

IN THE MATTER OF AN EFL DISCIPLINARY COMMISSION

Before:

Louis Weston
Ifeanyi Odogwu
Kevin Carpenter

BETWEEN: -

THE ENGLISH FOOTBALL LEAGUE (the EFL)

Claimant

-and-

STEVENAGE FOOTBALL CLUB (the Club)

Respondent

DECISION

Introduction

1. We were appointed as the Disciplinary Commission to determine disciplinary proceedings brought by the Football League Limited (EFL) against Stevenage Football Club (the Club) under the Regulations for the season 2019/2020.

2. The case arises from the request by the Club to the EFL for a postponement of its fixture against Oldham Athletic on Saturday, 16 November 2019 (“the Fixture”). This postponement request was granted because three of the Club’s players had been called up for international fixtures.
3. The request was made on 9 November 2019 by the Club Secretary, Tom Norman at 18:50 by email to the EFL and amongst the Club’s players it related to was Luther James-Wildin who had been called up by the Antigua Barbuda Football Association (ABFA).
4. As events unfolded, Mr Wildin did not travel to play for ABFA and the EFL, suspicious that the postponement had been sought on a false basis, commenced an investigation.
5. The investigation culminated when the EFL, by letter of 12 February 2020, notified the Club of two charges it brought in relation to that postponement expressed as follows:

Charge

Pursuant to Regulation 31.1, the Club is charged with misconduct for failing to fulfil its fixture obligations in respect of the Fixture and/or causing the EFL to suspend the Fixture, without proper excuse.

Further or alternatively, pursuant to Regulation 3.4, the Club failed to act towards the EFL with the utmost good faith in requesting and obtaining the EFL’s permission to postpone the Fixture and its related communications with the EFL thereafter.

Particulars of Charge

The Club caused the EFL to postpone the Fixture on the basis of its representation to the EFL that it had three international call ups at a time when it did not, thereby causing the EFL to postpone the fixture without good reason.

In so doing, the Club failed to fulfil its fixture obligation. Pursuant to Regulation 31.1, the Club is deemed guilty of misconduct, unless and until such time as the Club can establish to the satisfaction of the Disciplinary Commission that the "circumstances giving rise to such failure are outside the control of the Club and could not have been reasonably foreseen or reasonably anticipated and remedied prior to the match". In light of the Postponement Policy, a legitimate reason for causing the EFL to suspend the Fixture would include the Club having three or more international call ups.

None of those circumstances relieving the Club from misconduct applies on the present facts. In particular, despite its representation to the EFL to the contrary on 9 November 2019, the Club did not at the relevant time have three international call-ups. The international call up in respect of James Luther-Wildin had been withdrawn by the Antigua and Barbuda Football Association by 8 November 2019 at the latest and that remained the case notwithstanding the Club's unilateral attempt (which was ultimately unsuccessful) to reinstate it, made only eight minutes prior to requesting the postponement.

Further or alternatively, the Club failed to act towards the EFL with the utmost good faith when it informed the EFL on 9 November 2019 that it had the requisite three international call ups to justify the suspension of the Fixture, on the same factual basis. The Club elected not to disclose to the EFL material information relevant to the proper exercise of the EFL's discretion whether to permit postponement of the Fixture in accordance with the Postponement Policy. The Club thereafter continued actively to misrepresent the position to the EFL by its communications on 15 and 18 November 2019, notwithstanding that the continued withdrawal of the call up had been confirmed to the Club by 14 November 2019 at the latest.

In all the circumstances, and relevant to the seriousness of the charge, it is properly to be inferred that the Club's breach of the duty of utmost good faith was committed with the intention of avoiding its obligations in respect of the Fixture, by obtaining a postponement in circumstances where it would or may not have done so had it acted in accordance with its obligations of utmost good faith.

6. We refer to those charges as a the '31.1 Charge' and the '3.4 Charge'.

7. The Club denied the charges and at a disciplinary hearing convened by video link on 23 April 2020 we heard evidence and the submissions of counsel (for the EFL, Daniel Cashman and for the Club, Nick De Marco, QC).

8. We determined that neither the 31.1 Charge nor the 3.4 Charge was proved and dismissed those charges. These are the written reasons for our decision.

9. We set them out under these headings:

- a. The relevant legal principles.
- b. Issues, Evidence and Findings.
- c. Discussion.

The relevant legal principles

10. We were asked to determine the following legal issues:

- a. What is the applicable standard of proof, particularly on the 3.4 Charge?
- b. What is it that the EFL has to prove to establish a breach of the obligation of utmost good faith?
- c. Whether a charge under Regulation 31.1 could be made out if a match was postponed by agreement and then played?

We take those issues in turn.

