BEFORE A LEAGUE APPEALS COMMITTEE OF THE FOOTBALL LEAGUE,

IN THE MATTER OF AN APPEAL FROM THE DECISION OF A PLAYER RELATED DISPUTE COMMISSION UNDER REGULATION 74 OF THE FOOTBALL LEAGUE REGULATIONS

BETWEEN: CLUB A & [redacted]

[redacted] **Appellant**

-and-

PLAYER B **Respondent**

DECISION

Introduction

1. This is an appeal by Club A & [redacted] ("the Club") which owns and operates Club A from a decision of a Player Related Dispute Commission ("PRDC") dated 27 April 2021 made in relation to a complaint to the PRDC by Player B ("the Player").
2. The matter arises out of the decision of the Club to impose on the Player a fine of two weeks wages on each of two disciplinary charges. The Player had unsuccessfully exhausted the Club's internal appeals procedure. Before the PRDC he contended that the Club had not been justified in imposing the sanctions on him and sought the four weeks unpaid wages, amounting to [redacted] and interest.
3. By its decision the PRDC found in favour of the Player and ordered and directed;

> *"a. The Club shall pay to the Player the sum of* [redacted] *within 14 days of the date hereof.*
>
> *b. The Club shall pay to the Player interest in the sum of* [redacted] *within 14 days of the date hereof.*

c. The Club shall pay (i) the Player's reasonable costs and expenses of these proceedings, to be assessed by this Commission if not agreed and (ii) the costs of this Commission."

4. The jurisdiction of the League Appeals Committee ("the Committee") is set out in Regulation 74 of the EFL Regulations. The way in which the Committee is to proceed is set out in Regulation 74.9 which is in these terms:

"Unless:

74.9.1 as otherwise agreed between the parties;

74.9.2 as directed by the Chairman in exercise of his discretion under Regulation 74.9 [this is a typographical error for 74.8] above; or

74.9 3 as prescribed by Regulation 74.13 below,

The League Appeals Committee shall proceed by way of review of the evidence presented before, and the decision of, the Player Related Dispute Commission the parties having the right to make written and oral submissions on those matters only."

In this case none of the exceptions set out at Regulations 74.9.1 to 3 apply and the Committee is required to proceed with the appeal by way of review rather than a rehearing.

The Undisputed Background Facts

5. The Player was registered with the Club from [redacted] to 30 June 2020. Initially he was employed under a contract dated [redacted] which was expressed to run until [redacted] In mid-2016 the [redacted] contract was replaced by a new contract [redacted] with a termination date of 30 June 2020. Following the expiry of that contract on [redacted] he joined [redacted].

6. The Player played more than [redacted] for the Club and was appointed vice-captain of the First Team at the beginning of the 2019/20 season. While playing for the Club the Player lived in a rented property adjacent to the Club's training ground. The tenancy on this property was due to expire on 28 April 2020.
7. In late 2019/early 2020 there were discussions between the Player and the Club about a contract extension but, in the event, no such extension was agreed. The Player also suggested that he should be released from his contract or given a free transfer so he could join [redacted] The Club was unwilling to release from his contract and the parties were, and remained, too far apart on money for any new contract to be agreed.
8. On [redacted] the Player suffered an ankle injury during the first half of a match against [redacted] and was substituted. [redacted] the Club doctor who examined the Player concluded: *"Marked medial soft tissue injury involving the anterior and posterior proximal superficial components of the medial ligament complex. The deep component appears relatively unaffected.* [redacted], the Head of Medical at the Club, who subsequently saw the Player, noted that the prognosis for such an injury would normally be "in the region of minimum 5 weeks and maximum 11 weeks". Following the injury the Player underwent treatment at the Club under the supervision of the Club's medical (and other fitness} staff with a view to returning to playing.
9. On 13 March 2020, the English professional football leagues, the EFL included, suspended professional football until "3 April at the earliest" as a result of the Covid pandemic. This was followed on 23 March 2020, by the announcement of the national lockdown. During this period, the Player worked to recover from his injury.
10. On 10 April 2020 the Club informed all its players that the players were "on holiday until May 16''. At this stage the Player made the decision to move

(with his family) to a property he owned in [redacted] closer to extended family members. He left his rented flat on 11 April 2020 (i.e., the day after being told he was on holiday) but did not inform the Club that he was going to [redacted]. The Club became aware that he had done so via social media. At the time, the Club did not take issue with the Player for doing so.

