is acceptable but they may not engage in any form of criticism/ advice until the cooling off period has elapsed. A breach of this policy could result in a charge of bringing the game into disrepute being made against the player/manager/ coach/ referee". Common sense is the key to this rule – we are not trying to stop constructive comment or discussion but we will not accept verbal abuse when the matter is still too hot/emotional to deal with".

On 4 March 2008, Turner, on behalf of Sydney University Lions Water Polo Club, sent a letter to "Australian Water Polo" with reference to "Sydney University v Hunter Hurricanes (sic) – Sunday 2 March 2008" and which stated:

"Our Club wishes to sincerely apologise to the National League and Mr Alex Zlatkovic for the unsportsmanlike behaviour of our National League coach.

The undersigned is working with Sydney University Sport to have counselling specialists within Sydney University Sport work with our National League coach to aid him in better handling stressful situations in general and more particularly those involving our sport.

I have personally rung Mr Zlatkovic and apologised on behalf of the Club and Jahangir.

We have stood Jahangir down as coach until this matter is determined".

The report of Zlatkovic was referred to the "Judiciary" Committee of the National Water Polo League. The Appellant attended as did Turner and Mr Stewart Moar of Sydney University. The hearing took place on 8 March 2008. Both referees Zlatkovic and Hodgers attended. In the written report of the Judiciary it stated that Zlatkovic reported the Appellant for "hitting referee and language".

The Judiciary, in its report recorded "Under Rule 10. 10. 5 the Judiciary advised the defendant that the report would be amended by removing or disregarding the references in the Report to Rule 21. 9 and the Grading (2) given".

Section 10 of the Operations Manual is headed "Judiciary". Section 10. 10. 5 provides:

"10.10.5 Inaccuracies in reports

- a) *If it is discovered during a hearing that any inaccuracy occurs in a written report, the Chairman shall have the discretion to enable it to be rectified by way of verbal information being heard.*
- b) *If it is apparent to the Chairman that the applicant are or the functions of the Judiciary are jeopardised, the Chairman shall grant an adjournment of the hearing, as the Chairman sees fit”.*

The Judiciary, in its report, also noted that the date on the report of Zlatkovic was incorrect stating 2007 instead of 2008.

In that report the Judiciary recorded *“Plea: The Defendant pleaded “Guilty” on the proviso that he denied using the words “I will fucking kill you”.*

It is to be noted that by Section 10. 9. 2 of the Operations Manual which in Part deals with the *“Hearing Procedures”* on a hearing before the Judiciary it is provided by sub-clause (c) that *“The Chairman shall ask the applicant whether the plea is “Guilty” or “Not Guilty”.*

Further the Judiciary recorded that for the purpose of its decision it accepted that the Appellant did not say the words *“I will fucking kill you”*, noting that he admitted all other language set out in the Report.

In the report of the Judiciary it is stated that it determined that the description of the assault as set out in Hodgers email was accurate and admitted by the defendant.

The decision of the Judiciary as recorded is:

“Coach Jahinger Shagaev was suspended on charges of:

1. *Abusive language (including racial vilification) – 2 years suspension (as from 2 March 2008).*
2. *Assault of Referee – Life suspension, but because plea of guilty, apologies given, remorse expressed and personal circumstances of Defendant, he may apply to the Tribunal (or its successors) in writing on or after 2 March 2018 for a review of this Decision. The Tribunal (or its successor) shall determine the review procedures at the time any such application is received. The suspensions are to be served concurrently and shall prevent the Defendant from involvement in the NWPL as a coach, player or official”.*

Section 10. 7 of the Operations Manual states in part:

“All appeals against decisions made by the NWPL Judiciary Committee must be directed within 7 days of any decision to the Secretary General Australian Water Polo Inc for presentation and hearing by the Australia Water Polo Inc Board”.

The Appellant appealed against the decision of the Judiciary to the National Water Polo Inc Board which heard the appeal on 27 June 2008. The Appellant was represented by Mr Stack of counsel. The Board published its reasons for its decision on 3 July 2008.

The Board concluded that it should reduce the penalty imposed by the Judiciary and ordered in its reasons:

“On the charge of assault referee a period of five years complete disqualification with a further five years suspended sentence is the appropriate punishment. No additional penalty is imposed on the charge of abusive language”.

By its recorded conclusion in its reasons for its Decision the Board stated:

“Jahangir Shagaev is suspended from 4 March 2008 from all AWPI and State Association sanctioned games and water polo events in Australia as a coach, athlete or official for a period of ten years, with five to be served, and the balance of five years to be suspended subject to good behaviours (sic) during the period of 10 years from 4 March 2008”.

By a written application lodged with the Court of Arbitration for Sport, Oceania Registry on 11 July 2008 the Appellant appealed to the Court of Arbitration for Sport against the decision of the AWPI. By his appeal the Appellant named the AWPI as the Respondent to the appeal. As part of his Application to the Court of Arbitration for Sport, the Appellant attached a copy of the decision of the Judiciary and a copy of the reasons for decision of the Board of the respondent.

In the “Brief” filed on behalf of the Appellant with the CAS Oceania Registry there was included an affidavit of the Appellant, sworn 21 July 2008 and affidavits of Mr Greg Turner, Mr Stewart Moar and Dr Lyn Hammond each sworn that day. By a letter from the solicitors for the Appellant dated 9 September 2008 to the Respondent, the Appellant required Referees Zlatkovic and Hodggers to be available for cross-examination at the hearing.

The hearing of the appeal was held on 23 September 2008 at the office of Allens Arthur Robinson in Sydney and on 6 November 2008.

LAW

Jurisdiction

1. By Clause 4. 3 of the AWPI Constitution it is provided:

“4. 3 Should a Member, Club, Individual Member or Affiliate Member be dissatisfied with a decision of AWPI (or the Disciplinary Committee) it may, subject to the requirements of Sub Clause 22. 2, appeal to the CAS, which shall hear and decide the appeal and whose decision shall be final and binding upon the parties”.

