

MR PHIL SMITH  
and  
THE FOOTBALL ASSOCIATION

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WRITTEN REASONS OF THE APPEAL BOARD  
FOLLOWING AN APPEAL HEARING ON 9 JULY 2014

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- 1 In April 2014 Mr Phil Smith appeared before a Regulatory Commission charged with offences concerning breaches of Football Association Regulations in respect of his activities as a licensed football agent. After hearing, the Regulatory Commission found Mr Smith guilty in respect of the charges he faced.
- 2 On 20 May 2014 Mr Smith appeared again before the Regulatory Commission for the imposition of sanctions, together with Wycombe Wanderers Football Club who had pleaded guilty to similar charges before the Commission.
- 3 The Club were ordered to pay a fine of £10,000 and warned as to their future conduct. Mr Smith had his football agent's licence suspended for two years, with 18 months suspended, and he was warned as to his future conduct.
- 4 By Notice of Appeal dated 5 June 2014 Mr Smith appealed the decision upon sanction made by the Regulatory Commission.
- 5 An Appeal Board was convened at Wembley Stadium on 9 July to hear the appeal. In preparation for the same, the Board considered the totality of the documentation that had been available to the original Commission, together with the Commission's written reasons both in respect of the contested hearing and the subsequent imposition of sanctions. Further, the Board were assisted by written submissions made on behalf of both the Appellant and the Football Association.

- 6 The Football Association were represented at the appeal by Max Baines and the Appellant was represented by Nick de Marco.
- 7 By his Notice of Appeal, the Appellant contended that the imposition of a sanction imposing an immediate suspension of his football agent's licence was one that no reasonable Commission could have come to and/or was excessive within the meaning of Football Association Appeals Regulations, Regulation 1.5.
- 8 The facts giving rise to this appeal were set out in considerable detail and with admirable clarity in the written reasons provided on two separate occasions by the Regulatory Commission. Accordingly, they are not repeated herein. This document should be read in conjunction with the original documentation produced consequent upon the findings of the Regulatory Commission.

### **Preliminary applications**

- 9 Two matters concerning the potential admission of 'new evidence' pursuant to the provisions of Regulation 2.6 were made by the parties.
- 10 In written submissions prepared by the Football Association in contemplation of the appeal hearing, reference was made to other Football Association cases that had not been placed before the original Commission. The Football Association had made reference to the same in helpful reply to the Appellant's assertion upon appeal that there was a certain pattern to be understood from other previously decided cases. However upon strictest analysis, reference or reliance by the Football Association to such other material would amount to 'new evidence', and require leave of the Appeal Board pursuant to the Regulations.
- 11 The Board concluded that they were not satisfied that the further material referred to by the Football Association was of a kind that required admission pursuant to the Regulations. Accordingly, that material was not admitted into the appeal hearing.

- 12 The Appellant had given written notice of his intention to seek to adduce new evidence concerning the apparently unforeseen significant financial consequences of the Regulatory Commission's order to suspend his football agent's licence with immediate effect. The context and substance of those potential consequences were set out in the Notice of Appeal and supported in a witness statement from the Appellant dated 5 June 2014.
- 13 Having regard to the provisions of Regulation 2.6, the Board were bound to consider whether they were satisfied with the reasons given as to why the new evidence was not, or could not have been, presented to the original hearing. In principle, the Appeal Board could see a sound argument that both the Appellant himself (with all his experience and personal knowledge of his standard contracts) and his legal advisers could and should have given obvious thought to the complete consequences of the loss of an agent's licence. It is not good enough simply to observe that no thought was given to the same because those concerned had not entertained the possibility that just such a course may be taken by the Commission. Equally however, the Board appreciated that the consequences were in respect of discrete contractual arrangements that may not have been at the forefront of the Appellant's mind at the time of the original hearing.
- 14 The Football Association did *not* oppose the admission of the new evidence, doing so in the context that they considered it "*fair*" to admit the evidence.
- 15 The Board concluded in all the circumstances that this was a case in which it was right to admit the 'new evidence'. Accordingly the evidence was so admitted and considered by the Board.
- 16 Consideration was given to the possibility of the Board remitting the case to the original Commission for rehearing with the benefit of the new evidence. Both parties submitted against that course, particularly having regard to the pressing timescales relevant to the appeal. The Board did not remit the case.
- 17 The Appellant gave evidence, speaking to the content of his witness statement. There was no challenge to the substance of the assertions made by the Appellant by

the Football Association. Mr Baines confined his observations and submissions in respect of the same to matters that went to the weight of the evidence rather than its content.