11. As to the standard of proof, the issue arose because it was gently submitted by the Club that because the 3.4 Charge involved allegations of dishonesty a standard of proof higher than the civil standard (the criminal standard or the standard of comfortable satisfaction) should be applied.

12. We reject that submission for these reasons:

- a. These are civil proceedings,

- b. The standard of civil law is a single standard, of the balance of probabilities, unvaried by the nature of the allegation or its consequences (see *Re (B)* [2008] UKHL 35), but with observation that in assessing probabilities the tribunal should take account of the inherent probability of an event.

13. As to the meaning of 'utmost good faith':

- a. We note that the phrase is used in disparate contexts in English law and often in a fiduciary or insurance context.
- b. We note that there is no universal definition and, whilst we were provided with a substantial body of authority, we found greatest clarity in the Court of Appeal's analysis in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 which provides that the meaning is '*heavily conditioned by its context*' (see per Jackson LJ at ¶109), but that at the least there was an imposition of an obligation (on the facts of that health provision case) that '*The parties will work together honestly endeavouring to achieve the .. stated purposes [of their contractual arrangements]*' (ibid ¶112).

14. Following that guidance we, with the agreement of Counsel, decide that in the context of Regulation 3.4 '*utmost good faith*' is disproved if it is established that:

- a. A party has acted dishonestly, and/or
- b. A party has deliberately concealed information which it knew to be likely to be material to a decision under the Regulations.

15. As to the construction of Regulation 31.1 our view is that:

- a. Regulation 31.1 creates two offences.
- b. The first of which '*failing to fulfil a fixture*' is apposite to a case where a club for any reason does not play out a match, without any sufficient reason, e.g. pitch not properly prepared.

- c. The second of which *'causing the League to suspend any fixture'* is apposite to a case where a club gives the League time enough to suspend a fixture, without any sufficient reason, e.g. not paying players' wages.

16. It was agreed by the parties that "postpone" and "suspend" are not defined terms and could be used interchangeably.

17. Further, it was agreed, and we decided that at least the second limb of Regulation 31.1 is made out if a club acting other than with utmost good faith causes the EFL to postpone a fixture.

18. It is plain therefore that the legal analysis distils the questions in this case to be whether the EFL could prove on the balance of probabilities that the Club had acted dishonestly or deliberately concealed information it knew to be material to a decision under the Regulation for both the 31.1 Charge and the 3.4 Charge.

The evidence

19. We were provided with a Hearing Bundle, Agreed Chronology and heard and had available for cross-examination before us:

- a. For the EFL

- i. David Cookson, Football Services Director.
- ii. Paul Snellgrove, Competitions Manager.

- b. For the Club:

- i. Alex Tunbridge, CEO.
- ii. Mark Sampson, Interim First Team Manager and Assistant First Team Coach.
- iii. Tom Norman, Club Secretary. iv. Phillip Wallace, Owner and Chairman.

v. Luther Wildin, the Player.

20. The ABFA manager (at the time of the Call Up) Michel Dinzey provided a witness statement but was not able to attend. We give his evidence no weight on either side, principally because there is no need for it against the findings we were able to make on the other evidence.

21. We have considered all of that evidence.

22. We also had the benefit of the clear and helpful submissions of Counsel. For which we are grateful.

23. The essential elements of the Charges that the EFL has to prove were:

- a. Was there was a Call Up in place for Mr Wildin at the time the Club requested the postponement of the Fixture by the EFL?
- b. Did the Club act dishonestly or deliberately conceal material facts as to:
 - i. The Call Up? and/or
 - ii. Subsequent events.

24. The first issue is plainly the central issue.

25. On that issue there is a simple and short answer provided by this evidence:

- a. ABFA by letter of 31 October 2019 called up Mr Wildin (the Call Up). The letter was on headed notepaper, was a formal document and required Mr Wildin to attend for ABFA matches on 15 and 18 November 2019 in Antigua and Curacao.
- b. There is no evidence at all that the Call Up was rescinded or revoked by ABFA.
- c. The evidence from ABFA on the issue is an email from ABFA to the Football Association (The FA) of 2 December 2019, which was forward on to the EFL. In

that email ABFA did not suggest at all that the call up had been withdrawn instead that email states:

'Because of the player's injury and the limited medical facilities on the island we asked the player to come out for the second game only, however our Head coach Michel Dinzey advised the player not to travel, we did not communicate this to Stevenage officially in writing.'

d. It came as some surprise to the Commission to receive as disclosure only during the hearing, that that email from ABFA was in response to the EFL email of 19 November 2019 to ABFA asking it for information, and in particular: *'What date did the National Association release the Player from international duty?'*

26. As a simple question of fact, the first issue must be resolved in favour of the Club. The Call Up was in place on 9 November 2019, it had never been revoked, rescinded or cancelled by ABFA.