2. Clause 22. 2 of the AWPI Constitution further provides:

“22. 2 Appeals from decision of the AWPI

22. 2. 1 A Member, Club, Individual Member of Affiliate Member may appeal the decision of the AWPI to the CAS in accordance with Clause 4. 3;

22. 2. 2 Any appeal made in accordance with Sub Clause 22. 2. 1 must be made to the CAS within fourteen [14] days of the decision by AWPI.

22. 2. 3 *A decision made by the CAS following an appeal in accordance with Sub Clause 22. 2. 1 is final and binding upon all parties and shall not be appealed by any party*”.

3. It is to be noted that in Rule 57 of the CAS Code of Sports-related Arbitration (2004) it is provided by the first two sentences of that Rule:

“The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”.

4. In an interlocutory decision in an Appeal heard by the Court of Arbitration for Sport in CAS 2004/A/651 the Panel stated *“CAS Rule 57 provides for a full power to review the facts and the law. The French version reads “revoit les faits et le droit avec plein pouvoir d’examen”. The unofficial literal translation would be “review the facts and the law with full scope of examination”. The French version provides for a slightly more complete explanation of that power”.*

5. This is an appeal from the decision of the Respondent by its Board on 3 July 2008. Clauses 4. 3 and 22. 2 of the AWPI Constitution provide for such an appeal to CAS. Further at the Directions Hearing on the appeal held on 18 August 2008 each party to the appeal agreed, *“That pursuant to Clause 4. 3 of the Australian Water Polo Incorporated Constitution dated 1 July 2006, the Court of Arbitration for Sport (CAS) has jurisdiction to determine by arbitration the dispute which is the subject of the appeal brought by the Appellant dated 11 July 2008 against the Respondent and agree to refer the dispute to CAS for determination by arbitration”.*

Evidence on appeal

6. At the outset of the hearing of the Appeal Senior Counsel for the Respondent, identified the *“charges”* that were brought against the Appellant and which were the subject of the Appeal as *“bitting referee”, “language”, “misconduct”* and *“bringing the game into disrepute”*.
7. At the outset we put to one side the *“charge”* of *“misconduct”* as referred to in Clause 4. 2. 2 of the AWPI Constitution. As previously dealt with, pursuant to Clause 4. 2. 2 of the AWPI Constitution the Respondent has power to deal with an individual member who *“in the opinion of the Disciplinary Committee” “has been guilty of misconduct of any kind”*. It is pursuant to Section 23 of the Operations Manual which provides for the composition of such committee and its procedures. The decision appealed from to CAS in this case is not a decision of the Respondent exercising its powers under Clause 4. 2 in reliance upon the opinion of the Disciplinary Committee. The subject of this appeal is a decision of the Respondent on hearing an appeal from a decision of the *“Judiciary”*.

Disposition

8. The hit to the chest by the Appellant, with two open hands, which pushed Zlatkovic backward, as demonstrated by him, constituted a *“slap”* in the true sense of that word as distinct from a punch with closed fists. That demonstrated was a hit in the nature of a slap. That Zlatkovic in

his report crossed out the letters “*assa*”, which he assumed was the commencement of the word assault, and wrote slapped instead, gave a more specific description of the nature of the hit that he said he received rather than use the generic word “*assault*”. That Zlatkovic was hit by the Appellant in the manner demonstrated gains support from the evidence of Hodgers who described hearing a thumping noise at the time that Zlatkovic moved backwards.

9. We accept that the Appellant hit Zlatkovic by slapping him in the chest and that caused him to move backwards.
10. It is to be observed from the evidence of the Appellant that much of what was said by him to Zlatkovic, as recounted by Zlatkovic and Hodgers, that he agreed with their accounts as to those matters. It is to be observed that in his affidavit the Appellant said that when some half a metre from Zlatkovic he said that the referee was a “*disgrace*” and a “*cheat*”.
11. The areas of conflict between the accounts given were whether Zlatkovic gently put his hand on the Appellant’s chest or pushed him in the upper stomach and whether the Appellant said to Zlatkovic that he would “*kill him*”.
12. Generally we accept the account of what happened and what was said after the game as given by the two referees as against that of the Appellant having had the advantage of observing them give evidence and be cross-examined. The two referees gave their evidence directly as to what they could recount, without embellishment or exaggeration as against that of the Appellant who was reluctant to make concessions. The Appellant gave the impression that he sought to describe his actions as only “*inappropriate*” rather than any worse description. In evidence Hodgers said that he did not see Zlatkovic put his hand on the Appellant and was unable to say how much force was used at that time having regard to his position and endeavours to get between the Appellant and Zlatkovic.
13. The Appellant’s evidence was that he was pushed in the upper stomach by Zlatkovic. Dr Lyn Hammond gave evidence that she observed, from the position in which she was seated at the officials’ table, that Zlatkovic forcibly pushed the Appellant in the solar plexus region. We accept this evidence. However, having regard to the angry abuse levelled by the Appellant to Zlatkovic, when he was only some half a metre from him, we are satisfied that the actions of Zlatkovic were dictated by his, endeavouring to ward off the Appellant.
14. As to whether the Appellant actually used the words to Zlatkovic that he would “*kill*” him, when determining whether that was actually said regard must be had to the seriousness of the allegations made. The threat to “*kill*” someone constitutes a serious criminal offence. The Appellant denied using such words although he conceded that he called Zlatkovic a “*fucking piece of Serbian shit*” and also said to Zlatkovic that he would crucify him.
15. Hodgers could not recall the Appellant saying to Zlatkovic that he would “*kill*” him. Mr Moar said that he heard the Appellant say to Zlatkovic that he was a “*Serbian shit*” and that he would “*crucify him*”, but said he did not hear the Appellant say to Zlatkovic that he would “*kill*” him. Further, Turner gave evidence that at no time did he hear the Appellant say to Zlatkovic that

he would “*kill*” him. In the circumstances of this appeal we cannot be satisfied to the necessary degree that the Appellant said to Zlatkovic that he would “*kill*” him, as distinct from saying that he would “*crucify*” him which was conceded by the Appellant.

