IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF RULE K OF THE FOOTBALL ASSOCIATION RULES

Before David Casement QC sitting as sole arbitrator

5 October 2014

BETWEEN

MR JAMES HOLDEN

Claimant

-and-

(1) THE FOOTBALL ASSOCIATION

(2) THE CHESHIRE COUNTY FOOTBALL ASSOCIATION

Respondents

FINAL AWARD

1. The claim brought by the Claimant, James Holden, by arbitration notice dated 5 June 2014 is hereby dismissed.

2. The parties shall be at liberty to apply in respect of any ancillary orders including costs in which event directions will be given.

3. The seat of this arbitration is England.

DAVID CASEMENT QC

REASONS

Appointment

1. By written terms of appointment I was appointed by the three parties to act as sole arbitrator pursuant to Rule K of The Football Association Rules. I gave case management directions 18 August 2014 leading to a hearing which took place at Wembley Stadium on 22 September 2014.

2. At the arbitration hearing Mr Daniel Burgess of counsel appeared for the Claimant and Mr Tom Cleaver of counsel appeared for the Respondents. Neither counsel appeared in the earlier hearings before the Disciplinary Commission or the Appeal Board. I am grateful to both counsel for their very helpful written submissions and their oral submissions at the hearing.

3. Rule K of The Football Association Rules provides:

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.

Background

4. On Sunday 17 November 2013 the Claimant herein, James Holden, played for Cale Green against AFC Stockport in the Cheshire FA Sunday Challenge Cup. After the final whistle there was an altercation between Mr Holden and an assistant referee namely Robert Vaisey. By a letter dated 20 November 2013 from Garry Polkey of the Cheshire Football Association, Mr Holden and Cale Green were informed that charges were being processed in respect of the

incident and that Mr Holden was suspended from all football with immediate effect because the main charge was an assault on a match official.

5. The charge letters were processed and sent to Cale Green on 21 November 2013. Mr Holden was charged with three counts under FA Rule E3 namely (1) assault on a match official (2) improper conduct against a match official (including threatening and/or abusive behaviour) and (3) improper conduct (including threatening and/or abusive language/behaviour). Cale Green was also charged in respect of the violent conduct and suspended for four matches and fined. Cale Green did not contest the charge against it.

6. The response to the charges from Mr Holden was by way of a letter to the match officials which, among other things, stated "I am disgusted and embarrassed by my actions and the FA has charged me which is obviously the correct procedure to take. I wish to make it clear that at no time was the comments and conduct I made and said with any real intention and it was stupid "heat of the moment" incident which I now bitterly regret. I anticipate that I will receive a lengthy suspension and because of my conduct and do not have any issues with this. It is something that I deserve because it is wrong for players to abuse officials when all they are trying to do is officiate a game to the best of their ability. Once again, please accept my apologies."

7. On 25 February 2014, the Disciplinary Commission of the Second Respondent ("Cheshire FA") found the Claimant ("Mr Holden") guilty of breaches of FA Rule E3. It found as a fact that he had headbutted and painfully grabbed the testicles of a match official, decided that that amounted to 'Assault on a match official' within the meaning of the applicable rules, and (in accordance with the recommended sanction for such an offence) banned him from all football for 5 years. In particular I refer to paragraphs 27 to 30 of the findings by the Disciplinary Commission.

8. The commission was rightly concerned to apply the Memorandum of

Procedures for Field Offences 2013 to 2014 ("the Memorandum") which sets out at Rule 14.2 the three categories of the offence namely threatening behaviour, physical contact or attempted physical contact and assault which causes injury to an official. The Memorandum also sets out at Rule 14.5 the recommended punishments for each category. The recommended punishment can be reduced or increased depending upon any mitigating or aggravating factors that are present. It is of note that the Memorandum applies to all levels of the game excluding the six designated Leagues.