27. More nuanced is the evidence and answer to the second issue.

28. The Call Up required the Club to release the Player to ABFA for both of the international matches. Further, the Call Up was a sufficient condition, under FIFA Regulations, to a postponement of the Fixture once two other players were also called up. Two of the Club's other players were called up: Terence Vacooten and Noor Husin.

29. At the time of the Call Up, Mr Wildin was recovering from an injury and was not expected to be fit to play until after the Fixture, and it was of some doubt whether he would be fit to play for ABFA in one or both of the international matches.

30. As a result Mr Sampson and Mr Dinzey engaged in correspondence and conversation via various means (including WhatsApp, email and telephone calls) during the week of 3 March 2019. As a result of a poorly drafted statement from Mr Sampson that did

not address all issues, some equivocal disclosure and his lack of detailed and clear evidence on precise conversations with Mr Dinzey, we were not able to reach any clear picture of the state of those conversations.

31.The conversations had importance because it was the EFL's case that during these conversations Mr Dinzey informed Mr Sampson that Mr Wildin was not being called up to international duty.

32.Driven therefore to the real evidence we placed considerable weight on an email from Mr Norman to ABFA on 6 March 2019, which was drafted after conversation between Mr Norman and Mr Sampson. The email states:

'I have spoken to our Manager...it's been agreed that the call-up has been withdrawn? Please can you confirm that this is correct and Luther isn't required to report for international duty?'

33.We found Mr Norman to be a thoroughly honest witness who in his first role in professional football, and to his credit, was intent on doing his job well and to the book. His evidence in respect of that email was that he wished to have from ABFA clarity as to the position on the Call Up, he did not consider an agreement between Mr Dinzey and Mr Sampson sufficient.

34.More generally it was the Club's evidence that making of call ups and cancellation of call ups would not take place between managers but would take place between the Club secretary and the football association concerned. We have no evidence to challenge let alone contradict the Club's position and we see obvious sense in the Club's position.

35.The combination of that email, the circumstances of Mr Wildin's injury and the evidence of Mr Sampson led us to conclude that it was likely that:

- a. During their conversations the managers (Sampson/Dinzey) had discussed and reached an agreement that it was likely that Mr Wildin would not in fact be required to attend for both of the ABFA games,

- b. That 'agreement' was intended to be subject to formal confirmation between the Club and ABFA; and
- c. That 'agreement' left open whether Mr Wildin would be able to play in the second of the two matches he was called up for.
- d. The email of 6 November 2019 was therefore, as Mr Norman described, a request by the Club for formal confirmation of the position and also of the terms of the decision.

36. We do not find therefore that the EFL was able to prove on the evidence that:

- a. There was a certain cancellation of the call up letter, which covered two matches, nor
- b. That there was a certain concluded agreement between ABFA and the Club, nor
- c. That the Club believed it had formal concluded agreement to cancel the call up by ABFA.

37. To the email of 6 November 2019 there was no immediate response, so the Club sent a chaser on 8 November 2019 and then received the somewhat ambiguous response on 8 November 2019 by email from ABFA:

'Message has been received and noted. We wish him a speedy recovery.'

38. That email of 8 November 2019 was no answer to the Club's email of 6 March 2019 or at the least was no clear and certain answer.

39. On 9 November 2019 the Club played Peterborough. In the course of that match 3 Club players were injured.

40. Following the game at 18:42 and 18:50 respectively Mr Norman sent emails to ABFA confirming Mr Wildin was available for international duty and to EFL seeking permission for a postponement of the Fixture.

41. The timing of those emails aroused the suspicion of EFL because they were sent shortly after the Club had lost three players to injury and two were already away for international duty. The central theme of the EFL's case was that this circumstance led the Club to 'force' the call up of Mr Wildin so as to secure postponement of the Fixture, with the motive of allowing Mr Wildin to play at the resumed fixture, and other players no doubt to recover.

42. There were on evidence very formidable bars to such a motive being established:

- a. First, Mr Sampson, Mr Norman and Mr Tunbridge gave clear and we found honest evidence that the agreement to email ABFA and EFL was made on the morning before the match against Peterborough and so before knowledge of the injuries to three players. Mr Norman's evidence that he was unable to access his office, situated in the away fans' stand until after the game, was compelling.
- b. Second, such deception would require the Commission to find that those three individuals had conspired to deceive the EFL. We find such a suggestion improbable and unlikely. No evidence supported it, they are all of good character and there was no sufficient incentive to suggest they would desert their previous good conduct to do so.
- c. Third, the loss of the Fixture was not without its disadvantages. Revenues would be lost by the move of a Saturday game to a midweek game.

