

BEFORE AN APPEAL BOARD OF THE FOOTBALL ASSOCIATION

BETWEEN:

MR FAMARA DIEDHIOU

Appellant

-and-

THE FOOTBALL ASSOCIATION

Respondent

WRITTEN REASONS OF THE APPEAL BOARD

Introduction

1. The Appellant is a professional footballer presently registered with Bristol City Football Club Limited ("the Club"). This is an appeal of the decision of the Regulatory Commission set out in its decision letter of 18 May 2018 in which it found the Appellant guilty of a breach of FA Rule E1(a) during the fixture between the Club and Birmingham City FC on 10 April 2018 ("the Match").
2. The appeal hearing was heard on 12 July 2018 at Wembley. In attendance were the following:
 - 2.1 David Casement QC (Chairman), Appeal Board
 - 2.2 Gareth Farrelly, Appeal Board
 - 2.3 Mark Hovell, Appeal Board
 - 2.4 Paddy McCormack, Judicial Services Manager and Secretary to the Appeal Board

- 2.5 Famara Diedhiou, the Appellant
- 2.6 Stuart Baird of Centrefield LLP, Advocate for the Appellant
- 2.7 Jennifer Norris of Centrefield LLP, Associate
- 2.8 Mark Ashton, Chief Executive of Bristol City Football Club
- 2.9 Lee Johnson, Head Coach of Bristol City Football Club
- 2.10 Luke Werhurn, Club Secretary of Bristol City Football Club

- 2.11 Rebecca Turner, Regulatory Advocate, The Football Association

3. The charge against the Appellant related to an altercation that took place during the Match in or around the 52nd minute and involved the Appellant and two Birmingham City players, David Davis and Harlee Dean. During that altercation it was alleged that the Appellant spat in the face of Mr Davis.

4. On behalf of the Appellant two grounds of appeal were advanced in accordance with Regulation 1.6 of the Appeal Regulations:

*“(a) the Regulatory Commission have come to a decision which no reasonable such body could have come; and/or
(b) the Regulatory Commission have imposed a sanction which is excessive.”*

5. The appeal is conducted by way of a review and not by way of a rehearing, as is set out in Appeal Regulation 2.5. The burden rests upon the Appellant to establish that the Commission’s decision was one which no reasonable Commission could have come and that the penalty was excessive. That is a high hurdle which is set by the Regulations. In respect of evidential assessments, factual findings and in the exercise of discretion the Commission is entitled to a significant margin of appreciation and its decisions should not be interfered with save where

the decision is clearly wrong or wrong principles have been applied. It is not for the Appeal Board to substitute its opinions for those of the Commission unless the decision of the Commission is unreasonable or the sanction is excessive.

The Appeal Hearing

6. For the appeal hearing a paginated appeal bundle was prepared and circulated in advance with the co-operation of the parties. On the morning of the appeal hearing two applications were made on behalf of the Appellant.
7. The first was to adduce and refer to three previous written decisions in respect of other cases which were said to be relevant to the present appeal. These had not been referred to in the Notice of Appeal or accompanying documentation and had only been circulated the previous day. The Appeal Board noted that it is implicit in the rules that the parties should co-operate to make the process as efficient as possible and this includes identifying and providing all documents including authorities or other written reasons in a timely fashion. Notwithstanding the lateness of their production the Appeal Board allowed the Appellant to refer to the written reasons.
8. The second application was however different. On behalf of the Appellant Mr Baird set out in summary the failings of the Regulatory Commission including its failure to take into account other possible explanations as to why Mr Dean and Mr Davis may have made the allegation including being “mistaken.” The possible explanations were deliberate spitting (which is denied), accidental spitting whilst shouting in Mr Davis’s face, sweat from the Appellant which was mistaken for spit and finally there being no spitting but Mr Davis reacting to something else when he moved his head back eg a fear of a head butt from the Appellant. To support the third possibility, sweat being mistaken for spitting, Mr Baird applied to adduce

new evidence that was not before the Regulatory Commission. The Board was informed that the evidence consisted of a letter from the Club Doctor to say that the Appellant sweated so profusely that it was possible that this might have been mistaken for a spit by Mr Davis and Mr Dean. The documents that constituted the new evidence were not before the Regulatory Commission, were not referred to in the Appeal Notice, there was no written application at the appeal hearing and no indication had been provided to The FA prior to the hearing that the application would be made. In fairness to Mr Baird he indicated he had only become aware of the evidence that morning. There was no proper explanation for the failure to comply with the requirements of Reg 2.6 of the Appeal Regulations and no proper explanation as to why it was not presented at the original hearing. The application was refused given the wholesale failure to comply with the rules in regard to new evidence and the obvious prejudice that it would cause to The FA who would have needed to consider the evidence and possibly adduce its own evidence in response.

