

IN THE MATTER OF AN EFL DISCIPLINARY COMMISSION

Before:

Raj Parker

BETWEEN: -

THE ENGLISH FOOTBALL LEAGUE (the EFL)

Claimant

-and-

SOUTHEND UNITED FOOTBALL CLUB (the Club)

Respondent

DECISION

Introduction

1. This is the award of the Disciplinary Commission convened in relation to charges brought by the English Football League ("EFL") against Southend United Football Club ("the Club") arising from:
 - a. the Club's failure to strictly adhere to the terms of the Standard Contract in that it failed to pay contract players and scholars on the due date of 31 December 2019 in breach of EFL Regulation 63.7 and Youth Development

Rule 285 ("the December wages charges"). The wages were in fact settled on 10 January 2020.

- b. the Club's failure to strictly adhere to the terms of the Standard Contract in that it failed to pay contract players on the due date of 28 February 2020 in breach of EFL Regulation 63.7 ("the February wages charges") .The contract players were in fact paid on 19 March 2020.
 - c. the Club fielding an ineligible player in a League Competition Match, that is a Sky Bet League One match against Lincoln City FC on 1 February 2020 ("the ineligible player charge"). The club is charged with having failed to comply with the provisions of EFL regulation 44.1 and the guidance to EFL Regulation 54.1 in breach of EFL regulation 54.5.
2. In the current 2019/20 season the Club has been competing in the EFL's Sky Bet League One. When the season was suspended on 14 March 2020 because of the Covid-19 pandemic it was in the relegation zone with only 4 wins and 19 points from 35 matches played. There are 21 more points available to it if the season recommences and is played out, but it finds itself 16 points adrift of 'safety' with a significant margin of goal difference (-46). At the time of this Award, given the Covid-19 pandemic, it is unknown whether the Sky Bet League One season will be played out or, if that is not possible, if a mathematical formula will be used taking into account the Clubs' current points totals to calculate positions.

Procedural history

3. On 17 January 2020 the December wages charges were issued by the EFL. On 25 February 2020 the Club confirmed those charges were admitted and advanced mitigation detailing the default on the part of Club suppliers to provide the Club with funds necessary to support its cash flow and the challenges it faced in terms of bridging finance, which was delayed over the Christmas period.

4. On 6 March 2020 the ineligible player charge and the February wages charges were issued, the Club having had an opportunity to respond to the EFL's requests for observations in relation to the facts concerning the ineligible player charge ¹.
5. By way of a consent order issued by the Commission all of the charges were consolidated to be considered together.
6. The matter proceeded to a hearing to determine sanction held on 18 May 2020 by video link. Mr Steven Flynn appeared for the EFL and Mr Matthew Bennett appeared for the Club. Mr Nick Craig of the EFL and Mr Ron Martin the Chairman of the Club were also in attendance and were given the opportunity to address the Tribunal, although neither gave formal evidence.
7. The Club did not contest any of the charges so the only issue was the appropriate sanction for the conduct and admitted breach of the Regulations.
8. It became clear during the hearing that rather than a total of 93 individual breaches in relation to the late payment of wages, 58 remained to be considered. All of the Club scholars and under 23 players were in fact paid on time in February and therefore we are concerned with 18 contract players who were paid late for that month. The periods in relation to the delayed payments are 10 days in relation to the December payments, and 18/19 days in relation to the February payments.
9. Both Mr Flynn and Mr Bennett provided helpful written skeleton arguments in advance of the hearing.

Submissions of the parties.

10. Mr Flynn for the EFL accepted that the December and February wages charges should be considered together in relation to sanction. He effectively asked for a three-point immediate deduction in respect of these delayed payment charges and an additional three-point immediate deduction in respect of the ineligible player

¹ EFL requested observations on 3 February 2020 and the Club responded on 24 February 2020

charge to make a total of six points in all². This, he argued, was justified in all of the circumstances of the case and bearing in mind the seriousness of the breaches. The facts concerning the delayed wage payments and fielding an ineligible player were distinct and constituted separate misconduct.

11. As to the delayed payment charges he submitted that the 'starting point' was a three points deduction before one then goes on to consider aggravating and mitigating circumstances to justify any departure, bearing in mind the overarching principle of proportionality.

12. The Regulations are important to protect players and particularly young players where severe hardship could be caused by late payment. In addition, not paying players on time distorts the integrity of the competition and risks an unfair competitive advantage. It is important to maintain the support of fans and sponsors and any late payment of players has a detrimental impact on all the clubs in the League and the wider game. There have even been instances where clubs have suffered strikes by players in recent seasons because of non-payment of wages. He made reference to the Bolton and Macclesfield cases where fixtures could not be fulfilled.