16. The principle submission made by Mr Stack on behalf of the Appellant on this Appeal was that under the AWPI Constitution, the AWPI By-Laws and the Operations Manual they did not enable a “*charge*” to be brought against a coach as distinct from a player of hitting a referee and the use of “*language*” by a coach directed to and against a referee. He submitted that Section 10 of the Operations Manual and in particular Section 10. 1 which is headed “*Players*”, applies only to players and not to a person such as the Appellant who at the relevant time was the coach of a team which had competed in a match. He submitted that whereas if, under Section 10. 1. 2 of the Operations Manual, a player who assaulted an official could be subject to a penalty of suspension for one year to life, such provisions only applied to players and not to a person who was a coach of a participating team. He submitted in substance that whereas the Appellant had always accepted that his conduct after the subject match was “*unsportsmanlike*” and he had unreservedly apologised for that conduct, the Appellant could not be charged as he had been and that neither the Judiciary nor the Respondent could deal with the charge as presented and penalize him particularly having regard to Section 10 of the Operations Manual as it applied to players and not to an individual member in the position of the Appellant, as he was a coach of a competing team and not a player.
17. When regard is had to the report of Zlatkovic, it is clear that the report referred to the Judiciary was against the Appellant as a coach. The charge of “*Hitting referee-language*” was descriptive of the events detailed in the report. The Judiciary amended the report pursuant to Section 10. 10. 5 of the Operations Manual which in substance removed from it a reference to a “*player*”. It was submitted on behalf of the Appellant that the Judiciary had no capacity to make such amendments under that clause of the Operations Manual as it applied only to make amendments to the narrative of the report. We do not agree. Section 10. 10. 5 of the Operations Manual empowers the Judiciary to make the amendments that it did to the report.
18. The AWPI Constitution, the AWPI By-Laws and the Operations Manual, which provides the rules upon which the National Water Polo League was and is conducted creates a range of separate and interlocking contractual arrangements between the Respondent and Members and Persons who include individual members, officials, referees, team officials (including coaches) whose regulated participation in water polo matches enables water polo league matches to be conducted fairly and properly and to the advantage of those participating in that sport – cf *Ragus v Sullivan* (2000) 50 NSWLR 236, at p. 251, Spigelman CJ and Mason P.
19. The Appellant, an individual member and a team official at the relevant time being the coach of a team which had participated in a water polo league match was bound by such separate and interlocking contractual arrangements. It is to be observed that pursuant to those contractual arrangements he appeared before the Judiciary, he appealed against the penalty imposed on him by it to the Board of the Respondent and he has appealed to the CAS against the penalty imposed on him by the Respondent by its Board, which later process has enabled him to have the facts and “*the law*” reviewed.

20. We do not accept the principle submission made on behalf of the Appellant, for to uphold it, that would result in a situation that where a player in a league water polo match could be reported and dealt with for hitting a referee and using foul, abusive and threatening language against a referee, the person who was the coach of that player could not be reported and appropriately dealt with.
21. We are satisfied that pursuant to clause 20. 1 of the AWPI Constitution, the Respondent by decision of its Board on the hearing of the appeal brought before it from the decision of the Judiciary had the power to “*reprimand, fine, suspend, disqualify, expel or otherwise deal with ... an individual member ... which in its opinion has been guilty of conduct warranting such action*”. In its reasons it relies on this provision and in our opinion it was open to it to do so. We are of the opinion that the Panel is also entitled to exercise that power. On the facts we conclude that this is clearly a case where the appellant should be suspended under Clause 20. 1.
22. To the extent necessary we would also imply a term in the contractual arrangements that the provisions of Section 10 of the Operations Manual apply *mutatis mutandis* to coaches and officials as they do to players. Our colleague, Mr Holmes QC in separate reasons has analysed the relevant sections of the Operations Manual particularly Section 10 which in his opinion supports that view.
23. There are clearly arguments against that view but, on balance, we think it is, with respect, correct and we agree with his reasons for implying such a term.
24. We are also of the view that the implication of such a term is consistent with the principles laid down by the courts for doing so (cf. *BP Refinery Ltd v Hastings Shire Council* (1977) 52 ALJR 20 PC). To imply such a term is reasonable and equitable, the contractual arrangements are not complete without such a term and by necessity it gives efficacy to such contractual arrangements particularly having regard to their nature. Further the term implied is so obvious it goes without saying, and is capable of clear expression and does not contradict any express term of the contractual arrangements.
25. We are satisfied, to the extent necessary in such a case as this, where extremely serious allegations have been made against the Appellant, that by his actions after the relevant match was completed on 2 March 2008, and on the pool deck he breached the term implied in that he slapped the referee in the manner that we have determined and further he used abusive, insulting, threatening and obscene language towards the referee.
26. It follows that whether pursuant to Clause 20. 1 or the implied term the Respondent had the power, on the hearing of the appeal from the decision of the Judiciary, to determine the facts as to the events which took place after the match on 2 March 2008 and to impose such penalty as it considered was warranted by the conduct of the Appellant guided as it saw fit by other provisions in the Constitution, By-laws and Operations Manual and by comparable decisions in other cases.

