SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/0000080108

IN THE MATTER OF AN FA RULE K ARBITRATION

BEFORE: DAVID CASEMENT QC

ON 29 JULY 2013

Between:

THURROCK FOOTBALL CLUB

Claimant

- **and –**

THE ISTHMIAN FOOTBALL LEAGUE LIMITED

First Respondent

THE FOOTBALL ASSOCIATION LIMITED

Second Respondent

AWARD AND REASONS

Introduction

1. I was appointed on 19.7.13 as sole arbitrator by consent of the parties pursuant to the expedited procedure set out at Rule K8 of The FA Rules and Regulations. The Claimant ("Thurrock") served a notice of arbitration dated 11.7.13 in which it sought to challenge the decision of The FA Appeal Board as set out in its written Decision and Reasons dated 17.7.13 ("the Decision"). Despite there being express reference to Rule K8 in the Arbitration Notice it was confirmed before me by the Claimant and the Respondents that the parties wanted this hearing to be treated as a final hearing. Therefore no interim relief is sought and I am seized of the substantive issues in the case.

2. At the hearing before me the Claimant was represented by Mr Graham Bean of Football Factors. The Respondents were represented by Tom Mountford, counsel instructed by Charles Russell LLP. I am grateful to the parties and their representatives for their assistance including the preparation and delivery of clear written and oral submissions.

3. The background is set out in more detail below but in summary Thurrock participated in The "Ryman" Isthmian Football League Premier Division during the 2012/13 season. During that season Thurrock fielded a player who was suspended sine die during the 2012/13 season. The ineligible player was Joel Barnett and he played for Thurrock on four separate occasions.

4. Charges were brought against Thurrock by both The Football Association ("The FA") for breach of FA Rule E10 and also by The Isthmian Football League Limited ("the League") for breach of League Rule 6.9.

5. Thurrock was found to be in breach of FA Rule E10 by The FA Regulatory Commission on 24.5.13. The Commission found that Thurrock acted in breach of Rule E10. Thurrock received a warning as to future conduct, was fined £100, forfeited the hearing fee, and was ordered to pay £100. On the same day, the League, by its sub-committee, noted that the Commission had found Thurrock in breach and imposed a three point deduction and fined the club £75.

6. Thurrock appealed to The FA Appeal Board in respect of the Regulatory Commission findings of breach. The FA Appeal Board dismissed the appeal on 9.7.13. There is no further challenge to the factual findings of that decision ("the First Appeal Board Decision").

7. Thurrock also appealed the League decision on penalty to The FA Appeal Board whose decision was handed down on 17.7.13. The FA Appeal Board was constituted differently to that which sat on 9.7.13. The FA Appeal Board dismissed the appeal from the League decision. Thurrock served an arbitration notice on 11.7.13 to challenge this decision ("the Second FA Appeal Board Decision").

8. The deduction of the three points ordered by the League is important for Thurrock because it means the difference between being relegated and not being relegated.

The FA Rules and Regulations: Rule K Arbitration

9. The role of the Rule K arbitration tribunal is set out at Rule K1 (d):

"Rule K1(a) shall not operate to provide an appeal against the decision of a Regulatory Commission or an Appeal Board under the Rules and shall operate only as the forum and procedure for a challenge to the validity of such decision under English law on the grounds of ultra vires (including error of law), irrationality or procedural unfairness, with the Tribunal exercising a supervisory jurisdiction."

10. This is not an opportunity for an arbitrator to substitute for the Second FA Appeal Board Decision his own preferred view. I am limited to considering whether the Second FA Appeal Board Decision is vitiated by reason of it being ultra vires (including an error of law), irrational or procedurally unfair. It is clear that I exercise a supervisory function and not an appellate function.

11. I am in full agreement with Mark Warby QC sitting as an arbitrator under Rule K in Handsworth Football Club v The Football Association dated 11.7.12:

> *"First unlike the position -as it stood in the Sheffield and Stretford cases there is a rule, Rule K.1 (d), which expressly provides for the nature of my jurisdiction. It states that in an arbitration claim such as this, challenging an FA Appeal Board, I should exercise a supervisory jurisdiction. I should determine what kind of jurisdiction the wording of the Rule contemplates, and act accordingly. In my view the wording used is apt to describe the standard approved in the Sheffield United case, and I find that the likelihood is that the Rule was framed with a view to adopting that standard. That was that the arbitral panel under Rule K "stand[s] in the shoes of the High Court", and exercises a jurisdiction of the kind described in Bradley and McKeown. That is how I interpret and apply the Rule."*

12. The arbitration notice also contains a pre-hearing application namely that the decision to deduct three points should be set aside pending the completion of these proceedings. That is no longer proceeded with by Thurrock.

