SPORT RESOLUTIONS

SR/154/2020

IN THE MATTER OF AN ARBITRATION UNDER THE REGULATIONS OF THE ENGLISH FOOTBALL LEAGUE

BEFORE:

His Honour Phillip Sycamore
William Norris QC
Christopher Quinlan QC

BETWEEN:

The English Football League Limited

Appellant

and

Macclesfield Town Football Club Limited

Respondent

DECISION OF THE LEAGUE ARBITRATION PANEL

INTRODUCTION

1. This is the appeal of The English Football League Limited ("the Appellant") against the decision of the English Football League Commission ("the Commission") dated 19 June 2020 ("the Decision") by which the Commission determined charges brought by the Appellant on 27 May 2020 against Macclesfield Town Football Club Limited ("the Respondent"). The charges related to the failure by the Respondent to pay the March 2020 salaries on time contrary to English Football League ("EFL")

Regulation 67.3 and for a breach of the terms of the Appellant's loan for that purpose and contrary to its duty of utmost good faith under EFL Regulation 3.4.

2. The Respondent admitted the charges against it in respect of the breaches of EFL Regulation 63.7 (18 charges in all) and denied the charge relating to the breach of EFL Regulation 3.4. The Commission found that matter proved and dealt with all charges together in determining sanction. The Commission made the following orders: i) activation, with immediate effect, of 2 suspended points ordered against the Respondent in an award by the Commission dated 5 May 2020 in relation to charges of failing to fulfil a fixture in December 2019 and non-payment of players in February 2020; ii) imposition of a further 4 points deduction, suspended for the next season 2020/21, to be activated if the Respondent is found to have committed any further breach of Regulation 63.7; iii) a requirement to deliver a business plan to the Appellant by 31 July 2020; iv) payment of a fine of £20,000.00 to the Appellant and v) payment of the costs of the Appellant and the Commission.

3. The Appellant's Grounds of Appeal are set out as follows:

> "…5.1 The Commission's approach to sanction was in error; and /or
> 5.2 That the sanction imposed was too lenient having regard to all the circumstances…
> 6 The Commission's approach to sanction was in error in that:
> 6.1 It took into account irrelevant matters; and/or
> 6.2 It failed to consider relevant matters; and /or
> 6.3 It reached a decision that is unreasonable…"

4. In essence, the Appellant contends that the approach of the Commission was in error because it took into account the fact that the Respondent would be relegated if a 3 point deduction was imposed and that it had regard to the Points Per Game formula adopted by Member Clubs of the EFL.

5. We have been appointed as a League Arbitration Panel pursuant to Section 9 of the EFL Regulations (Regulation 98) to determine this appeal, sitting as an appeal body in accordance with EFL Regulation 95.4.

6. EFL Regulation 95.4 provides:

> "95.4 In the case of a Disciplinary Appeal, the League Arbitration Panel sits as an appeal body and the standard of review is:

95.4.1 where required in order to do justice (for example to cure procedural errors in the proceedings before the Disciplinary Commission), the Disciplinary Appeal shall take the form of a re-hearing de novo of the issues raised in the proceedings i.e. the League Arbitration Panel shall hear the matter over again, from the beginning, without being bound in any way by the decision being appealed;

95.4.2 in all other cases, the Appeal shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being appealed was in error and the burden of establishing the decision was in error shall rest with the appellant; and

95.4.3 in the case of appeal against sanction, the grounds are that the original sanction was too severe or too lenient having regard to all the circumstances."

7. At a preliminary hearing held on 28 July 2020 by video link (Zoom) it was agreed, *inter alia*, that the substantive appeal would proceed under paragraph 95.4.2 as a review and not as a re-hearing *de novo.*

8. The powers of The League Arbitration Panel following an appeal can be found at EFL Regulation 94.7 which provides as follows:

"94.7 Following a Disciplinary Appeal, the League Arbitration Tribunal shall have the power to:

94.7.1 confirm the decision; or

94.7.2 set aside the decision in whole or in part and substitute a new decision; or

94.7.3 order a rehearing before a differently constituted Disciplinary Commission

9. The appeal was heard on 11 August 2020, again by Zoom video link, and we express our appreciation to the staff at Sport Resolutions for their assistance in ensuring the effective operation of the technology resulting in a smoothly run hearing.

10. The Appellant was represented by Mr Steven Flynn of counsel and the Respondent by Mr Richard Stubbs of counsel. We are grateful to them for their helpful written and oral submissions.

THE BACKGROUND

11. The Respondent has competed within League Two since the 2018/2019 season. During the 2019/2020 season, the Respondent has committed 91 breaches of the EFL Regulations. Since December 2019 there have already been appearances before three Disciplinary Commissions and a League Arbitration Panel. There have been a number of concerns raised by the Appellant with the Respondent about the Respondent's failure to meet certain of its financial obligations, including payment of players' salaries on various dates between July 2019 and March 2020 and failure to fulfil fixtures.