27. In the light of the analysis in Mr Holmes QC's reasons we would suggest there is a need for the Respondent to redraft Section 10 and other relevant provisions to remove any doubt that coaches and officials are included. It should not be left to implication.
28. We also think it desirable that all disciplinary matters should be dealt with on appeal from the Judiciary by the Disciplinary Committee established by Clause 23 inserted, we understand, to meet the Australian Olympic Committee's policy requirements on such matters. This is not presently the case in all cases e. g. this matter.
29. It was further submitted on behalf of the Appellant that the period of the suspension imposed on him by the Respondent was excessive, while it was accepted in the written submissions filed on behalf of the Appellant that his conduct, after the conclusion of the match was "*wholly inappropriate and that a penalty of some kind was called for*". It was submitted that the Appellant's "*pushing*" of the referee although "*totally unacceptable*" the circumstances of that happening should be taken into account.
30. In the course of submissions made on behalf of the Appellant, we were provided with examples of what was said to be penalties imposed in like circumstances as to those which occurred in this case.
31. We have also taken into account the fact that the Appellant has not previously "*offended*" in relation to the sport of water polo and that over a number of years he has made a significant contribution to the sport both as a player and team official.
32. However the physical contact made by the Appellant, when he hit the referee by slapping his chest, forcing him backwards and the language used by the Appellant directed towards the referee, including called him "*a cheat*", that he was a "*fucking piece of Serbian shit*" and that he would "*crucify him*" was and is appalling conduct on behalf of the Appellant. That is particularly so having regard to the fact that the Appellant was a team official and was the coach of a team in a match which had been just concluded. Any reasonable person witnessing the actions of the Appellant, after the conclusion of the match on 2 March 2008 would consider that what the Appellant did and said to the referee was totally repugnant to the sport of water polo and to the conduct of any fair and properly controlled sporting event.
33. Taking into account the matters and the submissions made on behalf of the Appellant by his counsel, we have concluded that the appropriate penalty that should be imposed on the Appellant is that he be suspended for a period of three (3) years from 2 March 2008 from all Australian Water Polo Incorporated and State Association sanctioned water polo events in Australia and elsewhere as a coach, athlete or official.

Reasons for award by Malcolm Holmes QC

34. I agree completely with the findings of fact and with the conclusion reached by the majority but have arrived at it for different reasons which I now set out.

A. *Nature of present hearing*

35. It was accepted by both parties that as a result of the operation of R57 of the CAS Code the hearing before the Panel was a complete rehearing de novo of the dispute “*as if the previous hearings hadn’t occurred*”. The Panel sought to place itself in the position of the Judiciary Committee and permitted both parties to present their cases afresh and without being constrained to the evidence led in the previous hearings. Both parties asked the Panel to deal with the questions of liability and penalty together and agreed to dispense any need for separate hearings on these questions.

B. *The Charges*

36. The charges against the Appellant as they were originally worded in the referee’s report, and those which were thereafter made against the Appellant, gave rise to considerable discussion and debate between the parties. When the matter came on for hearing before the Panel, the Respondent identified the four charges that were brought against the Appellant and which were the subject of these proceedings. These were (1) hitting (in the sense of assaulting) referee, (2) language, (3) misconduct, and (4) bringing the game into disrepute.
37. The Appellant before the Judiciary Committee, the Board and the Panel asserted that there is no charge stated in the 2008 Season Operations Manual (the Operations Manual) for the Australian National Water Polo League (the League) of either “*hitting (assaulting) a referee*” or “*language*” which could be brought against the Appellant as a coach.
38. The Appellant made the same assertion in relation to the two additional charges of “*misconduct*” and “*bringing the game into disrepute*” which were specified by counsel for Respondent at the commencement of the hearing before the Panel. The Respondent submitted that the two additional charges were established by the same matters of hitting (assaulting) a referee and language which were relied upon to establish the two original charges before the Judiciary Committee.
39. The Appellant, through his counsel, also confirmed to the Panel that he was able to meet the four charges alleged against him at the hearing before the Panel although he reserved his rights in relation to his submissions as to the validity of the charges. These included a submission that the charges “*did not constitute proper charges under the [Operations] Manual*”. There were also submissions advanced by the Appellant alleging a failure by the Judiciary Committee and by the Board to conduct a full hearing de novo but these were not pressed because any such alleged denial of procedural fairness was cured by this appeal as the parties were afforded a right to a complete rehearing by the Panel. The Appellant objected to the two additional charges brought before the Panel but did not require or request any adjournment in order to defend these additional charges.

C. *The principles*

40. In any disciplinary hearing, fundamental principles of fairness require that the person charged is entitled to know precisely that which is alleged against that person. The person accused is entitled to know not only the charges that are alleged against the person, but also to have proper particulars of each charge. The rules of natural justice will generally impose on a person acting in the nature of a prosecuting authority in disciplinary proceedings an obligation inform “to furnish such particulars as will fairly enable the accused person to understand and to meet the case being brought against him” (*Public Service Board of NSW v Etherton* (1985) NSWLR 430 per Street CJ at 432).
41. There is a fundamental difference between a charge, and particulars of the charge. “A charge is the allegation that a particular norm of conduct which binds [the person charged] has, on a particular occasion or over a particular period, been broken. Particulars are a statement of the precise circumstances in which it is alleged that norm has been broken. The particulars differ from the evidence by which the charge will be proved, and a reference to the evidence proposed to be relied on is not necessarily a satisfactory providing of particulars” (*Reynolds & Co Pty Ltd v Australian Stock Exchange Ltd* (2003) 44 ACSR 612 at [102]). In the present case the main dispute concerned an assertion by the Appellant that the Operations Manual did not contain any “norm of conduct” in the terms of the four charges which applied to a coach and therefore the charges could not be brought against him.
42. At the hearing before the Panel, the Respondent referred to numerous provisions in the Operations Manual, the Constitution and the By-Laws where the parties had agreed that the particular conduct by coaches was not tolerated during the conduct of the League and that the possible range of sanctions for coaches who had engaged in such conduct was a suspension from the sport from two matches to life. These provisions are considered below in relation to each of the four charges alleged against the Appellant.