Appellant's Submissions

9. The Notice of Appeal was elaborated upon by Mr Baird in his submissions. His primary assertion was that the Regulatory Commission was not entitled to find, applying the appropriate standard of proof, that the Appellant had committed the offence. Much stress was placed upon the proposition, accepted by Commissions and Appeal Boards, that the more serious the allegation, and spitting is a very serious offence, the stronger the evidence required to make out the charge because there is an inherent improbability that it was committed. In short the standard of proof remains the same, that is the balance of probabilities, but the evidence required to meet that standard must be stronger and clearer than it would be for a much less serious offence. The Regulatory Commission did not identify that "heightened standard", as it was described, and therefore was in error.

10. It was also submitted that the Commission failed to take into account the other possible innocent explanations for why Mr Davis, the complainant, and Mr Dean gave the accounts that they did and why they were mistaken. In order to meet the “heightened standard” to which Mr Baird referred the Commission should have taken into account the following:
 - 9.1 the seriousness of the allegation and the fact that the Appellant had an unblemished record;
 - 9.2 the possibility of the spitting being accidental especially given the Appellant and Mr Davis were face to face and the Appellant was shouting at Mr Davis;
 - 9.3 Mr Davis did not wipe anything from his face;
 - 9.4 the Commission by its own admission could not discern a spit from the video footage provided;
 - 9.5 the movement back of Mr Davis’s head was consistent with him doing that for another reason, possibly the fear of a head butt;
 - 9.6 the possibility that it was sweat that went onto Mr Davis’s face and not spit.
11. It was submitted that the fact that the Appellant had asked for the Commission to deal with matters on the papers and not at an oral hearing “should not lead to an adverse inference against the Appellant”. The Board makes it clear that there is no question of any such adverse inference. It is the right of the Appellant under the Regulations to ask for the matter to be dealt with on paper. It was submitted that it was the Club’s decision that it be dealt with on the papers. That is irrelevant. The final decision was that of the Appellant who faced the charge. Having

made that decision to have the matter dealt with on the papers the Appellant forfeited the opportunity to cross-examine witnesses including Mr Davis and Mr Dean and the Appellant's own opportunity to answer questions that would be put to him. That however follows from the Appellant's own decision not to have an oral hearing. The Commission then proceeded to deal with matters on the papers.

12. Mr Baird made submissions on the quality of the evidence adduced by The FA before the Commission including the witness statements of Mr Davis and Mr Dean. There was a lack of detail in those statements and importantly they did give the names and details of the incident at the time. That should have been taken into account by the Commission. Also the fact that they did not allege it was a "deliberate" spit in their statements which meant the Commission could and should have concluded that it was an accidental spit. In the course of submissions Mr Baird submitted that the most likely explanation and which the Commission should have adopted was that there was spitting but it was accidental whilst shouting in Mr Davis's face.
13. On behalf of the Appellant it was submitted that the Commission had failed to properly consider or balance the raft of alternative and innocent explanations of events. It was said the alleged reaction, spitting, was inexplicable in these circumstances and the Commission should not have arrived at that finding especially given the heightened standard of proof. The Appeal Board was invited to overturn the decision and/or remit the matter to the Commission. The suggestion was that to remit it to the Commission for there to be a hearing was the best course.

The FA's Submissions

14. In respect of the standard of proof Ms Turner submitted that it is noteworthy the Appellant did not refer in its written submissions to the Commission to the "heightened standard" or the need to find more cogent

and clear evidence given the seriousness of the charge. No cases were cited and the principle was not even referred to. It was therefore surprising for the Appellant to now criticise the Commission for not expressly referring to it in its written reasons.