- 18 In answer to questions from the Appeal Board, the Appellant confirmed, inter alia, that he had no documentation to support the suggested loss that might accrue with Luton Football Club; that he had been approached by clubs the subject of the outstanding contractual arrangements in a context where he felt he had been put 'on notice' of their intention to limit payment to him; that he was not the sole licensed agent in the company; and that he had no documentary evidence either from his accountant or otherwise to support an assertion that there was a financial risk to the viability of the partnership.
- 19 The Appeal Board considered the grounds of appeal together with the new evidence and the assistance of further oral submissions on behalf of the parties.
- 20 It was contended by the Appellant that the imposition of an immediate suspension of an agent's licence for a 'first offence' was both unprecedented and disproportionate.
- 21 The Appellant's case in this regard focused in significant part on the supposed assistance to be drawn from previously decided cases that were said to display a pattern where those in similar circumstances to the Appellant had not been the subject of an immediate suspension of their agent's licence.
- 22 The Appeal Board echo the sentiments of the Football Association and Regulatory Commission in observing that there needs to be a deal of caution when seeking to determine any principles or pattern from previously decided cases. That is particularly so where the facts of those previously decided cases are limited in their report. The other comparative cases before the Regulatory Commission gave no full or adequate insight as to whether the person the subject of the sanction had committed a flagrant breach of the Agent Regulations in direct contravention of an explicit warning from the Football Association and then thereafter contrived to conceal the true nature of the agreement.

- 23 The Appeal Board concluded that there was no 'settled practice' as the Appellant had sought to suggest. Each case necessarily must be considered on its merits, both in terms of its gravity and having regard to such features of individual mitigation available.
- 24 The proper focus when considering the necessity or otherwise to impose an immediate suspension of an agent's licence is the very nature of the offence itself on the specific facts of the case.
- 25 The Regulatory Commission had found that this was a case in which the Appellant had concealed from the Football Association an agreement that was not only prohibited by the Regulations but which the Football Association expressly advised a participant was not permissible under the relevant agent's regulations. When the second representation contract was submitted, it misrepresented the true nature of the agreement that had in fact been reached as between the parties.
- 26 It was accepted by all of the parties upon appeal that this was indeed a "*serious offence*". The Appeal Board unhesitatingly further agreed that the serious nature of the offending *per se* was "*aggravated*", as it was described to be by the Regulatory Commission, by the nature of the Appellant's conduct detailed hereinabove. In the circumstances in which the Appellant had specifically conducted himself, the Commission were right to treat it as a "*challenge*" to the Football Association's authority.
- 27 To suggest, as the Appellant had done, that there was "*no cogent*" reason for the imposition of an immediate suspension of the agent's licence, was a submission without merit. The same failed to have proper regard to the gravity of the offence itself and to its particular circumstances as they were found to be after a contested hearing. Despite taking the opportunity at the commencement of the appeal (through his Counsel) to apologise for his conduct, the Appellant still in the view of the Board, did not accept much of that which had been decided against him and failed to appreciate the serious nature of the conduct of which he had been found guilty.

- 28 In the circumstances of the case as they appeared before the Regulatory Commission, and in the absence of any significant mitigating features to assist the Appellant, the Appeal Board concluded that the imposition of an immediate suspension of the football agent's licence was right in principle, fair and profoundly reasonable.
- 29 The imposition of the particular sanction could not in any sense be described to be a decision of a Regulatory Commission that no other such body could have come to. Equally, the imposition of that sanction by the Regulatory Commission was not, in the conclusion of the Appeal Board, in any sense "*excessive*" on the facts as they then were.
- 30 The Appellant further contended that there was a disparity as between the sanction imposed upon the Appellant and that imposed upon Wycombe Wanderers Football Club, in circumstances where the Appellant was to suggest the nature and gravity of the offending had been in equal measure and responsibility as between the respective parties. In their written reasons the Regulatory Commission gave fivefold reasons as to the "*material differences*" as between the Appellant and the club (see written reasons paragraph 2.6).
- 31 In particular, the Regulatory Commission had significant regard to the fact that the club was under new ownership and that the new owners were "*innocent*" of participation in the offence. They had in effect inherited the impropriety that had gone before. The club, in the finding of the Regulatory Commission, had acted cooperatively, honestly, and had pleaded guilty. Their "*honest straightforward*" approach was, the Appeal Board noted, in stark factual contrast to the conduct of the Appellant. There were matters identified by the Regulatory Commission that were available to the club in mitigation that were not available to the Appellant.
- 32 The Appeal Board found that the Regulatory Commission's stated reasons for drawing a (right and proper) distinction as between the parties were reasonable. The difference in the sanctioning consequences as between the Appellant and Wycombe Wanderers did not render the sanction upon the Appellant as being "*excessive*". Insofar as the club were deemed to have been dealt with "*leniently*" in the words of

