

**IN THE MATTER OF AN ARBITRATION IN ACCORDANCE WITH PARAGRAPH 15  
OF THE TERMS AND CONDITIONS FOR WOMEN'S FOOTBALL TIER 2  
APPLICATIONS**

*Before:*

*Robert Englehart QC (Chair)*

**BETWEEN:**

**Blackburn Rovers Ladies Association Football Club**

*Claimant*

**-and-**

**The Football Association Limited**

*Respondent*

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**AWARD**

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## **INTRODUCTION**

1. I have been appointed as the Sole Arbitrator to determine a challenge brought by the Claimant ("Blackburn Rovers") against the Respondent ("the FA") under Paragraph 15 of the Terms and Conditions which governed the application of Blackburn Rovers for a licence for Tier 2 of Women's Football. Both parties put in written submissions with, in the case of the FA's submission, an accompanying appendix of documentation. I also held a hearing at which both Steve Waggott and Gemma Donnelly made submissions on behalf of Blackburn Rovers and James Segar of Counsel made submissions for the FA. This is my decision following that hearing. I am most grateful to the parties, particularly Mr Waggott and Ms Donnelly who travelled to London for the hearing, for their measured and succinct observations.

## **THE BACKGROUND**

2. Until recently the top two leagues for professional women's football were FA Women's Super League 1 and FA Women's Super League 2 which were two divisions of a single league. The FA needs no introduction. It is the governing body for professional football. Blackburn Rovers did not play in the Super League. It competes in the FA Women's Premier League Northern Division where the club has achieved considerable success. Indeed, last year it was the runner-up in the FA Women's Premier League Play-Off Final. I was told that the club runs 6 ladies and girls teams.
3. In 2017 the FA determined for reasons which do not matter for my decision to re-organise the top of what is described as the women's football pyramid. Commencing with the 2018/19 season, there were to be two tiers, a tier 1 of professional teams and a tier 2 where teams might be either semi-professional or professional. Tier 1 is now known as the FA Women's Super League and tier 2 as the FA Women's Championship. However, for ease of reference I refer to them simply as tier 1 and tier 2.
4. Initially, the FA invited applications for licences for the new tiers 1 and 2 from all the clubs which had participated in the FA Women's Super League. In fact all the applying

clubs were granted licences. There remained four places to be filled for the new tier 2 with one further place being reserved for the winner of the FA Women's Premier League Play-Off Final. The licence application process then moved onto its second open stage for selection of the remaining four tier 2 places. There were 14 clubs which submitted tier 2 licence applications at this open stage including Blackburn Rovers. In the event, Blackburn Rovers' application was unsuccessful with the four available licences being granted to Leicester City Women, Lewes FC Women, Manchester United Women and Sheffield United Women. I was informed at the hearing that Sheffield FC Ladies has now withdrawn from tier 2. Accordingly, the FA is in the process of selecting another club to fill its place. Doubtless, the merits of Blackburn Rovers will be considered again as part of this process.

### **THE BLACKBURN ROVERS APPLICATION**

5. The FA had appointed a Selection Panel to make recommendations over the grant of the tier 2 licences to the Women's Football Board. The Selection Panel reviewed Blackburn Rovers' application in March 2018. The Club was then invited to attend for an interview after which its application was subject to further review. Ms Donnelly, who has 14 years' experience with the club, attended the interview. Ultimately, the Women's Football Board decided not to award a licence to Blackburn Rovers, and the club was so informed by letter of 31 May 2018. This letter drew attention to four particular areas where it had been judged that the application fell down by reference to the published Key Minimum Requirements used for assessing licence applications:
  - the match attendance figures fell below the minimum requirements for 2018/19;
  - the marketing plan did not contain the level of detail required;
  - the commercial plan did not meet the key minimum requirements;
  - the required information about staff was not provided.