15. In any event, it was submitted, that the Commission were aware of the seriousness of the allegation and did comply with the substance of the standard of proof. At paragraph 13 of the written reasons the Commission said it had “carefully considered all of the evidence and submissions in that regard.” Also at paragraph 14 it said it carefully considered the evidence. At paragraph 19 it can be seen that the Commission looked for corroboration of Mr Davis’s complaint and found it in the evidence of Mr Dean. The Commission identified the standard of proof at paragraph 13 that the burden was on The FA to prove the charge on the balance of probabilities. The Commission has therefore adopted the correct standard of proof and applied it correctly.
16. It was further submitted by Ms Turner that the Commission did consider whether there were other innocent explanations and at paragraph 18 it noted that it considered whether the allegation was in fact “mistaken.”
17. Whilst Mr Baird asserted that the most likely explanation was one of accidental spitting, and that is what the Commission should have found, it was never part of the written submissions before the Commission that there was accidental spitting. In fact at paragraph 12 of the Appellant’s statement before the Commission he asserted there was “categorically no spitting involved.”
18. The Commission took into account the Appellant’s good record as is clear from paragraph 21 of the written reasons.

Appeal Board’s Findings

19. The hurdle which the Appellant must overcome to succeed on this appeal is a high one as was accepted by Mr Baird. It is not enough to say the Commission was wrong in its assessment of the evidence or that the Appeal Board might have come to a different conclusion. It is certainly not appropriate to surmise what the evidence might have been had it been tested at an oral hearing.
20. The Commission applied the correct standard of proof which is the balance of probabilities as set out at paragraph 13 of the written reasons. It is obvious that the more serious the allegation the stronger the evidence is required to be to displace the inherent improbability of that offence occurring. How much stronger the evidence must be will depend upon the nature of the charge and the circumstances of each case. The Appellant did not invite the Commission's attention to the cases that dealt with inherent improbability in the context of the balance of probabilities. The principle was not even expressly referenced let alone any referral to authorities or other written reasons. Mr Baird accepted in submissions that it was implicit in the submissions and should have been obvious to anyone reading them that the principle was in play. The Appeal Board agrees the principle was obviously in play. It would have been obvious also to the Commission. Just as the Appellant did not feel the need to expressly reference the principle in his written submissions so it was unnecessary for the Commission to do so. It is clear that the Commission carefully examined the evidence and considered the corroboration and the possibility of the allegations being mistaken. There was no need to reference a "heightened standard of proof," an expression which is apt to mislead. There is only one standard of proof and it does not gain or lose height.
21. There is no proper basis for suggesting that the Commission failed to carefully consider the alternative innocent explanations for the events such as accidental spitting. The Commission would have taken into account all possibilities and measured them against the evidence in order

to decide if the burden and standard of proof were discharged. The fact that each possibility is not expressly set out and discounted is not a proper criticism. That is particularly so in circumstances where, as here, the Appellant did not say there was or might have been accidental spitting and his evidence was categorical there was no spitting at all.

22. The Commission were clearly impressed with the evidence adduced by Mr Davis and Mr Dean along with the immediate reaction of Mr Davis's head moving back and also immediately going to the Assistant Referee.
23. In paragraphs 19 and 20 of the Notice of Appeal the Appellant engages in argument as to the findings of the Commission. Those are matters which go to weight. In the unanimous view of the Appeal Board those arguments advanced come nowhere close to impugning the decision of the Commission as being unreasonable to the extent required under Regulation 1.6 (3). The Commission was tasked with deciding the charge on the papers and the Appeal Board finds that on the evidence and submissions available to the Commission its decision was soundly based.
24. Had the appeal been allowed the Appeal Board would have decided the matter itself on the papers given that the Appellant had elected for the determination to be made on the papers. To remit to the Regulatory Commission would have led to unnecessary costs and delay.

Sanction

25. The six match sanction was excessive according to the submissions of the Appellant. The Regulatory Commission justified the sanction by analogy with the sanction which would apply to the offence if it had been caught on camera and dealt with as a "Not Seen" incident under Schedule A. This was not an incident that was seen by anyone other than Mr Davis and Mr Dean who made the complaint and therefore the Commission had no

requirement to impose a similar sanction. Under regulation 3.3 of the Appeal Regulations the Appeal Board has a wide discretion as to sanction.

26. It is said the sanction should be reduced because:
- (a) the incident was not caught on camera nor was it reported by the Match Officials and therefore received no publicity;
 - (b) it is the first breach by the Appellant of any FA Rules;
 - (c) the Appellant has expressed great regret about being associated with this incident and notes that his name is tarnished.
27. The sanction is not excessive. The Commission was entirely entitled to draw the analogy that it did in respect of what is a serious breach.
28. The decision of the Regulatory Commission therefore stands and the appeal is dismissed. The Appellant's appeal deposit of £100 is forfeited. The Appellant will pay the costs of the Appeal Board in the sum of £2850.

DAVID CASEMENT QC (CHAIRMAN)

GARETH FARRELLY

MARK HOVELL

16 JULY 2018