

IN THE MATTER OF AN ARBITRATION IN ACCORDANCE WITH
PARAGRAPH 14 OF THE TERMS AND CONDITIONS
FOR WOMEN'S FOOTBALL TIER 2 APPLICATIONS

B E T W E E N:

Sunderland AFC Ladies Limited

Claimant

and

The Football Association Limited

Respondent

AWARD

INTRODUCTION

1. I have been appointed as the Sole Arbitrator to determine a challenge brought by the Claimant ("Sunderland") against the Respondent ("the FA") under Paragraph 14 of the Terms and Conditions which governed the application for licences for Tier 2 of Women's Football. Both parties put in extensive written submissions with accompanying appendices. In addition, the FA served a witness statement from Lucy Wellings, the Women's Football Clubs Manager at The FA. The parties agreed that I should determine

this challenge on the papers, that is without hearing either oral evidence or oral submissions. This is my decision pursuant to that agreement.

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. Sunderland played in the former Super League 1. However, 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.
3. 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. For reasons which are not fully explained Sunderland did not apply at this stage. 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 Sunderland. In the event, Sunderland's application was unsuccessful with the four available licences being granted to Leicester City Women, Lewes FC Women, Manchester United Women and Sheffield United Women.

THE SUNDERLAND APPLICATION

4. 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 Sunderland's application in March 2018. According to the witness statement of Ms Wellings, the Club's application was in fact ranked last of all the applications at this stage. The Club was then invited to attend an interview after which its application was

subject to further review. Ultimately, the Women's Football Board decided not to award a licence to Sunderland, and the Club was so informed by letter of 31 May 2018. This letter drew attention to two particular areas where it had been judged that the Sunderland application fell down by reference to the published Key Minimum Requirements used for assessing licence applications: first, the Club's Commercial Plan was deemed inadequate and, secondly, there was a lack of detailed information about some key club staff.

THE APPLICATION PROCESS

5. 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.

6. 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. Even Key Minimum Requirements could at the FA's

discretion be waived for a particular club: see paragraph 9. Thus, paragraph 11 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 13 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

7. 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 14 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 17 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.

SUNDERLAND'S COMPLAINTS

8. Sunderland advances 8 grounds of appeal against the FA's decision. The first two grounds complain of unfairness and "bias" in the selection process. Grounds (4) to (8) complain about the content of the Terms and Conditions and about the appeal process itself. Ground (3) complains about the FA having discussed Sunderland's failed application in the public domain although no details are provided about the complaint.
9. The unfairness and "bias" of which Sunderland complains largely centre on inconsistent treatment said to have been accorded to other clubs. There is also a major complaint about the FA not having taken into account information which it held on file from the time when Sunderland was participating in the former Women's Football Super League.

THE FA RESPONSE

10. The FA's primary response to this challenge is that Sunderland's complaints are not admissible. Under paragraph 14 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.
11. As regards the detailed complaints, the FA rejects any suggestion of unfairness or bias. Each club's application has always been treated on its own separate merits, and the results of other club's applications are not relevant. Further, the evidence of Ms Wellings explains why the FA sought fresh information even in those areas where it might overlap with information already held on file.
12. The FA rejects the contention that the Terms and Conditions or the provisions about appeal are unfair. They were freely accepted by Sunderland when making its licence application. In any event, the present arbitration is not an appropriate forum to raise issues about unfairness of the Terms and Conditions.

13. As for publication of the result of Sunderland's licence application, the FA had to announce the successful applications so that Sunderland's lack of success was obvious. In any case, this again was not a legitimate ground of appeal.

DISCUSSION

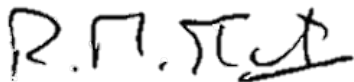
14. I appreciate the strength of Sunderland's feeling and its disappointment in not being awarded a tier 2 licence. Nevertheless, it has to be appreciated that under the Terms and Conditions my power as the Independent Arbitral Panel is extremely limited. My sole remit is to consider whether the FA has 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, to take an extreme case, 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. However, 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 Sunderland's complaints.
15. I address firstly the complaints of unfairness and "bias". Before doing so, I should however say that I do not understand the reference to "bias" as used by Sunderland as being a reference to some pre-determined tendency, whether conscious or unconscious, to reject Sunderland's application from the outset. If this were so, I would have no hesitation in saying that there is no evidence of bias. I would certainly reject bias in that sense as a legal term of art. But I understand the allegation of bias as being a reference to inconsistent and unfair treatment as between Sunderland and other clubs.
16. Under the heading "Unfair Bias" Sunderland lists 10 complaints under paragraph (A). 9 of these complain of favourable treatment accorded to other clubs, although details of the clubs in question and the reason for the treatment are not given. One of the complaints concerns payment to players, although there is no detail given; it may be, as the FA suggests, that this is a reference to clarification by the FA about when the

minimum wage would be payable. In any event, I cannot see that any of the 10 complaints can properly be said to be non-compliance with the licensing process as set out in the Terms and Conditions. The same is true for the complaints in paragraphs (B) and (C). As for Paragraph (D), this is a reference to the conditions of a draft licence after granting rather than conditions of the licensing process; there is, of course, substantial difference between removing and not granting a licence in the first place. It is in any event unclear how the clarification of a draft licence can have affected Sunderland's application.

17. Under the heading "Reasons", Sunderland gives 14 paragraphs of what are said to be "points of natural justice" [*per* paragraph 16] or an unreasonable approach by the FA. As with the complaints under the heading "Unfair Bias", they are on analysis not complaints of a failure to follow a stipulated process. Different decisions might have been taken, but that is not a failure of process.
18. Finally, I note the complaints about the Terms and Conditions and indeed the appeal process. My jurisdiction arises under the Terms and Conditions themselves, and I would have no power to deal with criticisms of them even if they were justified.

CONCLUSION

19. Doubtless Sunderland feels much aggrieved by what it perceives as a serious wrong in the decision not to award it a tier 2 licence. However, I do not regard any of Sunderland's complaints as being in truth complaints of failure to adhere to the licensing process as set out in the Terms and Conditions. Accordingly, I must dismiss Sunderland's challenge.



Robert Englehart QC, Sole Arbitrator
London, 05 July 2018



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

T: +44 (0)20 7036 1966

Email: resolve@sportresolutions.co.uk
Website: www.sportresolutions.co.uk

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