### **THE APPLICATION PROCESS**

6. The criteria published by the FA made it clear that licence applications would be assessed primarily by reference to the Key Minimum Requirements of a licence. The categories of these Requirements concerned Financial and Business Planning, Marketing and

Commercial, Facilities and Players, Support Staff and Youth Development. Guidance was given as to what should be addressed under each of these headings in an applicant club's Compliance and Development Report. Following submission of that Report, applications were to proceed as follows:

- (1) Each category of the Key Minimum Requirements was to be assessed by a member of the Selection Panel;
- (2) The full Selection Panel would then meet to consider the applications and assessments and, if necessary, revise them;
- (3) The Compliance and Development Reports along with the Selection Panel's views would then be reviewed by the Women's Football Board.

The Application Terms and Conditions (at paragraph 5) also explained that an applicant club might, at the FA's sole discretion, be invited to a presentation, interview or oral questioning.

7. The above summarises the published process for applications for licences. However, it must be said that the Application Terms and Conditions emphasise how decisions are solely for the discretion of the FA. I refer to the Terms and Conditions as signed by Blackburn Rovers. Even Key Minimum Requirements could at the FA's discretion be waived for a particular club: see paragraph 9. Thus, paragraph 12 stipulates:

*The Selection Panel and [Women's Football] Board shall have absolute discretion to assess the club against the Key Minimum Requirements and determine membership of Tier 2 in such manner as they deem appropriate.*

Paragraph 14 is equally clear:

*Subject to compliance with the terms of the licensing process as set out in these Terms and Conditions, The FA will be free to exercise its discretion in awarding Tier 2 licences as it sees fit. The decision of The FA shall be final and binding and there shall be no appeal against the exercise of such discretion.*

## **BASIS OF CHALLENGE**

8. Despite all references to an unfettered discretion of the FA, there is a residual right to challenge a decision if there has been a failure to follow the published licensing process. Thus, paragraph 15 of the Terms and Conditions provides:

*However, an applicant club who believes that The FA has not complied with the terms of the licensing process as set out in these Terms and Conditions may lodge a challenge by way of arbitration to an independent panel which shall comprise a sole arbitrator who shall be appointed by Sport Resolutions UK .....*

It is pursuant to this provision that the present challenge is made before me. Paragraph 18 of the Terms and Conditions makes it clear that, if I were to conclude that there had been a failure of process, I might direct the FA to carry out the selection process again on the basis of the documents previously submitted.

## **BLACKBURN ROVERS' COMPLAINTS**

9. Blackburn Rovers' letter of 14 June 2018 set out to refute the four particular matters raised in the FA notification of 31 May 2018. Before me, Mr Waggott and Ms Donnelly elaborated what had been explained in their letter. In addition, it was stressed before me how much effort had been put into building up what had become a successful women's club and how disappointing it was for Blackburn Rovers not to be able to play at the top level of women's football. I unreservedly accept that this is so.
10. As for match attendance figures, it was acknowledged that attendances to date fell short of the numbers included in the Key Minimum Requirements. I was told that the average attendance for Blackburn Rovers was in the order of 120 or thereabouts. However, there were plans to promote attendance. Furthermore, I was told that attendances at other clubs whose tier 2 applications had been successful were no higher than at Blackburn Rovers; attendances at Leicester City Women and Sheffield United Women in particular

were lower than at Blackburn Rovers. Ms Donnelly was able to say this from figures disseminated on social media.

11. The marketing plan put forward by Blackburn Rovers could, if it was accepted, have been more detailed. However, Ms Donnelly emphasised that what had been put forward was very similar to what Blackburn Rovers had put forward the previous year. It had been acceptable then, and it was inexplicable why it could be thought inadequate now.
12. The club's commercial plan explained how sponsorship had been achieved to increase income. There was naturally a shortfall between income and expenditure. Nevertheless, for many years the main club had been supporting the ladies' club financially and had demonstrated its support. Ms Donnelly could not comprehend how the commercial plan could now be thought to be worse than before.
13. The fourth matter raised was that the FA claimed not to have received copies of employment contracts for various personnel at the club. Here Ms Donnelly took issue with the FA. They had been provided with everything which they required.