43. We do not therefore find that the Club acted towards the EFL with any ulterior motive or dishonesty.

44. We also do not find that in seeking the postponement of the Fixture the Club concealed, deliberately or otherwise, that which it knew to be material to the postponement. The Club's position in the mind of Mr Norman and confirmed by Mr Tunbridge and Mr Wallace, was that it would not allow a decision by a manager to determine a call up, but rather would require ABFA in official form to cancel, rescind or revoke the Call Up. We see good sense in that position, further we conclude that it is unlikely and therefore unproven that anyone at the Club considered that the EFL would be influenced by any agreement between Mr Sampson and Mr Dinzey.

45. Moving on events thereafter can be summarised relatively shortly.

46. Mr Wildin never travelled to fulfil his call up. ABFA and the Club discussed transport arrangements, health arrangements and the like but again these conversations and messages were between managers and whilst Mr Sampson had confirmed to Mr Dinzey his understanding that Mr Wildin was not required to travel in an email of 14 November 2019 it is not clear that Mr Sampson passed that information to either Mr Norman or Mr Tunbridge.

47. In the result the Club was left in the position of having received a call up letter and never having received formal confirmation of its cancellation, revocation or withdrawal. To all purposes the Club acted as if Mr Wildin was called up and particularly the Club acted on that position and did not play Mr Wildin in the FA Cup fixture over the weekend of 19 November 2019 after liaison with the FA. Plainly it would have been to the Club's advantage to have cancelled the Call Up and for Mr Wildin to play in this important fixture.

48. The EFL was suspicious of the outcome of this situation and caused enquiries to be made of the Club from about 15 November 2019.

49. The enquiries made of the Club were all answered. However, there are some pieces of evidence that do give support to the EFL's suspicion, for example:

- a. In the course of its responses the Club by Mr Tunbridge and Mr Wallace did as a matter of fact suggest that the managers (Sampson/Dinzey) had agreed to Mr Wildin not being called up, and both as a matter of fact, in their evidence stated that no such agreement had been reached.
- b. A WhatsApp message sent at 18:03 on 15 November 2019, and photographed by Mr Sampson at 18:03 (i.e. immediately after it was sent) so that it could be provided as evidence, in which Mr Sampson was seeking from Mr Dinzey his confirmation of whether Mr Wildin was going to be travelling to the ABFA matches suggested at least that the Club might have been creating evidence of uncertainty when none in fact existed.

50. Whilst accuracy and precision are the stock and trade of lawyers, we accept the evidence of the Club that these inaccuracies had no ill purpose. We do so for these reasons:

- a. We conclude that both Mr Tunbridge and Mr Wallace were honest and straightforward witnesses, and that the reality of their inconsistent statements was not dishonesty or any attempt to mislead but genuine, and at best careless, drafting when either summarising emails and conversations or addressing summaries of other people's conversations, to provide to the EFL as soon as they could in response to formal requests for information.
- b. Whatever the interpretation of the letters sent by the Club, underlying them was disclosure of the source material that the letters gave inaccurate summaries of. That rendered the letters more likely to be careless or inaccurate rather than intentionally misleading or dishonest.

51. We were not able to reach a consensus as to the motives of Mr Sampson's WhatsApp message of 15 November 2019, it was at the least a curious message to send in the context of the discussions that had by then taken place between Mr Sampson and Mr Dinzey. However by reason of the findings that we made as to the Club's state of knowledge and conduct and the view we took that it was, at the least, reasonable for

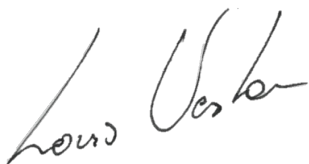
the Club to consider call ups and cancellations of call ups should take place at a club/association level this unresolved issue does not affect our overall conclusions.

52. We find therefore that the Club did not act in breach of Regulation 3.4 in respect of the investigation. At the very highest, its conduct in providing disparate and sometimes inconsistent answers to the EFL gave fuel to the investigation but not at all to the substantive charges.

53. In all of those circumstances and in respect of all of that evidence we do not consider that the Charges, or any element of them, are made out. We underline our view that there is no evidence at all that supports an allegation of dishonesty on the part of the Club.

54. Finally, one matter that arose in the evidence was the position of the Club that the EFL's guidance on postponement for call ups and the procedures to be followed was not comprehensive. It is, we think, not the role of this Commission to advise upon or to draft the Regulations of the EFL.

55. We invite submissions from the parties on any consequential orders. We would suggest that the Club should provide any applications within 3 working days of these reasons being circulated and the EFL a response 2 working days thereafter. Such documents should include submissions on whether the parties are content for any applications to be resolved on paper or by a further oral hearing.



Louis Weston On behalf of the Disciplinary Commission

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