9. In the present case it is contended on behalf of Mr Holden that the offence fell into the category of physical contact or attempted physical contact which did not result in injury with a recommended punishment of 6 months suspension and a fine of £150. This is in contrast to the Commission's finding that it was an assault resulting in injury for which the recommended punishment is 5 years suspension.

10. Mr Holden appealed against the decision of the Disciplinary Commission. He asserted that the decision was wrong in law because it wrongly placed the case into the most serious category and wrongly found there was injury caused by the assault. He also asserted that the decision was tainted with procedural unfairness. The procedural unfairness was said to consist of the following:

(1) the Commission included one member of the FA Referees Committee of the Second Respondent;
(2) the Commission failed to provide the handwritten notes from the match officials so as to enable those to be compared with the typed notes that were provided;
(3) Mr Polkey, the Second Respondent's secretary and the person who laid the charges, remained in the room whilst the Commission was deliberating. Mr Holden's representatives relied upon Flaherty v NGRC [2004] EWHC 2838 Ch D and [2005] EWCA Civ 1117 CA;

(4) Mr Polkey stated during the hearing that "the FA is happy with the charges";

(5) the Commission refused to provide its written reasons to Mr Holden's representative prior to him having to lodge his appeal notice. It was said this was a breach of the obligation to provide minimum safeguards of procedural protection to the individual affected by their actions and to act fairly. Reliance was placed upon Bradley v Jockey Club [2004] EWHC 2164 QB at 34.

11. On 16 April 2014, the Appeal Board of the Second Respondent ("the FA") dismissed an appeal against that decision.

12. The Appeal Board decision is the subject of this Rule K Arbitration. However Mr Holden's attack on the Appeal Board decision is in effect in two parts:

(1) the Appeal Board was wrong in law in not allowing the appeal from the Commission for the reasons set out in the appeal notice and clarified in the skeleton argument of Mr Burgess;

(2) the Appeal Board decision itself was tainted with procedural unfairness by reason of the following:

(a) the Second Respondent served its reply to the Notice of Appeal three days late;

(b) the Second Respondent circulated an appeal bundle to the Appeal Board which omitted all of the evidence provided by the Claimant. This was later rectified but it is said it was nonetheless a failure on the part of the Second Defendant giving rise to procedural unfairness;

(c) two members of the Appeal Board were members of the County Football Association.

The requirement of injury to be caused by the assault

13 Rule 14.2 of the Memorandum provides the following three categories:

14.2 There are three categories of offence:

(a) Threatening Behaviour: words or actions that cause the official to believe that he/ she is being threatened.

(b) Physical Contact or Attempted Physical Contact: e.g. participant pushes the referee, pulls the referee (or his clothing/equipment), barges, or kicks the ball at, the official causing no injury and/or attempts to make physical contact with the official e.g. attempts to strike, kick, butt, barge or kick the ball at the official

(c) Assault: participant acts in a manner which results in an injury to the official. This category includes spitting at the official whether it connects or not."

14. A question in this case is whether the findings of fact made by the Commission, as to which there is no challenge, fall within Rule 14.2 (c).

15. On behalf of Mr Holden it has been submitted by Mr Burgess that there was no injury caused to Mr Vaisey. Mr Burgess submitted the following:

(1) the Appeal Board itself interpreted the Commission's findings as meaning there was no injury in the sense that there was no physical injury. In the Appeal Board's findings at paragraph 44 it stated "..the fact that no physical injury was present."

(2) the Appeal board misdirected itself at paragraph 37 of its decision:

"The Appeal Board were firmly of the opinion that the County had not misinterpreted or failed to comply with the Rules and Regulations relevant to its decision. The evidence clearly confirmed the aggression shown by Mr Holden towards the match official. It may well have been fortunate that the match official moved away from Mr Holden as that may well have prevented a more serious "coming together" of their heads. Further grabbing a person's testicles must be classed as a form of assault and we are certain that the man in the High Street would have no hesitation in agreeing with that basic common sense approach. It is accepted that there are different degrees of assault and each may cause a different degree of injury which may result in serious broken bones (or worse) down to tenderness and soreness. An injury does not have to be a physical injury."