D. *No notification of possible penalty*

43. The Appellant submitted that the statement of the charges before the Judiciary Committee was defective and insufficient because the statement made at that time did not enable the Appellant to know the case he had to meet. The referee (or Chairman), it was submitted, as a matter of procedural fairness should have identified not only the charge but also the possible sanction or range of sanctions to enable the Appellant to fully appreciate the seriousness of the charges and the jeopardy in which he was placed. The Appellant contrasted the provisions in the Operations Manual relating to players which expressly attempt to properly inform players of the case they may have to meet by referring to the grading of the offences and the potentially applicable sanctions.
44. There is some judicial support for this submission. “In certain circumstances, procedural fairness has been held to require that notice be given not merely of the fact of proceedings but also of some of the detriments which may result to the person against whom the proceeding may be brought” (*Powick v Commissioner of Corrective Services* (1996) 87 A Crim R 565 at 568). Also in *Carter v NSW Netball Association* [2004]

NSWSC 737 at [117], the Court said “*procedural fairness required that the [person charged] should have been informed correctly of the nature of the proceedings ... and that if the Disciplinary Committee decided against the [person charged], the [person charged] could face the penalties provided by [specified rules] [and, if that person] did not know the nature of the proceeding, [they] could not appreciate its gravity or what procedural rights [they] might have available*”.

45. But what the principle of procedural fairness requires depends on the circumstances of the case, “*the principle of procedural fairness is a principle of substance not form*” and not all “*consequences which may flow from [the proceeding] are to be specified in the initiating document*” (Powick, supra, at 568-569). In addition, disciplinary bodies are on occasion cautioned against specifying penalties when giving notice of the charges and the proceedings. “*In many instances it may be appropriate that a notice does not mention potential penalties in order to avoid any appearance of prejudice*” (Judicial Review of Administrative Action by Aronson, Dyer and Groves, 3rd Edition, Thomson Lawbook Co, at 501, fn 235). Any complaint of this nature which might have been available in relation to the hearing before the Judiciary Committee was not pressed in view of the hearing de novo before the Panel.
46. At the hearing before the Panel, the Appellant, whilst disputing that the charges existed or could be brought against him under the applicable rules, was aware of the nature and particulars of the charges and the range of penalties sought. No complaint was made by the Appellant that he was unable to meet the factual basis of the charges or that he needed further particulars or an adjournment. The Appellant did not seek a preliminary ruling as to the validity of the charges but sought a single hearing on all issues. The Appellant’s concern was that each charge was not known under or specified by the applicable rules.

E. *The Factual Background to the Charges before the Judiciary*

47. When Zlatkovic, as the referee, completed the report form he wrote against the heading “*Charge*” the following;

“*21. 9 – hitting referee & language*”.

The form contained a footnote which stated “*WP 21. 9 To be guilty of misconduct, including foul language, violent or persistent foul play etc. The offending player shall be excluded from the remainder of the game, with substitution after the earliest occurrence referred to in WP 21. 3*”. In addition, he completed the section entitled “*Grade of Offence*” by inserting “*2*”.

48. A copy of the report was given to the Appellant’s club, the Sydney University Lions Water Polo Club, and by letter dated 7 March 2008 which was sent the letter by email at 3. 09pm, the club sought clarification of the particulars of the charge as stated in the report form. The letter stated:
“*We note from the referee’s card that Mr Zlatkovic has reported Jahangir [the Appellant] as committing a Grade 2 offence. This grading comes from Section 10. 3 of the Operations Manual. That particular section deals with offences committed by players. Section 10. 2 relates to coaches and team officials. The Section provides for a yellow card to indicate a warning, and a red card that requires the coach to leave the pool deck area. The manual then goes on to specifically define the penalties for a red card. In the present instance, Jahangir [the Appellant]*

was given a warning via a yellow card only. He was not given a red card. Jahangir [the Appellant] has also not been advised of any charge apart from the Grade 2 offence indicated by Mr Zlatkovic”.

49. The Chairman of the Judiciary replied by email at 5. 44pm in the following terms:

“I agree that the grading of offences relates only to charges against players.

I am not sure what the relevance is of what card was shown to Jahangir [the Appellant] but that is something that you can put to the Tribunal and it will be considered together with all other evidence and submissions including the contents of the Report as a whole.

I refer you to page 31 (in the NOTE where it is stated that “all charges of assaulting an official (or threat to assault an official) shall be referred to the Judiciary for a hearing”) and also to Sections 10. 10. 3 & 10. 10. 5 of the Manual”.

50. The reference by the Chairman to “page 31” is a reference to a passage in Section 10. 1 which is headed “Players”. Section 10. 10. 3 refers to the fact that the Judiciary is not a court of law. Section 10. 10. 5 refers to “inaccuracies in reports” and the power of the Chairman to rectify such inaccuracies.
51. At the commencement of the hearing on the following day, 8 March 2008, Mr Ryan, who was the Chairman of the Judiciary, stated that “the references to the rules and other aspects of the charge details of the referee’s report are incorrect as they do not refer to the correct sections in the rules and the grade 2 nomination by Zlatkovic concerns charges for players in the National Water Polo Operations Manual”. Thereupon, the referee, Zlatkovic, clarified that the charge was “bitting a referee and language as it appears in the Report”.

F. *The Appellant’s Objections to the Charges*

52. The Appellant in his written submissions raised three objections to the charges before the Panel; first, that on a proper construction of the Operations Manual there was no entitlement to issue the report against the Appellant, second, the charges in the report could not succeed against the Appellant as a coach because the charges in the report only applied to players, and third, that it was not open to amend the written referee’s report to “substitute” a charge against the Appellant of “bitting a referee” or “language”. This was also understood as extending to include an objection to adding the two additional charges of “misconduct” and “bringing the game into disrepute”.
53. There is an element of overlap in the issues raised by these submissions, each of which relates to the referee’s report and the proper construction of the Operations Manual. Any consideration of the nature and effect of the referee’s report must be considered in the context of the scheme established by the Operations Manual for dealing with disciplinary charges against those involved in the League. This requires an understanding of the provisions establishing the scheme, the procedures which must be followed and the circumstances in which a sanction may be lawfully imposed. The Panel is obliged to ascertain and apply the proper construction of the terms of the parties’ agreement as embodied in the Operations Manual and related documents to determine the nature and effect of the referee’s report and whether any

of the charges has been established and whether any sanction should be imposed on the Appellant.