Background

13. The background as contended for by Thurrock is as follows.

14. It is said by Thurrock the circumstances relating to the playing of the player Joel Barnett are unusual. In August 2012 the player signed for Thurrock FC and participated in four games before leaving the club and moving to Tilbury FC where he played in a number of other games before leaving and playing for Bishops Stortford FC. In respect of all three clubs when checks were made with the Essex FA there was no record of the player being the subject of any suspension. Such checks were based on the fact that it was known that the player had resided in the Essex area for a number of years. The FA also issued instructions to County FA's to advise their member clubs to check additional FA databases but it is said the Essex FA failed to do this in this matter and the Secretary of Thurrock was unaware of any other systems.

15. However, it was subsequently discovered in January 2013, unknown to Thurrock that the player registered for a club near to his parent's home in West Yorkshire for a short period in 2011 and that club subsequently was closed down. The FA Rules relating to such club closures mean that registered players at a club which closes with outstanding financial penalties, results in the amount owed being divided up between the registered players of that club and each player having to pay his contribution. In this case that meant that the player owed the sum of £16.

16. The West Riding Football Association wrote to the player in August 2011 advising of the outstanding fine at the address shown on the registration form but received no response. They further wrote to him on 16 September 2011 advising him that until such a time as the financial penalty of £16 had been paid he would be suspended sine die.

17. However, according to Thurrock, it has emerged that the player was arrested in June 2011 for his involvement in an offence which resulted in a period of imprisonment. None of the parties have been able to either trace the player or ascertain whether he was remanded in custody until sentence. However based upon the fact that following his release from prison he played for a further three clubs and did not divulge to them that he was suspended sine die it is a reasonable assumption that he was not aware of the ban. To support this when that information was discovered on 11 January 2013 by another club wishing to sign him the penalty was paid within four days.

18. It is also said on behalf of Thurrock that to add to the confusion relating to this matter, in October 2012, whilst representing Tilbury FC, the player was sent off and his details were inputted into The FA's Central

Administration System. Even at that point it did not identify the player as a "sine die suspended player" and The FA has accepted that duplicate records can be produced which Thurrock suggest could have caused flaws in the disciplinary notification systems used to be exposed although The FA denies this.

19. Thurrock assert that The FA and League were made aware of the fact that Thurrock was in potential breach of the various rules on 15.1.13, however charges were not issued in respect of these games until some three months later on 17 April, 2 May, and 6 May, 2013. It is submitted that this delay was significantly prejudicial to Thurrock given that the season had ended when the matters were dealt with and points deducted meaning that Thurrock had no way of attempting to recoup those points.

20. The potential recouping of the points is highly significant in the case of Thurrock because as a direct result of the three point deduction Thurrock was placed into the relegation places in the League and relegated to a lower division. Such relegation is said to have catastrophic implications for Thurrock including its very future existence. Whilst other clubs suffered the same fate (deduction of points) it did not have the same effect on them.

Decision to be reviewed

21. The decision to be reviewed under this arbitration is that of the Second FA Appeal Board Decision dated 17.7.13.

22. The salient parts of the Second FA Appeal Decision are to be found at paragraphs 56 to 71. In short The FA Appeal Board found that:

    22.1 the decision as to whether Thurrock played an ineligible player and acted in breach of FA Rule E10 was a matter for the First FA Appeal Board Decision. It had found there was a breach and that decision had not been challenged;

    22.2 the League, bearing in mind the finding of breach by the First FA Appeal Board Decision, did not have any discretion to avoid deducting three points from Thurrock;

    22.3 the option of ordering a match to be replayed was not available to the League as the season had already concluded by 24.5.13.

Notice of Arbitration: Grounds

23. The grounds of challenge are set out in the Arbitration Notice and consist of the following:

Ground 1: Exceptionality

It is said by Thurrock that there are exceptional features in this case which make it clear that it did not intend to cheat and it was in fact unaware of the player's ineligibility. That fact coupled with the "miniscule" amount of the fine (£16) which is the reason for the player's ineligibility meant the outcome was entirely unfair and unjust to Thurrock.

Ground 2: Delay

It is said by Thurrock that given The FA and the League were aware of the player's ineligibility since January 2013 they were guilty of excessive delay in bringing the charges to a hearing on 24.5.13 when the season had finished.

Ground 3: Error of law

League Commission did not strictly apply Rule 6.3 in that they state in Paragraph 2 of those reasons:

"The Board feel they have no alternative but to deduct points in view of the wording of the Rule which states that "Any Club found to have played an ineligible player in a match shall have any points from that match deducted from its record and have levied upon it a fine"

Thurrock argue this clearly and unequivocally shows that the Board did not consider the second part of the Rule which states that:

"The Board may also order that such match be replayed on such terms as decided by the Board which may also levy penalty points against the Club in default"

It is said to be clear that the Board have issued a penalty of a deduction of points because that is a penalty that they have always implemented as opposed to all other considerations and the Club submits in reaching this conclusion without due regard for other matters is procedurally unfair and an error of law.