11. On about 14 May 2020, the Club informed all players that they were required to return to training at the Club's training ground on 25 May 2020. On 24 May 2020, the Player arranged to rent a property near the Club's training ground for the period 25 May to 26 June 2020. The Player reported for training on 25 May 2020 and trained with the First Team.

12. In late May 2020, it was announced that the EFL would resume on 20 June 2020 and that the season would conclude at the end of July 2020 (as opposed to the scheduled date of 2 May 2020). [redacted] and the then First Team manager, [redacted], talked with the players who were due to be out of contract at 30 June to see whether their contracts could be extended. The Player expressed himself as prepared to play through to 30 June 2020 but was not prepared to agree an extension.

13. The Player trained on 25 May 2020. According to him, he "fairly quickly began to experience pain" in his left ankle (i.e., the one that had been injured in [redacted]). He reported this and was examined by [redacted] on 28 May 2020. [redacted] examined the Player again on Thursday 4 June 2020. They agreed that the Player "should take some days rest to see if the pain would settle down". Player did not train the following day, 5 June 2020. The Player sought further medical assistance on Saturday 6 June 2020 from [redacted], another Club doctor. He requested to manage his symptoms by modifying his training load over the coming period. In light of the fact that the first return game was not until 20 June 2020, he declined the steroid injection at that juncture and decided instead to wait a few days to see if the inflammation settled. On the following Monday, 8 June 2020, the Player

trained "with the physios" i.e. not with the First Team but under the supervision of the Club physiotherapist staff.

14. On Tuesday 9 June 2020 there was a friendly against [redacted]. According to the Player, which was not challenged, he was not in the squad that was sent to [redacted] but he trained at the Club training ground with the other First Team members who did not travel to [redacted].
15. On 10 June 2020 he arrived at the training ground ready to train but was told to report to the physiotherapists, which he did, training once again with them. Later the same day, the Club issued its letter of 10 June 2020, "the Notice of Charge", making allegations of breach of contract against him.
16. The disciplinary hearing took place on 12 June 2020.The Player was sanctioned and was "ordered not to attend any of the club premises between now and 30th June 2020".
17. The Player appealed against this disciplinary sanction and the appeal was heard by the Club Chairman on 8 September 2020. The appeal was rejected and the sanctions confirmed in writing on 3 November 2020. The Player then lodged a complaint under Regulation 89 of the EFL Regulations and the complaint was referred to the PRDC for a hearing.

The Notice of Charge

18. The terms of the Notice of Charge were as follows:

> *1. On 10th May you told [redacted] that you could not run because of pain in your feet but you indicated that there was no point telling the medical team as there was nothing you could do as you were in [redacted] You had, without notifying us, moved from your home at [redacted] to the [redacted] area and, as a result, were unable to access medical treatment when required during lockdown. This is in breach of your contractual duty to maintain a high standard of*

personal fitness and also live within 30 miles of the Training Ground.

2. On Friday 5th June you stated you were unavailable to train due to injury and so unable to play a training game on 6th June, this was repeated on 8th June. You again deemed yourself unfit to train this morning. This is despite our training staff having seen no evidence of any injury. Given you have stated that you will not ploy beyond 30th June, in any event, we have reached the conclusion that you are not genuinely injured but feigning injury to avoid playing any further for our club."