13. He accepted the Club's factual explanations concerning cash flow difficulties and delays to the process of providing security against bridging finance which resulted in the 10 day delay following the Christmas period in respect of the December payments, but submitted that does not excuse the fact that the payments were late. There was then a repeat occurrence in February notwithstanding that the Club had been charged in respect of the December wages. He submitted that this indicated that the charge had not had an effect on the Club's compliance.

14. As to the ineligibility charge, the player was registered with the Club as a scholar for the 2019/20 season. He was sent on work experience to Harlow Town for the period 02 December 2019 to 25 April 2020. Whilst on work experience, according to its

² This would have the effect of placing the Club at the bottom of the Sky Bet League 1 table with 13 points. (below Bolton Wanderers who have 14 points following a 12 points deduction under EFL regulations.)

terms in compliance with EFL Regulation 54, a player could continue to train and play for either the Club or Harlow Town in any age restricted or reserve team match or in any match in the football pyramid below the English Football League, but *not* in any first-team match played as part of the Premier League Competition English Football League Competition ,English Football League Cup or English Football League Trophy. The work experience agreement included the ability for the Club to recall the player and terminate it with immediate effect, (subject to 24-hour's notice).

15. On 24 January 2020 the Club confirmed by email to Harlow Town its decision to recall the player from work experience and prepared a letter to that effect addressed to Harlow Town, the EFL and also the Football Association ("The FA"). However due to an administrative oversight the letter was not submitted to the EFL or the FA. The player returned to the Club and came on in the 80th minute of its match against Lincoln City on 1 February 2020. The Club was leading 1-0 at the time. Lincoln City equalized in the 90th minute and the Club scored the winning goal in the 96th minute. It was one of only 4 wins for the Club this season.

16. The Club took the view that the player was no longer out on loan and had no reason to suspect any difficulty in fielding the player as they were able to obtain a squad number through the IFAS system³. In addition they had intended to send the letter to the EFL and FA but the person responsible had to attend the funeral of a former club captain and it had 'slipped their mind'.

17. The EFL in response refers to the circulars issued to all clubs reminding them that the issue of squad numbers cannot determine eligibility of players. There is a method of checking on screen for a player's eligibility which was not done in this case.

18. The EFL take the view that it is for the EFL to register players, not for clubs to agree between themselves that a player is eligible to play. This is of course right and is no doubt why the Club have accepted and apologised for the breach. The player was ineligible to participate in the Club's first team fixtures until April 2020 because he was technically on work experience at Harlow Town, a restriction that only the EFL

³ The online system for submission of registration documents to the EFL.

could release. Since the EFL was not notified because of an oversight, it did not do so.

19. Mr Flynn submitted that no real credit is to be given to the Club for admitting the charges because the Club had little choice but to accept them in the circumstances.

20. Mr Bennett for the Club accepted that these were serious charges and the principles as to why the EFL was concerned to properly protect the competition and the wider game by prosecuting them, but argued that the level of culpability of the Club was at the lowest end of the scale and the sanction should reflect that. This was not a case of deliberate financial mismanagement by a club and it could be distinguished from other cases such as Macclesfield. There had been regrettable failures to take into account cash flow difficulties and the impact on meeting the payment deadlines, but the breach was not one of the Club's own making in the sense of deliberately exposing its players to the risk of late payment. This was an unfortunate situation that perhaps could have been handled better but it was not deliberate and payments were in fact made, albeit 10 days late in respect of the December wages and 18/19 days late in respect of the February wages. It is also important to consider that the players were properly communicated with during both periods through the PFA and all the players were assured and accepted they would be paid. This is not a case of prolonged and repeated non-payment or late payment. In respect of the February delayed payment, upon becoming aware that it would be unable to fulfil its financial obligations to some of its professional players the Club considered taking a further loan from its parent company, but decided that with the players cooperation it would be able to meet the commitment from its own financial resources with minimal delay which would be preferable for the Club's longer term financial position. The PFA were engaged and the situation was resolved as quickly as possible with the players receiving a first instalment by 13 March with the balance being fully paid up to all players by 19 March 2020. The Club has not taken a loan from the PFA or the EFL as has been the case with other clubs.

21. This was a short interlude of non-compliance in the Club's long history under the chairmanship of Mr Ron Martin of 22 years in which it had not fallen foul of the EFL's financial regulations. The late payments were not calculated to enable the Club to

gain any advantage and it is questionable whether any sporting advantage could be said to have been gained by the short period of time before the wages were paid to players in respect of both periods. Nevertheless the breach was accepted and credit should be given to the Club for accepting the breach in circumstances where it could have taken technical points to argue liability. Instead the Club apologised for the breaches and put forward extenuating circumstances. He invited me to consider that the history of the Club and its exemplary disciplinary record showed that the Club was run on a sound and responsible financial basis. It had exciting plans for the immediate future involving the development of a new stadium with increased capacity and enhanced facilities, which were outlined by Mr Martin.