## **THE FA RESPONSE**

14. The FA's primary response to this challenge is that Blackburn Rovers' complaints are not admissible. Under paragraph 15 of the Terms and Conditions it is only failure to follow the licensing process which can be a valid ground of appeal. Otherwise, selection was expressly a matter for the FA's discretion. Here, the selection process was strictly followed.
15. As regards the detailed complaints, the FA rejects any suggestion of unfairness. Each club's application has always been treated on its own separate merits, and the results of other club's applications are not relevant. The FA had a difficult exercise to select four out of the fourteen applications. The points put forward by Blackburn Rovers were persuasively put. However, the merits of the FA's decision are not a matter for me.

## DISCUSSION

16. I appreciate the strength of Blackburn Rovers' feeling and its disappointment in not being awarded a tier 2 licence. The case for the club was advanced with great passion and sincerity by Mr Waggott and Ms Donnelly. Nevertheless, it has to be appreciated that under the Terms and Conditions my power as the Independent Arbitral Panel is extremely limited. My sole remit is to consider whether the FA has not "complied with the terms of the licensing process as set out in these Terms and Conditions". Thus, for example, I would have power to direct the FA to re-consider a licence application if, for example, the FA had simply decided not to refer an application to the Selection Panel or had decided not to assess an application in the light of the Key Minimum Requirements.
17. In the right factual context, it could perhaps also be said that the result of a given application was so irrational that the process must have gone wrong; this would be an extreme case. However, subject possibly to that, the merits of any licence application are most definitely not a matter for me to judge. The discretion which is vested in the FA under the Terms and Conditions is not my discretion. Particularly in the light of the limited number of tier 2 licences available and the imbalance of supply and demand, the decision to be reached is that of the FA. My own views have no relevance. It is in this context that I must consider Blackburn Rovers' complaints.
18. The Key Minimum Requirements proposed a match attendance target of at least 500 for 2018/19 with "robust evidence" for achieving the target. That figure is well above Blackburn Rovers' historic actual average attendance but, as I was told, the same would be true for many other clubs. Whilst I fully understand why Blackburn Rovers make comparisons with other successful applicant clubs, I do have reservations about drawing conclusions from other applications which are not before me. I simply do not have the material on which to come to a conclusion. Overall, it seems to me that what amounts to sufficiently "robust evidence" is essentially a matter of judgment for the FA.
19. My conclusions in relation to the Blackburn Rovers' marketing plan and commercial plan are similar. I understand how Blackburn Rovers feel some frustration over trying to

understand why these plans were regarded as falling short. However, value judgments are certainly not a matter for me.

20. As for the provision of staff contract documentation, I am not in a position to resolve disputes of fact. Mr Segan suggested that one possible explanation was that the FA had wanted to see actual signed contracts rather than the template which Blackburn Rovers said had been provided. If this is the explanation, it could be said to be preferring form over substance. However, I simply do not have the material on which to draw a conclusion.

## **CONCLUSION**

21. Blackburn Rovers' keen sense of disappointment is, as I have said, wholly understandable. However, I do not regard any of their complaints as being in truth complaints of failure to adhere to the licensing process as set out in the Terms and Conditions. Accordingly, I have no option but to dismiss the club's challenge.

R. P. T. J.

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Robert Englehart QC, Sole Arbitrator

London, 12 July 2018





Sport Resolutions (UK)  
1 Salisbury Square  
London EC4Y 8AE

T: +44 (0)20 7036 1966

Email: [resolve@sportresolutions.co.uk](mailto:resolve@sportresolutions.co.uk)  
Website: [www.sportresolutions.co.uk](http://www.sportresolutions.co.uk)

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