the Appellant, the same even if it were so, was no justification for a suggestion that the Appellant himself had been dealt with to excess. In particular, the difference in approach was recognition on the particular facts of this case as to the need for transparency and cooperation in grave matters of this kind.

- 33 Accordingly the Appeal Board concluded that the first two submissions of the Appellant in support of his grounds of appeal were without merit.
- 34 In respect of those submissions, it could not be said either that the decision of the Regulatory Commission was one that no reasonable such body could have come to, or that the sanction imposed by the Regulatory Commission was "excessive".
- 35 In those circumstances, and but for the need to consider the implications of the 'new evidence', the appeal would have been dismissed.

### **New evidence**

- 36 The irresistible conclusion to be reached in respect of the unchallenged new evidence was that there was a potential for a very significant financial loss to the Appellant. It is clear from the written reasons of the Regulatory Commission that they understandably had in mind that the imposition of a prohibition from working as an agent would necessarily have direct financial consequences for the Appellant. The same of course no doubt was considered in the usual course of events as being part of the burden of the sanction itself. To suspend an agent in these circumstances not only marks the offence in principle as to its gravity, but also brings about direct punishment in terms of financial consequences to the subject of the sanction.
- 37 However, the Appeal Board considered it entirely reasonable to infer from the circumstances of this case, that both the parties and the Commission did not foresee significant financial consequences to the Appellant in respect of income already due, being the subject of existing contracts.

- 38 The new evidence before the Appeal Board gave insight to the potential for significant additional losses in that respect. However, in the absence of any supporting documentation regarding the same, the Board did not take account of any remote possibility, as it was deemed to be, that the Appellant's partnership would become financially unviable.
- 39 Whilst only being a potential loss (having regard to the contractual situations relevant to the payments) the Board were satisfied on the evidence before them that there was a real and identifiable risk that the Appellant would be the subject of a significantly greater financial consequence to his affairs than had been contemplated by the Regulatory Commission when reaching their decision on the evidence then before them.
- 40 In the view of the Appeal Board (and noting the exacting care that had been taken by the original Commission) the Regulatory Commission would have acted differently if they had been aware of that which is now the 'new evidence' in that they would have regarded a six-month immediate suspension of the football agent's licence as being then excessive when taking account of all the potentially grave financial consequences of such an imposition.
- 41 The nature and consequences of a sanction cannot be seen, as it were, in its 'individual parts'. The Football Association had sought to persuade the Board that any consideration relevant to the potential of further financial consequences should *only* be seen in the context as to whether the Regulatory Commission would have in addition imposed a further financial penalty.
- 42 The Board disagreed both with that approach and analysis. Any punitive sanction imposed must be seen as a whole. When now taking account of the potential financial consequences for the Appellant, the Board were minded that on balance the original sanction was "excessive" within the meaning of the relevant Regulation. That was a conclusion that was reached with some hesitation.
- 43 This was, and remains, a case of such gravity that it requires the imposition of an immediate suspension of the football agent's licence. However, in the particular



circumstances of the Appellant as they are now seen to be in the light of all the material available to the Appeal Board, the justice of the case was met by a reduction in the period of the immediate effect of the licence. The immediate suspension was varied to one of seven weeks as between 20 May 2014 and 8 July 2014. The consequence of that revised order was that the Appellant would be free to resume his earning potential immediately and within the remainder of the existing transfer window.

- 44 The Appeal Board further varied the original sanction to include the imposition of a fine in the sum of £15,000. The Appellant was again warned as to his future conduct.
- 45 One half of the costs of the appeal were ordered to be paid by the Appellant. The same reflects the fact that whilst the appeal was in part successful, the alteration to sanction was only brought about by reason of the fact that incomplete facts had been put before the original Commission by the Appellant.

**Richard Smith QC, Chairman**

**Denis Smith**

**Brian Jones**

11 July 2014