The PRDC Findings

19. So far as the first charge was concerned, the PRDC looked at the two separate strands it identified in the charge. As to the second strand, failure to live within a 30 mile radius of the Training Ground, the PRDC pointed out that while there had been a 30 mile radius provision in the Player's [redacted] contract there was no similar provision in the [redacted] contract, nor was there any such provision in the Club's Code of Conduct. This allegation of breach of contract therefore failed. This finding was, in the view of the Committee, obviously correct and was not challenged by the Club on appeal.
20. The PRDC added obiter, that it was in any event not clear whether by moving to [redacted] for 6 weeks during the lockdown/holiday period he was indeed living in [redacted], and suggesting that once he was told he was on holiday it was up to him to decide where he spent it. In the circumstances the Committee need not express any view on this point, which might be thought strongly arguable, given that the Player had given up his flat near the Training Ground and, on the evidence, had no other home.

21. The first strand of the charge was that the Player *"had, without notifying us, moved from your home at* [redacted] *to the* [redacted] *area and, as a result, were unable to access medical treatment when required during lockdown. This is in breach of your contractual duty to maintain a high standard of personal fitness."*

22. In support of this strand the Club primarily asserted the Player was in breach of clause 3.1.3 of his [redacted] contract "*The Player agrees except to the extent prevented by injury or illness to maintain a high standard of physical fitness at all times …"* The PRDC rejected this submission, saying: "*There is no evidence at all that the Player did not maintain his level of physical fitness while on lockdown/holiday in* [redacted] *Indeed, to the contrary. The correspondence with the fitness staff at the Club as to both the injury sustained on* [redacted] *and the later "minor niggles" while in lockdown/on holiday tends to suggest that he was paying close attention, with the assistance of the Club's fitness staff, to his fitness and to his fitness programme."*

23. In addition the Club relied on Club Rules 3(e), 3(f) and 5(e). the PRDC rejected these submissions with brevity, and as a result dismissed the first charge.

24. The second charge was that the Player was "*not genuinely injured but feigning injury to avoid playing any further for our Club."* The PRDC noted that there was *"no identification in the Notice of Charge of which contractual terms were breached and nor was one relied upon in argument. Instead it was put on the basis the Club was entitled to reach the conclusion that the Player had, out of pique at the refusal to facilitate a free transfer in January and or as result of fear of any injury, decided to avoid playing for the Club in June 2020. This was a wholly unprofessional approach for any player to take and complete abuse of his contractual obligations to the Club"*. The PRDC's summary of this

was that, on the Club's case, there was no evidence of any injury (or that the Player was not genuinely injured) and that he was malingering. The PRDC took the view that the charge failed on the facts.

25. Having concluded that both charges failed the PRDC determined that the fines should not have been imposed, ordered payment of the sums withheld, the payment of interest and costs.

26. One oddity is that the Player claimed interest at 8% and the Club conceded that if it failed in its case interest was payable, but submitted that the appropriate rate was 2.5%. However the PRDC chose to award interest at 2%. There has been no appeal by either party on the question of interest and the Committee need therefore say no more on the point.

The Grounds of Appeal

27. In its Grounds of Appeal the Club set out three distinct grounds. They were:

    (1) The Commission misdirected themselves as to the correct test to apply when determining the appeal.

    (2) To the extent that the Commission did identify the test to apply on the appeal they failed to apply that test properly to the evidence before them.

    (3) In considering the second charge relating to the feigning of injury the Commission failed to properly understand the nature of the charge, which was the condition from which the Player suffered, which was not disputed, did not justify his refusal to play and as such amounted to a breach of contract.

The First Ground

28. The Club's case was that the power granted to the PRDC had to be exercised within narrow constraints so as to avoid undermining the employer's

position. Thus PRDC had to approach the case in the same way as an Employment Tribunal approaching a claim for unfair dismissal. It was not for the PRDC to substitute its own view but rather to determine whether the actions of the Club were within the band of reasonable responses. The PRDC should have held that it was reasonable for the Club to conclude that the Player was in breach of his contract and so entitled to impose the sanctions which it did.