This is said to involve an erroneous finding by the Commission that it was sufficient to merely have emotional injury eg the official felt humiliated by reason of the assault.

(3) the precursors of Rule 14.2 are closely aligned to the criminal law and made the distinction between common assault and assault occasioning actual bodily harm. It was contended that common assault was the equivalent of category (b) under Rule 14.2 and was relevant where was nothing more than a transient or trivial physical or mental injury or no injury at all. Mr Burgess contended that with assault occasioning actual bodily harm as with category (c) of Rule 14.2 it was necessary for there to be a physical or mental injury of a continuing and observable nature. He contended that emotional injury was insufficient.

16. In my judgment the meaning of Rule 14.2(c) is clear. It is not sufficient for the Second Respondent to prove there was an assault on a match official. It is also necessary for it prove that injury resulted from the assault. That is the major point of distinction between category (b) and (c) of the Rules. However

the injury that is required to be proved is not limited to physical injury. It would have been entirely open to those who drafted the rules to insert the work "physical" or other limiting words before "injury" or to limit the type of injury by reference to the distinction at criminal law between common assault and assault occasioning actual bodily harm. If the rules had been drafted in such a way as to incorporate criminal case law then a clear distinction would have been drawn between physical and psychological injury on the one hand and emotional injury on the other. Had the rule been so drafted then Mr Holden's arguments may have had more force but on the facts of the present case his case would still have come within category (c) because in the present case there was a clear finding by the Commission of not only assault but also of physical injury.

17. Physical injury for the purposes of Rule 14.2 need not be lasting and/or observable physical harm. It is clear that it must be something more than trivial harm but I can see no reason to imply a limitation whereby the harm must be observable or lasting. The present case is a good example of physical injury because the finding of the Commission, which is unchallenged, is that there was a painful grabbing of the match official's testicles by Mr Holden. Reference to the painful grabbing appeared twice in the findings of the Commission. In my judgment the infliction of pain to the testicles of the official as a result of the grabbing by Mr Holden is an assault causing more than trivial injury and it is irrelevant that the injury is not observable, verifiable by way of medical evidence or long lasting. Likewise it does not cease to be an injury because the pain subsides after a short period.

18. Furthermore, in my judgment it is also not necessary for the injury to be physical. There are no such words of limitation in Rule 14.2. I am also fortified in this conclusion by the closing words of Rule 14.2 of the Rules which provide that *"This category includes spitting at the official whether it connects or not."* It is clear that this inclusion is aimed at a type of injury which is not physical, the spitting does not even need to connect. The only

realistic type of injury that might be caused by spitting is emotional injury and that would include undermining the position of the official in question. The inclusion of spitting in this category is very telling because if physical or mental injury was a pre-requisite of this category, as asserted on behalf of Mr Holden, then a spitting offence would not fall within any category and therefore would not be subject to any sanction.

19. Mr Burgess courageously sought to argue that spitting might cause infection and therefore a physical injury. This submission was ethereal. These rules are not concerned with hygiene and the possibility of a spitting incident resulting in physical injury must be negligible a fortiori where the spitting does not connect.

20. The findings of fact made by the Commission were not challenged before the Appeal Board or before me and neither could they be challenged given the terms of reference. The Commission found "...contact had been made and in the opinion of the Panel this had incurred "injury" to the match official by way of "abuse", "hurt" and "undermining his position as a match official." (paragraph 30). I cannot go behind those findings and neither could the Appeal Board. Those factual findings, together with the finding of a painful grabbing of the testicles were more than sufficient to establish physical and emotional injury to Mr Vaisey within the true meaning of Rule 14.2 (c).