54. The terms of the parties' agreement are to be interpreted in accordance with ordinary principles of contractual construction although the rules of sporting bodies are usually not drafted with the same legal precision as formal commercial contracts. The Operations Manual is the classic example of this type of drafting and its inelegant drafting would benefit from a review. Nevertheless, in a situation such as the present, where there are a set of rules which regulates *"a group of entities and persons involved in administering and/or controlling and/or participating in a national [sporting] competition ... [w]hilst special care must be taken in closely examining each document requiring to be construed, more particularly where disciplinary offences with possible severe financial or other consequences to those concerned are involved, the construction exercise calls for a commonsense approach aimed at ensuring a workable set of rules"* (*Croatia Sydney Soccer Football Club Limited v Soccer Australia Limited*, Supreme Court of New South Wales, Einstein J, No 3525 of 1997, BC 9704797 at 31, 23 September 1997).

G. *The referee's report*

55. The Operations Manual sets out in some detail how the League is to be organised and the obligations and responsibilities accepted by all persons and clubs involved in the League. It provides that the management of the League is to be by the NWPL Commission. The venues and the pools that are used for the matches in the League are subject to detailed regulations which are set out in the provisions of Section 4 in the Operations Manual. Section 4. 6 lists those matters which are the responsibility of the host club and Section 4. 7 lists those matters which are the responsibility of the visiting club.
56. The responsibilities and entitlements of the referees who are appointed to control matches are set out in Section 5. Section 5. 2 refers to the obligation of a referee to issue a report following the conclusion of a match where there has been an incident. The prescribed form of the report is attached to the Operations Manual. The distribution of the report form is set out in some detail. For example in Section 5. 2. 3 the host club is to provide a copy of the report to the visiting club if *"it is their player/coach who has been reported"*. Whilst the heading of Section 5. 2, *"Reports of excluded players/coaches/officials"*, suggests that a report is only required where someone has been *"excluded"*, the wording in the body of Section 5. 2 suggests that a report is required from the referee in a wider range of circumstances.
57. The section commences with the name and contact number of the *"NWPL Judiciary Chairman"* and is followed by a cross reference to Section 10 which Section 5. 2 describes as the section which *"refers to all matters relating to reports/appeals and protests"* (underlining added). These paragraphs suggest that a report is required not only where a player is involved or has been excluded but whenever a player or coach or official has engaged in conduct which may lead to proceedings before the Judiciary Committee established under Section 10. Section 10 which is headed *"Judiciary"* purports to set out a disciplinary policy and procedure which applies to *"all matches"* (Section 10) in the League and *"if a charge ... or charges ... is made against any player, coach*

or club or league official" (Section 10. 4. 1). In such circumstances, the "NWPL Judiciary Committee will determine the matter" (Section 10. 4. 1).

58. The written report serves the purpose of initiating an informal disciplinary process. It brings to the attention of the Chairman of the Judiciary Committee an incident which should be considered at a hearing of the Judiciary Committee. The time between the sending of the report to the Chairman and the hearing by the Judiciary allows for calm consideration as to the manner in which those matters raised in a general sense should be pursued at the hearing. The Judiciary Committee is not confined to hearing disputes about "excluded" players, coaches and officials and the proceedings may relate to "clubs" (Section 10. 4. 1) and matters not resulting in an "exclusion" (eg, Section 5. 5, a charge of "bringing the game into disrepute"). It would be an unworkable construction of the Operations Manual to construe its provisions such as to say there was no entitlement to issue a report unless it related to an "exclusion". The report, as a matter of construction, may be issued in more general circumstances including when the referee honestly believes that a charge should be brought before the Judiciary. This view is supported by the provisions relating to the procedure followed at a hearing by the Judiciary which must be applied "generally" in cases which are brought against excluded players and also against those persons and "clubs" who have not been excluded. In all cases the proceedings commence with the reading of the report or reports "arising from the same incident" (Section 10. 9. 2 (b)).
59. The "Hearing Procedures" which are to be generally followed by the Judiciary Committee are described in some detail in Section 10. 9 and there is a particular order of events which must be followed. The Chairman is required to "open the hearing and announce" three specific matters which are listed in Section 10. 9. 1, thereupon the Chairman "shall read the report/s and provide copies to the relevant person/s". At this stage the Chairman has control over the proceedings and is responsible for informing the person against whom the allegations have been made, of the matters alleged against that person by reading the report.
60. It is apparent from the terms of the Operations Manual that the report as read by the Chairman at the commencement of the hearing generally serves the purpose, at the time of it being read, of informing the relevant "player, coach or club or league official" (Section 10. 4. 1 General) of the nature of the charge or "complaint" (Section 10. 3) which is then being alleged against that person at the hearing. The Operations Manual in Section 10. 10. 5 recognises that there may be "inaccuracies" in a written report and states that the Chairman has a "discretion to enable it to be rectified by way of verbal information being heard". On a proper construction of this unusual language, the Chairman is given the power to authorise a correction in the report. The verbal correction and rectification could be in relation to the specification in the report of the "rule number" identifying the correct source of the charge. The Chairman of the Judiciary indicated in his email sent to the Appellant before the hearing, that this power of correction was available to him when he specifically referred to Section 10. 10. 5.
61. At the hearing before the Panel, as this was a hearing *de novo*, the specification of the four charges and the rules relied upon, was verbally indicated by counsel for the Respondent in response to questions from the Chairman of the Panel. This specification insofar as it differed from the

terms of the original written report by the referee amounted to a rectification in accordance with Section 10. 10. 5 (a).