29. In support of this it was submitted that the Club did not have to show any breach of an express term of the Player's contract (although it was submitted that the Club had done so) it was enough to show a breach of the implied term of trust and confidence. The submission was that though the PRDC had purported to adopt the correct test it had not done so but had failed to take into account the implied term as to trust and confidence which informed how breaches of other express terms ought to be assessed. The parties were not cold commercial parties but rather "engaged in a far more symbiotic relationship requiring trust and confidence to repose".

30. The Club identified three points which it said the PRDC ignored and which should have led the PRDC to hold that the Player was in breach of the implied term of trust and confidence. Those points were (a) that the Player was expected to live within a reasonable distance of the Club, (b) that he was under an express obligation to notify the Club Secretary of any change in address, and (c) he had been expressly prohibited from travelling.

31. The Club went on to assert that when the Player returned to training he reported minor niggles which ought reasonably to have been expected to have been resolved by then which could only mean that either he was not accurately reporting during the lockdown period or that he was not accurately reporting on his return to training. Either scenario, it was submitted, was a breach of the implied term of trust and confidence, or so he was guilty of the first charge.

32. This ground of appeal is founded on a misapprehension. The PRDC's function is not limited to a quasi-review function. No such limitation is to be found anywhere in the Regulations. The PRDC is not performing a task akin to that which falls on an Employment Tribunal when it considers a claim for unfair dismissal. The hearing is a hearing de novo, unlike the hearing before the Committee where (except in the limited cases set out in the Regulations) the function of the Committee is to review. A scheme whereby an employee can challenge an employer's disciplinary decision before an independent outside body may be unusual, but to say that it cannot exist in the case of football employment contracts ignores the specificity of football and the fact that this elaborate system was set up in the context of a heavily negotiated industry-wide structure. The PRDC has operated since its inception hearing cases de novo and not operating as a quasi-Employment Tribunal.

33. In the present case the PRDC did not accept or reject the Club's (erroneous) submission as to the way it should approach its task. At paragraph 24 of its decision the PRDC stated: *"This dispute is not, of course, concerned with a dismissal, fair or unfair, and it is not all certain that such principles apply here. Nevertheless, on the assumed basis that the approach to be taken in that context may provide some guidance, in the Commission's view the starting point is section 98 of Employment Rights Act 1996 Act."* It then held that even on the Club's approach the Club had failed to establish its case.

34. In doing so the PRDC began from the position, accepted by the Club (as recorded at paragraph 28 of the PRDC decision), that as a starting point the Club had to establish a breach of contract by the Player. In its decision it did not mention the assertion relied on by the Club in this appeal that the Player was in breach of his duty of trust and confidence and that the penalty imposed was justified on that basis.

35. In the view of the Committee this is hardly surprising. The Club, as it had conceded, had the burden of establishing that the Player was in breach of his contract. The breaches of contract which it asserted were those alleged in its letter of 10 June. Nowhere in that letter is there any mention of an allegation of a breach of the obligation of trust and confidence. Further, in the Defence which the Club served in response to the Player's Particulars of Complaint before the PRDC not only is there no mention of any alleged breach of the implied term of trust and confidence but the Defence pins the Club's colours firmly to the mast, accepting the express contractual terms pleaded by the Player and going on to state "In addition the Club will rely on the following terms" and then setting out specific terms from the Player's [redacted] contract, his later (then current) [redacted] contract and the Club's Player Rule Book. In line with this approach there was nothing in the Club's witness statements put before the PRDC and included in the bundle before the Committee which made any reference to, or placed any reliance on, a breach of an implied term as to trust and confidence.