22. He submitted that the circumstances of the late payments in this case distinguishes it from previous cases where points were deducted from Clubs for late payment of wages (Macclesfield and Bolton). The facts of this case do not approach the level of wrongdoing in those cases which concerned prolonged and repeated payment delays. He submitted that in all the circumstances a financial penalty ought to be imposed rather than a sporting penalty of a points deduction. He submitted that there is no prescribed starting point and the Commission has a wide discretion in accordance with EFL Regulation 92 to impose a sanction which properly reflects the justice of the case. Were there to be a financial penalty, it should be proportionate to the seriousness of the breaches and the level of culpability of the Club and its financial position (made worse of course as a result of the pandemic).

23. In relation to the ineligibility issue it was an unfortunate coincidence that this breach also occurred in February 2020. He accepted that it was regrettable that the player was included on the Club's team sheet for the match and put this down to an inadvertent oversight. There had been a human error and a misreading of the online system to check whether a player was eligible. It was not done to obtain any advantage and in fact it could not be properly said that the Club did in fact obtain any advantage in the circumstances of the particular match. The player was 19 years old and was making his debut. Of course he was on the field of play and was ineligible but there was no manifest effect on the game. He referred me to cases where Commissions in other cases had decided not to impose a points deduction on clubs who had fielded ineligible players.

24. In relation to overall proportionality he referred to the effect on the Club in the present situation it finds itself in. He argued that this is the relevant exercise where even the deduction of a single point would have a significant detrimental impact on its prospects. It is particularly uncertain what any points deduction would entail given that no decision has yet been made as to whether the League will resume or, if it is not to resume, on what basis the positions of Clubs at risk of relegation will be calculated. He urged me to conclude that the Club's conduct in this case does not merit a points deduction in either instance of misconduct and any such deduction would cause unwelcome and disproportionate stigma, reputational and other damage. He urged me to consider modest financial penalties in respect of both the late payment of wages and the ineligibility issue.

Decision

Approach

25. Section 92 of the EFL Regulations gives the Disciplinary Commission a broad discretion to make a decision which can include a wide variety of orders. Of particular relevance are an order to deduct points, or to impose a financial penalty payable to the League. There is also a power to issue a reprimand or warning as to the future conduct of a party. These sanctions may be imposed immediately or may be deferred or suspended for such period and on such terms as the Disciplinary Commission shall decide.

26. There is no prescribed tariff for any of the breaches of Regulations admitted in this case. I of course bear in mind the cases to which I have been referred for the approaches of other Disciplinary Commissions dealing with similar matters. It is obviously important for those involved in the professional game that such Disciplinary Commissions make decisions on sanction which are broadly consistent and which can be relied upon to provide reasonably predictable outcomes. However each case will turn on its own particular facts and previous cases provide useful guidance only. They can in no sense be said to be 'binding' and there are no hard

and fast 'starting points' when one comes to consider penalty, in the absence of specific reference in the Regulations.

27.Cases relating to late payment of wages and fielding ineligible players, as can be seen from the previous decisions, are highly fact sensitive both in terms of the alleged level of offending, but also the particular mitigating circumstances advanced in each case and the impact on the Club a particular sanction would have.

28.The sanction exercise needs to do justice and achieve a fair outcome in all the circumstances of the case. This involves balancing:

- a. the need to appropriately to punish the Club for the totality of its wrongdoing, including the deterrent effect this will have on it and others, whilst also taking into account points advanced in mitigation to achieve proportionality and
- b. the need to assist the EFL in protecting the competition and the wider game in relation to the particular misconduct.

29.It would in my judgment be unfair and disproportionate to impose an immediate points deduction of 6 points on the Club as contended for by Mr Flynn for the EFL.

30.I accept that the protection of players and scholars at this level of the game is very important and that any late payment of wages is likely to cause severe hardship and provides the means of an unfair competitive advantage over clubs who pay players on time. It is equally important for the EFL to seek to protect the integrity of the competition in order to maintain the support of fans and sponsors and to avoid the kinds of circumstance that have occurred in relation to Bolton and Macclesfield.

31.I regard the late payment of wages case brought by the EFL against this Club as different from these more serious and persistent types of case which involve elements of what might be regarded as deliberate wrongdoing.