Ground 4: Disproportionality

The penalty applied is irrational and is totally disproportionate to the breach committed given the unusual and specific circumstances. There has to be a degree of rationale behind such a draconian penalty which has such far reaching implications for Thurrock FC against the other Clubs penalised in this matter.

Analysis

24. I will come to the individual grounds argued before me but at the heart of this dispute is the meaning and effect of League Rule 6.9 which states:

"Any club found to have played an ineligible player in a match shall have any points gained from that match deducted from its record and have levied upon it a fine. The Company may vary this decision in respect of the points gained only in circumstances where the ineligibility is due to the failure to obtain an International Transfer Certificate or where ineligibility is related to the Player's status only.

The Board may also order that such match be replayed on such terms as are decided by the Board which may also levy penalty points against the Club in default. "

25. I have heard submissions as what this Rule means. In my judgment Rule 6.9 is clear. If a club fields an ineligible player:

25.1 the League has no discretion but to deduct the points that the club obtained during the matches in which the ineligible player played. That consequence is unavoidable by reason of the use of the word "shall" in the first sentence of Rule 6.9;

25.2 further the club "shall" also be the subject of a fine. The level of fine is not fixed and could be from a nominal sum to a large sum depending upon the circumstances and the mitigation;

25.3 the second sentence provides a potential exemption in respect of International Transfer Certificates and is irrelevant to the present case;

25.4 the third sentence provides an option to the Board to order that a match be replayed;

25.5 the third sentence also provides an option whereby the Board may levy penalty points against the club in default.

26. Mr Bean sought to rely upon the "precedent" of Isthmian Football League v AFC Wimbledon dated 26.3.07. I was provided with no copy of the detailed reasons for that decision. I was provided only with a short statement of the decision which stated that the relevant rule was 6.8 (the predecessor to 6.9) and that the point deduction was reduced from 18 to 3. I am not told what the points consisted of - i.e. whether they were points deducted to cancel out the points obtained in games played using an ineligible player or whether they were in whole or in part penalty points.

27. I accept that in material respects 6.8 and 6.9 are the same in the material respects I am concerned with. The first sentence in respect of point deduction is the same. However I reject the argument advanced by Mr Bean that the AFC Wimbledon case is authority that there is discretion whether to make a points deduction or not:

    27.1 I have not been provided with the reasons for the decisions so as to explain what the composition of the points deducted was. There are two types of points referred to in 6.8 (as there are now in 6.9) and the copy of the award provided to me is silent on this point;

    27.2 A decision of an FA Appeal Board is not binding upon me although it may be persuasive. That is the point of a Rule K arbitration in that it operates a supervisory jurisdiction;

    27.3 In the event that the FA Appeal Board in Wimbledon found that there was a discretion not to deduct the points from a defaulting club that it had obtained from matches where it played an ineligible player I have no difficulty in concluding that the decision was wrong. It runs contrary to the plain wording of the Rule which uses the mandatory "shall" and is to be contrasted with its later use of the word "may" in respect of penalty points.

28. The Second FA Appeal Board decision was therefore correct at paragraph 71 in finding that the Board had no discretion other than to deduct the three points in respect of the one match for which the ineligible player played for Thurrock and it won.

29. The third sentence of Rule 6.9 provides the Board with two areas of discretion. These are clearly in addition to the deduction of points. The Board could order a replay of the match and it could levy penalty points.

30. The decision in respect of the possibility of a rematch is dealt with at paragraph 63 of the Second FA Appeal Board Decision. The FA Appeal Board recognised that there was such a discretion but that this option was not available to the Board or the FA Appeal Board given the season had ended at the time it gave its decision. That can in no sense be considered an unreasonable finding by either body.

Exceptionality

31. I have sympathy for Thurrock. The amount of the fine facing the player was only £16. It appears that he himself may not have been aware of the fine. It also seems clear that Thurrock itself was not aware of the player's ineligibility. The consequences for Thurrock are said to be severe with not merely relegation but also a loss of income of about £40,000.