36. It cannot be said that the PRDC was in error in failing to deal with a case which was not pleaded and not dealt with in the evidence before it. How the hearing before the PRDC would have proceeded had what is now the central plank of the Club's appeal been before it is impossible to say. On behalf of the Player it is asserted that "*Had the charge been laid on this basis, or had the Club put its case before the PRDC in this way, then the Player would have then sought to adduce evidence undermining this e.g. evidencing the Club's conduct towards him following his return from holiday and following the flare-up of his ankle*." The hearing would then have been conducted differently. In the Committee's view it is far too late for the Club now to seek to raise and argue this new case on an appeal conducted by way of review.

37. By way of a postscript to this point, the Committee in any event is unimpressed by the points on which the Club now seeks to rely to assert a breach of the implied term of trust and confidence.in this context. The Club complains that "*The Player had received a relocation allowance in order to live close to the ground, he was aware of the expectation that he lived within a reasonable distance of the Club, he was under an express obligation to notify the Club Secretary of any change in address, and he had been expressly prohibited from travelling".*

38. The Player had received a relocation allowance on joining the Club in 2014 and had lived in premises near the training ground throughout his contract. On 10 April he and the other players were told they were on holiday until 16 May. Having been told he was on holiday he went to the home he owned in [redacted] near to extended family. The Club was well aware of this from social media but took no point on it at the time, either to complain of his being away from the local area during his holiday period or about his travelling. When he was informed of the return to training he returned to the area of the Club, taking a short term rental of a flat.

39. So far as the ban on travel is concerned, what the email of 10 April said was: "*In these exceptional times and adhering to government advice we would not expect any of our players to be travelling whether domestically or internationally, whether British notional or otherwise. It is quite possible that travelling abroad could result in an increased risk to your own health and or being unable to return to training when required. This would, in light of the clear advice given, be a very serious issue and treated as such by the Club*." Even assuming in the Club's favour that going to the house in [redacted] while on holiday amounted to "travelling", the email makes it clear that the Club drew a distinction between domestic and international travel. The Club would regard the latter as a "very serious issue". It is

difficult to see how these factors either singly or taken together could amount to a breach of the implied term of trust and confidence.

40. The Club further asserted that moving away from the support provisions prevented the Club from supporting the Player and involved the Club placing greater trust in the Player maintaining his fitness and reporting difficulties. Club submitted that "*either he was not accurately reporting during the lockdown period or that he was not accurately reporting on his return to training. Either scenario is a breach of the implied term of trust and confidence."* This claim fails on the basis of the facts found by the PRDC at para 69 of its decision. The fact that shortly after he re-started training on 25 May the Player fairly quickly began to experience pain in his left ankle which he reported to [redacted] on 28 May is no indication either that he did not accurately report problems either before or after he returned to training.

The Second Ground

41. This ground of appeal relates to the second charge in the Notice of Charge, namely that the Player was "*not genuinely injured but feigning injury to avoid playing any further for our Club."* The argument starts from the Club's misapprehension as to the nature of a hearing before the PRDC. It is founded on the submission that, on the facts before the Club at the time of the disciplinary hearing and the appeal, the Club's decision that the Player was not genuinely injured but was malingering was within the reasonable band of decisions and so the PRDC should not have disturbed the Club's disciplinary decision. In support of this it proceeds to a complaint that the PRDC did not address some of the evidence placed before it.

42. The Club's submission was that on the evidence before it the Club in its disciplinary proceedings was entitled to take the view that the Player was seeking to avoid playing because he hoped to avoid any injury which might

adversely affect any new contract, his loyalties were no longer with the Club because he was leaving at the expiry of his contract and he was upset that he had not been allowed to leave on a free transfer in January. This, it was submitted, impacted the whole squad at a time the Club was fighting to avoid relegation.

43. The Committee rejects the submission that "*The Commission ought to have been considering the evidence which was before the Club decision makers at the time of the decision not the evidence before the Commission*." The PRDC was conducting a hearing de novo and as such had to consider, in line with the concession made by the Club, whether the Club had established a breach of contract, not whether the Club had established that its conclusion that the player was in breach of contract was within the reasonable band of conclusions which it could reach.