32.I accept Mr Bennett's submission that this is a Club which is run on a sensible financial footing and which has not had any financial disciplinary breaches brought

against it before this unfortunate episode. It has had a Chairman of some 22 years who has been responsible for steering it and supporting it financially. In the last two seasons that has been particularly difficult because of the Club's results. I accept there has been no deliberate financial mismanagement here, rather a failure to manage cash flow for a relatively short period. It is not a case where the owner has withdrawn large amounts of cash from the business or overspent to cause the Club to run into financial difficulties.

33. The players were all paid, albeit late, by 10 and 18/19 days, in relation to the two months in question. I accept that no actual sporting advantage needs to be shown, but do not accept an immediate points deduction is justified when one looks at the circumstances of the failure to pay on time. It is generally to be preferred that sporting outcomes are to be decided on the field of play, save in bad cases of misconduct.

34. The Club does also deserve credit for admitting to the charges so that this matter has been able to be dealt with expeditiously. In all the circumstances I feel able to choose within the range of available penalties a penalty which reflects the gravity of the wrongdoing, but mitigates against the immediate impact on the Club in its current situation and with regard to its unblemished financial disciplinary record.

35. It is important to recognise, notwithstanding that the conduct in this case is at the lower end of culpability, that the payment of players on time in accordance with the Standard Contract is essential for the competition to function. A single sanction is appropriate for both periods of late payment. I impose a penalty of three points deduction to reflect the two periods.

36. However, for all the reasons I have taken into account in mitigation I order that it is to be suspended for the balance of the 2019/20 season and the first six months of the new season. This means that the deduction of 3 points, which are suspended, shall only come into effect upon the Club being found to have committed (or admitted) any further breaches concerning the late payment Regulations (under Regulation 63.7 and the Youth Development Rules 285) from the date of this Award until a date 6 months in to the new season. For the avoidance of doubt any case

which the EFL may bring in relation to March 2020 will not count for this purpose. The first six months of the new season will run from the date whichever League (1 or 2 it finds itself in) commences. If the Club commits a further breach in relation to these Rules and Regulations the points deduction will take immediate effect and the Club will be at risk of a further punishment for any further breach.

37.I considered whether to impose a financial penalty in addition as suggested by Mr Flynn. I have decided not to do so because of the mitigation put forward and the circumstances of the breaches. The penalty is on its own sufficient to mark the gravity of the misconduct in all the circumstances. The Club will be well aware of the penalty it will receive for any further breach.

38.I also regard the ineligibility case as deserving of credit for having been admitted so that this matter has been able to be dealt with expeditiously. I accept that no sporting advantage needs to be shown and the importance of the Regulations in maintaining the integrity of results and reputation of the competition, but do not consider that an immediate points deduction is justified. Under EFL Regulation 44.2 the Commission may, where a club has played an unregistered or ineligible player, deduct three points from its score and/or impose such other penalty as a Commission may decide.

39.The player was a 19-year-old scholar, who only came on in the 80th minute, making his debut. He was the Club's own registered Academy player who had been de-registered on the EFL's system in order for him to undertake work experience at Harlow Town. Harlow Town had de-registered him for the match and he had an ongoing scholarship agreement with the Club, so were it not for the oversight as to the correct procedure to bring it to the attention of the EFL, he would have been eligible to play.

40.I accept that many breaches by clubs in relation to eligibility are due to administrative errors but in this case the Club had taken steps by sending a letter of recall to Harlow Town, confirming with Harlow Town the player had been de-registered and assigning a squad number to the player. The missing and important step it failed to complete due to the matter slipping the responsible person's mind

was to upload the recall letter with the EFL. This is the first and only time in Mr Martin's tenure of 22 years that the Club has been charged by the EFL with a breach of player eligibility.

41. The breach merits a penalty which reflects the gravity of the wrongdoing and which produces a fair outcome given the balancing exercise I identify above. I do not consider that it would be proportionate in all the circumstances to impose a points deduction. The circumstances are not so serious as to warrant a points deduction or even one that is suspended.

42. I therefore impose a financial penalty of £7,500 for the ineligibility breach which shall be paid to the EFL within 14 days of notification of this Award.

43. The Club shall also be responsible for a payment of £4,625 plus VAT (the amount was not challenged by Mr Bennett) in relation to the EFL's external legal costs and for the cost of this Disciplinary Commission, within 14 days of notification of this Award.

44. The parties are entitled to appeal this Award pursuant to Regulation 94.3. A time limit of 14 days will run from the notification of these reasons.

45. This Award may be published⁴ unless otherwise agreed by the parties and subject to any appropriate redaction to protect third party confidentiality.

46. As requested I am prepared to reserve any further charges relating to late payment of wages or ineligibility by the Club for this and next season to myself for consideration but trust that there will be no reason for that to occur.

⁴ In accordance with Appendix 2 Paragraph 20.2 of the EFL Regulations



Raj Parker

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