32. That said, clearly Thurrock must shoulder some of the responsibility. It is clear that it never checked with The FA in August 2012 to ascertain if the player was eligible. It was suggested to me by Mr Bean that there is no proof that the ineligibility of the player would have been apparent if an enquiry had been made at that time of The FA database. That however is mere speculation. I was referred to the findings contained in the First FA Appeal Board Decisions paras 25 and 26:

"25. Mr Ives had given evidence that county associations were advised to direct clubs to this particular method of checking for suspensions. It does appear likely that Essex County FA (and no doubt other county associations) had not actually passed on that advice and direction, which Mr Southgate said he did not recall ever reaching him. However, it must have been obvious to him and to anyone else at the Appellant club looking at the list of suspensions which they did see on the Essex County FA website that it contained only suspensions imposed by that association. There was therefore clearly a further check which was needed to ensure that a player was not under suspension by another county association. It is the responsibility of club officers to familiarize themselves with the necessary procedures and to consult their county association or the FA if they are in any doubt. In this case it is apparent that the Appellant had ascertained only that there was no Essex County FA suspension of Mr Barnett but (apart from asking the player himself, which could not have been treated as an adequate assurance) did nothing more.

26. Mr Bean valiantly attempted to paint a picture of the Appellant club as having done everything it could reasonably have done to check for any suspension of Mr Barnett. For the reasons summarized in our previous paragraph, that is not the true picture."

33. In my judgment, the circumstances are not exceptional. Ineligibility is ineligibility irrespective of the reason or the amount of the fine. The consequences I accept are severe and regrettable however that is as a result of the clear application of the rule which makes it mandatory to deduct points.

34. I therefore reject the suggestion that exceptionality provides any basis to impeach the Second FA Appeal Board Decision in this case.

Delay

35. It was urged upon me that there was a delay in bringing the charges against Thurrock and then further delay in determining those charges on 24.5.13. It is said this amounts to procedural unfairness.

36. I have no difficulty in rejecting delay as a basis for impeaching the Second FA Appeal Board Decision:

36.1 whilst delay may have been mentioned during the hearing before the League and the FA Appeal Board it was not advanced as a separate ground upon which to obtain relief and hence was not considered by either tribunal. It is too late to raise such a matter as delay at the arbitration stage because it requires a factual enquiry as to what took place and when and the reasons therefore;

36.2 in any event I do not consider that there was undue delay in this case. Thurrock had requested a personal hearing and there was no request for expedition. The period between the charges being brought and the eventual hearing cannot be left solely at the door of the Respondents;

36.3 it was submitted on behalf of the Respondents that it only became aware of a match in which the ineligible player played for Thurrock and which it won (namely the match of 25.8.12) after the issue of the initial charges on 17.4.13. On the other hand Thurrock would have been aware of the fact that it had obtained points on 25.8.12 and would have been aware since January of the likely implications. It could have pressed for an earlier hearing;

36.4 further, it has not been demonstrated that there was any serious prejudice to Thurrock as a result of the fact that the hearing took place on 24.5.13. True it is that the season had ended by that stage but that assumes that the Board would otherwise have been minded to order a replay. That is speculative at best. In reality it is likely that such rematches would usually only be ordered

where it would be fair and of benefit to the non-defaulting team. There is no suggestion of that in this case.

Error of Law

37. Thurrock argues that the first sentence of Rule 6.9 contains a discretion. It prays in aid the decision of the FA Appeal Board in the Wimbledon case. I have already considered this above. For the reasons set out I reject the argument advanced on behalf of Thurrock which is clearly contrary to plain meaning of the words used.

Proportionality

38. In the absence of a discretion there is no scope to consider proportionality in respect of the deduction of the three points. It is not the role of an arbitrator to strike down a rule that has been agreed between the members of the League.

39. In any event in my judgment there is nothing disproportionate about deducting the points that a defaulting club obtained in a match in which it played an ineligible player.

Conclusion

40. This is an unfortunate case and I have sympathy for Thurrock. However, the meaning of Rule 6.9 is clear. It must forfeit the points that it earned during the match that it won whilst playing an ineligible player.

41. No proper basis has been demonstrated for impeaching the Second FA Appeal Board Decision. The claim brought by way Thurrock by way of arbitration is therefore dismissed.

42. I will hear the parties in respect of the costs of this arbitration. My provisional view, based upon the findings, is that:

42.1 the Claimant shall pay 50% and the Respondents shall pay 50% of the arbitration panels costs including the administration costs and expenses directly to Sport Resolutions;

42.2 the Claimant shall pay to the Respondents the Respondents' costs incurred in the arbitration proceedings and also the 50% share of the costs liability incurred by the Respondents above;

42.3 I shall carry out an assessment of the costs in the absence of agreement between the parties. Any party is at liberty to make application to me in writing notifying the other parties of the relief sought and I will give directions for such assessment.

43. If any of the parties wish to argue for some alternative order or direction I shall be content to hold a telephone hearing at a convenient time.

DAVID CASEMENT QC

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