12. On 10 April 2020, the Appellant agreed to advance a facility of £84,861.38 to the Respondent on condition that *"the club[would] in the first instance use the Facility to settle all outstanding employees' salaries for the month of March 2020 and for earlier months in respect of D Whittaker."*

13. Although the funds were transferred to the Respondent's bank account on 14 April 2020, the funds were not applied immediately in their entirety for payment of salaries and by the end of the day of 14 April 2020 the players had received only 80% of their wages for March 2020, the balance not being paid until 17 April 2020. At that time 20% of staff wages remained unpaid, despite the fact that the Appellant had provided funds for them to be paid. It was not until 6 May 2020 that the Respondent paid the non-playing staff their wages for March 2020.

14. In the intervening period, a Disciplinary Commission was convened to consider the charges in relation to a failure to fulfil a fixture with Plymouth Argyle and non-payment of players in February 2020. The Commission imposed: i) A 4 point deduction in respect of the non-fulfilment charge; ii) A 4 point deduction in respect of the February non-payment of salary charge; but iii) reduced the total sanction from 8 points to 6, suspending 2 of those points deducted, to be activated if the Club committed a further breach of EFL Regulations 31.1 or 63.7 during the 2019/20 season. It is clear that the Commission, on that occasion, was aware of the non-payment of the March 2020 salaries but was unaware of the Respondent's failure to comply with the terms of the 14 April 2020 advance from the Appellant. In its decision at paragraph 70 the Commission said: *"…the Commission should make it clear that it does not consider that MTFC's tardiness (yet again) to pay the players' remuneration for March on time necessarily requires a further charge. Given its reasoning and conclusions as above, it would require strong persuasion to impose a yet further points deduction for any such breach (albeit the sixth monthly failure this season to pay players promptly) …"*

15. Although the Respondent disputed the EFL Regulation 3.4. charge, the Commission, in its decision of 19 June 2020, found it proved and treated the two groups of offences together as requiring sanctions, describing the Respondent's misconduct as 'egregious' (see paragraph 63 of decision of 19 June 2020).
16. The sanctions imposed on 19 June 2020 did not involve the imposition of any immediate sporting sanction, rather the activation of previously suspended points and the imposition of points to be suspended until the 2020/21 season.

APPROACH TO REGULATION 95.4

17. As we have indicated already, the relevant provisions in this appeal are those at Regulation 95.4.2 and 95.4.3 which were helpfully considered recently by Sir Wyn Williams, sitting alone as Arbitrator, in the EFL v Bolton Wanderers appeal. In summary, Sir Wyn concluded that: i) " in error" means that the decision of a Commission in the particular context in which it arises is wrong; ii) the word "too" preceding *severe* and *lenient* is intended to mean excessively severe or lenient, not simply merely severe or lenient; and the standard is an objective one and cannot be judged "*at the whim of an individual arbitrator."*

18. In The Football Association v Bradley Wood decision, which was drawn to our attention, the following was stated:

> "When considering evidential assessments, factual findings and the exercise of a judicial discretion in the context of an appeal by way of review, a Commission must be accorded a significant margin of appreciation. Accordingly, such evidential assessments and factual findings should only be disturbed if they are clearly wrong or wrong principles have been applied. That threshold is high and deliberately so. When assessing whether a sanction is unreasonable the same margin of appreciation applies. It is not for the Appeal Board to substitute its own opinion or sanction unless it finds that the Commission's decision was unreasonable."

DISCUSSION

19. The Appellant maintains that the Commission was in error in taking into account the fact that the Respondent would be relegated if a 3-point deduction was imposed. The Respondent maintains that the Commission was entitled so to do and, further, that the Appellant is, in any event, precluded from pursuing this approach, having made a concession during the hearing before the Commission. We were taken to the transcript which, according to the Respondent, demonstrates that counsel for the

Appellant failed to suggest that consideration of relegation was inappropriate when asked by the Chair of the Commission whether it was agreed that the Respondent would not be relegated unless a 3 -point deduction was imposed, thus suggesting that the Appellant accepted that the Commission was entitled to consider the implication of relegation for the Respondent.

20. We have read the relevant extracts from the transcript and taken into account the submissions of both parties. We do not consider that the exchange between the Chair of the Commission and counsel for the Appellant involved any form of concession nor, indeed, was there any invitation from the Chair for counsel to respond further.