62. The report is something required from the referee promptly after the events giving rise to the report. On a fair reading of this unusual language, the power to rectify is not, as was submitted by the Appellant, "*limited to a factual issue and nothing more*". The power is much wider as is apparent from the terms of Section 10. 10. 5 (b) which contemplates that a rectification of the report might be such a substantial change in the nature of the charges, that, as a matter of procedural fairness, an adjournment is required to enable the party affected by the change to meet the new case alleged against that party. Section 10. 10. 5 states that if "*it is apparent to the Chairman that the applicant are (sic) ... jeopardised*" (by the rectification), the Chairman shall grant an adjournment of the hearing.
63. The Appellant submitted that he had been charged with an offence which was identified in the report as "*WP. 21. 9*" and that the report could not be altered. The Operations Manual does not characterise the referee's report as "*the pleading that was brought forward*" as was submitted on behalf of the Appellant. The written report is an important document in that it commences a chain of events leading to the verbal statement of the charges by the Chairman.
64. The Appellant seized on the apparent limitation on the circumstances in which a report may be amended created by the words "*if it is discovered during the hearing that any inaccuracy in a written report*" which appear in Section 10. 10. 5(a) to support an argument that an amendment could not be made before or at the outset of the oral hearing. I find that on a proper construction of the section the words "*during the hearing*" have a wide and ambulatory meaning and are not confined to the time and circumstances after the referee's report has been read or the oral hearing has commenced. On a proper reading of this Section, the report may be amended verbally or in writing, prior to or at the commencement of the oral hearing to allow any correction in the form of amendment, clarification and particularisation as may be necessary to allow a fair hearing of the allegations. It would be a totally unworkable system if the wording of a document written at the conclusions of the match beside the pool immutably determined the precise legal characterisation of the events and the specific applicable rules such that it could not be corrected or rectified when embarking on the oral hearing.
65. The Chairman is then required to "*ask the applicant whether the plea is 'Guilty' or 'Not Guilty'*". The section uses interchangeably, and inexplicably, the words "*player*", "*applicant*", "*relevant person*" and "*player/applicant*" when referring to the person defending the charge and does not mention or refer to a "*coach or club or league official*" (cf. Section 10. 4. 1) who may also be required to defend a charge. This is yet another example of the inelegant drafting of the Operations Manual. It is apparent that the references to "*player*", "*relevant person*" and "*player/applicant*" in Section 10. 9, "*Hearing Procedure*", should be understood as including a reference to a "*coach or club or league official*". This is confirmed by other references not in Section 10. 9. 1 but elsewhere in Section 10 such as Section 10. 4. 1 where the Judiciary Committee procedure is engaged if "*a charge ... is made against any player, coach or club or league official*".

66. After the “*plea*” has been made by the “*player, coach or club or league official*” Section 10. 9. 1 sets out what procedure is to be followed thereafter depending on whether the “*player*” has pleaded guilty or not guilty. The Operations Manual indicates that the role of the referee at this stage of the process is also in the nature of a potential witness and “*the evidence of the Referee*” is accorded “*greater weight than other persons*” (Section 10. 4. 2). The informal nature of the process however is apparent as the “*Referee/ complainant*” is called to “*expand upon their written report*” and then “*be subject to questioning*” (Section 19. 9. 4 (7) and (8)). The “*Referee/ complainant*” is given the right “*to call one or more witnesses*” (Section 19. 9. 4 (9)).

H. *The Charges are available against the Appellant as a “coach”*

67. The charges which may be brought against players are listed in Section 10. 1, headed “*Players*”, and this sub-section also lists the corresponding sanctions which may be imposed if the charges are made out. The sanctions take the form of varying periods of suspension, which depend on the particular charge involved, the grading of seriousness and whether or not it is a first offence, second offence or third offence. The players have the option of either accepting the decision of the referee in the report on the charge and the corresponding sanction of a suspension under Section 10. 1. 1, or appealing the suspension to the Judiciary Committee under 10. 1. 2. However, if the charge is that of assaulting an official, which includes a threat to assault an official, that charge must be referred to the Judiciary Committee for a hearing under Section 10. 9.

68. Section 10. 1. 2 sets out a higher level of suspensions to be imposed if the charge is made out before the Judiciary Committee. If the charge of assaulting an official is made out then the range of sanctions is a suspension from one year to life. It is apparent that there is an incentive for players to accept the decision of the referee in the report form rather than run the risk of a greater sanction being imposed by the Judiciary Committee. The referee and the Judiciary Committee (which is sometimes referred to as the Tribunal) are given guidelines as to how to grade the seriousness of the offences in Section 10. 1. 3.

69. The charges which may be brought against coaches and officials, are not expressly listed in the Operations Manual in a similar manner to the listing of the charges which may be brought against players in Section 10. 1. 1. Nor is there any corresponding express listing of the sanctions which may be imposed on those coaches and officials in the event that a charge is established. Under section 10. 2 there is a yellow and red card system for coaches and officials in relation to certain conduct which occurs during the match. A yellow card indicates a warning and a red card indicates the coach or official must leave the pool deck for the remainder of the match. It is apparent that section 10. 2 does not purport to comprehensively deal with the charges which might be brought against coaches or officials in the conduct of the League more generally. For example, Section 10. 3 contemplates that “*complaints*” can also be made “*by clubs*” against referees and officials. The word “*complaint*” is apparently used in the sense of a “*charge*” as the section provides that the complaints must be made in writing and within 48 hours of the match or event in which it occurred and immediately following states “*the NWPL Judiciary Committee will bear the*

charges”. Also Section 5. 5 refers to charges of “*bringing the game into disrepute*” which may be brought against a “*player/manager/coach/referee*”.