44. It follows that this Ground of Appeal fails.

The Third Ground

45. In submissions to the Committee the Club sought to put a gloss on the second charge by asserting that it was not denying that the Player was injured but that his injury was not sufficiently serious to have prevented him from playing. The Club went on to refer to evidence from [redacted] that the level of inflammation evident in the ultrasound on 6 June was not such as to prevent him from training or taking part in matches, from [redacted] that although there was some inflammation this would not prevent him from training and he was, in [redacted] opinion, fit enough to take part in first team competitive matches, and that the level of inflammation experienced by the Player was "no more than a lot of other players would experience following intensive training sessions and that if you were to examine 10 players following training that the majority of them would have slight inflammation in joints, this being just part of the occupational aspects of being an elite

athlete." The Club criticised the PRDC for not mentioning this evidence in its decision, asserting that it was clearly not considered in the PRDC's consideration of the charge.

46. The PRDC concluded on this point:

> *"75. The essence of the charge is that, on the Club's case, there was no evidence of any injury (or that the Player was not genuinely injured) and that he was malingering.*
>
> *76. In the Commission's view, this charge fails on the facts. There was evidence of injury: as was submitted by the Player, three medical professionals noted evidence of an injury upon an examination of the Player….*
>
> *77. Moreover, both* [redacted] *and* [redacted] *offered the Player steroid injections. It would be hard to imagine any proper basis to do so in the absence of injury.*
>
> *78. In the Commission's view, the evidence supports the Player's position that he was not feigning injury. On the evidence before the Commission it is impossible to conclude that the Player was not injured but was feigning injury so as to avoid playing. In the Commission's view that notion is inconsistent with the medical evidence and with the fact that the Player reported for training on 25 May 2021 as he was asked to do and trained with the First Team until experiencing difficulty with his ankle injury. It may well be that he was being cautious, perhaps overly so, but that is not the same thing as feigning an injury."*

47. In the Player's Response to Grounds of Appeal the Player submitted that *issues relating to the Player's January 2020 transfer request; how quickly he could have returned from injury; and his unwillingness to extend his contract on less favourable terms* [presumably than his agent was seeking] *are not relevant to the charge*." The Committee does not accept this

submission. These were all matters of evidence which might have helped persuade the PRDC that the Player, having lost his loyalty to the Club, was indeed feigning injury. However these matters evidently did not do so.

48. The Committee accepts the submission on behalf of the Player that the claim that he was unwilling to play was not made out. He returned to training on 25 May 2020 and trained on 8 and 9 June. He was not selected for the trip to [redacted] but was prepared to train on 10 June. This does not support the Club's contention that he was unwilling to play. It is equally consistent with the suggestion that the manager had decided not to rely on him for the remainder of the season, given his unwillingness to remain beyond 30 June.
49. In the view of the Committee there was no obligation on the PRDC to set out the totality of the evidence adduced before it. It was dealing with the specific charge which the Club had chosen to make against the Player, rather than the attenuated version of the charge which the Club sought to persuade the Committee it should consider.
50. The PRDC found that there was evidence of the Player (who was, and over his years at the Club had proved himself to be, something of a delicate flower) being injured. This included his being offered steroid injections, something that could not properly have been done in the absence of injury. The PRDC determined that it was impossible in the circumstances to conclude that he was feigning injury to avoid playing and the charge therefore failed. There is no basis on which the Committee, acting as a reviewing body, can properly reverse that decision.

Conclusion

51. While the Committee appreciates the Club's view that it could not be expected, and was unhappy, to keep paying the wages of a player who was never going to play for the Club again, the Club has not demonstrated that

the PRDC was in error in the decision it reached and the appeal must be dismissed.

52. The Club must pay the reasonable costs of the Player in relation to this appeal, to be assessed by the Committee if not agreed, and must also pay the costs of the Committee

His Hon Robert Reid QC
Chairman
13 August 2021