21. That the Commission did take into account the implications of potential sanctions on relegation for the Respondent is not in dispute and is apparent from the body of the decision, for example at paragraph 55: *" …to treat the present offences as each requiring a further 3 points deduction this season (and resulting in relegation)… would be disproportionate, unduly harsh and unnecessary…"* and at paragraph 63: *" …In the end we have no doubt that MTFC's conduct, whist egregious, does not necessitate a sporting sanction which would result in its relegation from League 2…"*

22. In our judgment, the Commission erred in adopting this approach. The correct approach is to impose a sanction that reflects the seriousness of the wrongdoing. That should be separated from the question of what impact that might have on league position or relegation. Although we agree with the Respondent's submission that the decision in EFL v Rotherham United, on which the Appellant seeks to rely, is not binding, assistance can be gained from earlier Commission decisions. In Rotherham, on its specific facts, it was held that the fact of involvement in a relegation battle was not a matter to be taken into account (paragraph 31) and, at paragraph 33 emphasised the need for consistency:

> "The Commission accept the submissions made by Mr Lewis on behalf of the Complainant that there is a need for consistency whenever during the season sanctions are imposed and whatever the position in the table of the Club involved and that it would be plainly wrong if the same breach by the same Club was sanctioned differently if it happened in October rather than if it happened in April."

23. The Respondent invited us to consider the Appeal decision in EFL v Bolton Wanderers in which Sir Wyn Williams held that on the facts of that case the Commission was entitled to take into account the cumulative effect of an immediate deduction of points on top of other deductions over the season (paragraph 35).

24. We consider this case on its specific facts. First, we conclude that the activation of the suspended sanction imposed in the 5 May 2020 Commission decision does not form part of the sanction for the charges for the period 31 March 2020 to 6 May 2020, contrary to what is said in paragraph 52 of the decision of 19 June 2020. We then, having considered the submissions of both parties, turn to the Commission's determination on sanctions. We have firmly in mind the wide margin of discretion available to the Commission and have reminded ourselves of the helpful observations set out in Bradley Wood (see paragraph 18 supra) and in particular the high threshold and that it is not for us to substitute our own opinion unless we find that the Commission's decision was unreasonable. We also have in mind the observations of Sir Wyn Williams in Bolton (see paragraph 17 supra). Having regard to all of the facts, we conclude that the Commission acted in error by taking into account the fact that the Respondent would be relegated if a 3-point deduction was imposed.

25. The factual background to this case discloses that the Respondent has been found to have committed the same act of misconduct on six occasions in one season, compounded by a finding, after denial, of a breach of the duty of utmost good faith. To impose, as the Commission did, a less severe sanction than in the earlier proceedings in the same season, against a history of escalating and repeated offending is, in our judgment, after allowing for the margin of appreciation, too lenient. In all of those earlier proceedings, although some parts of the sanctions were suspended, there was some form of immediate sanction. Conversely, in the Decision which is the subject of this appeal there was no immediate points deduction (disregarding the activation of the suspended points, which we have dealt with at paragraph 24 supra). It is clear that the Respondent's level of offending has escalated and, until the Decision, there had been an appropriate escalation in the level of sanction imposed. We were invited to draw an analogy with the criminal law under section 143 Criminal Justice Act 2003, which states that:

> "In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the
>
> court considers that it can reasonably be so treated having regard, in particular, to—
>
> (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and
>
> (b) the time that has elapsed since the conviction."

We consider that to be an appropriate analogy.

26. Against the background of similar and escalating misconduct, compounded by a failure to properly use funds provided to discharge debts due to Football Creditors and having thus obtained a sporting advantage, we conclude that the commission erred in its approach by imposing a sanction which was too lenient. An immediate sporting sanction was the only appropriate sanction. We agree with the Commission that, having decided (paragraph 58 of the Decision) to treat the two groups of offences together as requiring sanctions, the appropriate points deduction is one of 4 points. Those points should have been imposed with immediate effect. In all other respects, in terms of the orders for activation of the suspended points from the May decision, delivery of a business plan, the fine and payment of costs we do not disturb the findings of the Commission.

27. For completeness, we also deal with the approach adopted by the Commission in having regard to the consequences of the Points Per Game formula adopted by the Member Clubs of the EFL (paragraphs 56 and 57 of the Decision). The Commission viewed this as "*[p]erhaps the most powerful point on MTFC's behalf."* In our judgment the Commission was entitled to take this into account, as a points deduction in the truncated season would have a greater impact than ordinarily, and so it was a material consideration to sanction. To that extent, we consider that the Commission did not err in that respect but, given our conclusions above it does not impact on our overall conclusion.

OUR DECISION

28. This is our unanimous view. We allow the appeal and set aside the Decision of the Commission of 19 June 2020. We exercise our powers pursuant to Regulation 94.7.2 to set aside the decision in whole or in part and substitute a new decision.

29. In the light of our findings above the appeal is allowed to the extent that we confirm the 4 points sanction imposed by the Commission but direct that those points are activated immediately, such immediate activation to be in substitution for the suspension to the 2020/21 season directed by the Commission. In all other respects we confirm the orders made by the Commission.

30. Since the conclusion of the hearing on 15 August 2020 we have received written submissions from the Appellant on issues in relation to publication and costs. We will await a response from the Respondent and will then deal with those issues on the papers.

His Honour Phillip Sycamore

For and on behalf of the League Arbitration Panel

18 August 2020

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