70. Furthermore the terms of Section 10. 4. 1 expressly contemplate that charges of “*Misconduct*” or “*Brutality*” may be made against a coach, as may charges of “*bringing the game into disrepute*” or charges that “*relate to FINA/AWPI Rules*”. This section critically states:

“10. 4. 1 If a charge of bringing the game into disrepute or charges that relate to FINA/AWPI rules outside the charges of Misconduct or Brutality is made against any player, coach or club or official, The (sic) NWPL Judiciary Committee will determine the matter”.

I. *The Third Charge of Misconduct*

71. A workable reading of the Operations Manual would suggest that the words “*Misconduct*” and “*Brutality*” where used in Section 10. 4. 1 are cross references to the same capitalised words where they are used in Sections 10. 1. 1 and 10. 1. 2 and that it is an implied term of the Operations Manual that these sections apply *mutatis mutandis* to coaches and officials as they do to players.
72. On this construction, the present charge of “*Misconduct*” may be understood as a charge in the terms of Sections 10. 1. 1 and 10. 1. 2 as “*language*” and which may be brought against the Appellant as a coach under the implied term.
73. As set out in the reasons for the majority, the language found to have been used by the Appellant was beyond unacceptable. As is apparent from the evidence set out above it was protracted, grossly offensive and disrespectful in the extreme towards the referee. The language used by the Appellant has no place in any form of organised sport in Australia.

J. *The First Charge of hitting referee*

74. The first charge of hitting a referee is also available under the same implied term of the Operations Manual that sections 10. 1. 1 and 10. 1. 2 apply *mutatis mutandis* to coaches and officials as they do to players. Alternatively, the sentence in Section 10. 1. 2 that “[*a*]ll charges of *assaulting an official*” shall be referred to the Judiciary for a hearing should be understood as not being confined to players but, on a proper construction of this sentence, as having a wider operation and applying to coaches and other officials. Accordingly, if, as has been found, the Appellant as a coach “*hit*” a referee, then the Appellant may be subject to the same charge of “*Assault of Official*” and to the same penalty range as a player. The Chairman of the Judiciary took this approach when in his email sent to the Appellant before the hearing of the Judiciary he specifically relied upon the sentence in Section 10. 1. 2 which stated that “[*a*]ll charges of *assaulting an official* ... shall be referred to the Judiciary for a hearing”. The present charge of hitting an official, in the sense of an assault, may thus be brought against the Appellant as a coach under the Operations Manual.

75. The Appellant sought to characterise “bitting” as Misconduct in the form of “violence” which was subject to a lesser sanction of 4 matches, however as was fairly conceded in submissions, it is also open to find that “pushing someone is an assault”.

76. I agree with the findings made by the majority and accordingly, this charge has been established and a lengthy suspension from water polo and not only the League is required. As stated in Section 10. 8 “all suspensions are applicable to the National Water Polo League only ... except in the case of assault of an official”.

K. *The Fourth Charge of Bringing the Game into Disrepute*

77. The present charge of “bringing the game into disrepute” as particularised as “bitting referee” and “language” may also be available to be brought against the Appellant as a coach as it is recognised by Section 10. 4. 1. Arising out of the terms of Section 10. 4. 1 when read with Section 10. 1 and 10. 2, there is an implied term that a coach or official may be charged with bringing the game into disrepute by engaging in the conduct set out in Section 10. 1 to the extent that it is not specifically dealt with under 10. 2.

78. This charge is established by the factual findings of hitting a referee and the language used by the Appellant. Although the Operations Manual is silent on the penalty which may be imposed, if the charge is established then some guidance as to the appropriate sanction which the parties have impliedly agreed, may be seen in the range of penalties expressly set out elsewhere in the Operations Manual.

L. *The First Charge of hitting referee*

79. There is an alternate basis for the first charge which is available under the express provisions of the Operations Manual. Those taking part in the League and in particular, all coaches, referees and players are obliged to comply with all the provisions of the Operations Manual. A “coach” is under an express obligation imposed by Section 9 to “observe AWPI’s Code of Conduct”. The AWPI’s Code of Conduct is set out in By-law 7. This provision prohibits conduct amounting to “inappropriate behaviour towards” an official (By-Law 7. 5. 13) and conduct amounting to “[a]buse and insults directed at” an official (By-Law 7. 5. 12).

80. As a result, the applicable rules also state that a charge may be brought against a coach before the Judiciary (and this Panel) under Section 9 of the Operations Manual and By-Law 7. 5. 13 of “inappropriate behaviour towards an official” which in this case was, established by the findings by the majority of “bitting a referee” and “language”.

M. The Second Charge of language

81. There is a basis for the second charge which is available under the express provisions of the Operations Manual. The applicable rules also state that a charge may be brought against a coach before the Judiciary (and this Panel) under Section 9 of the Operations Manual and By-Law 7. 5. 12 of “*abuse and insults directed at an official*”, ie the referee, which in this case was undeniably established by the admitted language used by the Appellant.
82. Based on the findings made by the majority I am of the opinion that the four charges have been established and that the Appellant should be suspended from any involvement in the sport for a significant period and agree with the decision to suspend the Appellant for a period of three years.

The Court of Arbitration for Sport rules:

1. The Appeal filed by Mr Jahangir Shagaev with the Court of Arbitration for Sport Oceania Registry dated 11 July 2008 is in part allowed.
2. The decision of the National Water Polo Inc Board dated 3 July 2008 is set aside.
3. Mr Jahangir Shagaev is suspended for a period of three (3) years from 2 March 2008 from all Australian Water Polo Incorporated and State Association sanctioned water polo events in Australia and elsewhere as a coach, athlete or official.
4. The question of costs is reserved and it is directed that each party by 14 January 2009 file with CAS Oceania Registry and serve on the other party written submissions as to costs.
5. This Award be made public.