21. I considered the submissions made by Mr Burgess in respect of the earlier rules and the link with the criminal law. There are major differences between the previous rules and the current rules. The absence of express reference to the criminal law being one. However of even greater importance is the inclusion of spitting in the most serious category namely assault which represents a sea change in how the rules view the type of injury which is caused as a result of assaults and spitting. I have therefore found that those submissions regarding the criminal law were unhelpful in determining the true meaning of Rule 14(2).

22. I also considered the submission that the Appeal Board found that there was no physical injury. The Appeal Board was not entitled to look behind the findings of fact made by the Commission and it was not asked to do so. It is therefore clear that the Appeal Board accepted that there was a painful grabbing as found by the Commission. The decision of the Appeal Board might have been better worded but it is tolerably clear that it adopted the Commission's findings of fact and found that the findings did not amount to lasting or observable physical injury but there was injury nonetheless. In any event and irrespective of the paucity of reasoning in the Appeal Board's decision it reached the correct result for the reasons set out above.

23. In my judgment players must be aware that under Rule 14.2 (c) if a player assaults a match official or spits at a match official (whether it connects or not) and which results in injury of a physical, mental or emotional nature which is more than trivial then they are likely to face a five year suspension from football subject to any aggravating or mitigating factors. That is the clear effect of Rule 14.2 (c).

Procedural Unfairness: Disciplinary Commission

24. I shall first deal with the allegations of procedural unfairness before the Disciplinary Commission. It is alleged that because Mr Burberry sat on the Commission and he is a member of the FA Referees Committee of the Second Respondent the Commission was tainted with apparent bias. The test for apparent bias is whether the inclusion of Mr Burberry would in the mind of the fair-minded observer, who is familiar with the relevant facts, give rise to a concern that there was a risk of bias. This allegation was not made out. The mere presence of a person who sits on another committee that is specifically concerned with referees could be of no concern to an informed and fair-minded observer. The point of having such people serve on Commissions is to benefit from their expertise: *Nwabueze v GMC* [2000] 1 WLR 1760 "*It is in*

the public interest that those who serve as lay members on disciplinary bodies of this kind should be well-informed and have experience of working in the area within which cases are likely to arise on which they may be called upon to adjudicate." See also R (Kaur) v (1) Institute of Legal Executives Appeal Tribunal and (2) The Institute of Legal Executives [2011] EWCA Civ 1168).

25. The second challenge brought by Mr Holden in respect of the Commission was that they did not order the release to him of the handwritten notes which were used to compile their typed reports. There was no application for such reports to be released and this was the subject of mere adverse comment on behalf of Mr Holden that the notes had not been provided. There is no justifiable complaint to be made by Mr Holden in this respect where no application was in fact made. In any event the typed reports were produced and Mr Holden did not challenge the accounts given in those reports.

26. The presence of Mr Polkey, who was the representative of the Second Respondent who laid the charges, during the Commission's deliberations was of greater concern. This is not best practice. Officials in a position such as Mr Polkey should not remain in the room with those who have to make a determination Flaherty v NGRC [2004] EWHC 2838 Ch D and [2005] EWCA Civ 1117 CA). I have not heard anything of what Mr Polkey did in the room and there is no evidence one way or the other as to when Mr Holden and his representative became aware that Mr Polkey remained in the room and whether they had an opportunity to object. It is clear that no objection was taken at the time. In my judgment it was for Mr Holden and his representative to set out evidence before the Appeal Board or before me as to when they became aware that Mr Polkey was in the room with the Commission whilst it deliberated and whether they had an opportunity to object. The burden of proof in respect of proving that he had no knowledge at the time and did not have an opportunity to object was upon Mr Holden: R v Byles and others ex p Hollinge [1911-13] All ER 430. I am not prepared to find the process vitiated by bias where Mr Holden has failed to raise an

objection at the time and has also failed to provide evidence of when he was aware of Mr Polkey remaining in the room. This ground therefore fails.

27. The separate but related ground regarding Mr Polkey was that it is asserted that during the hearing Mr Polkey said "the FA is happy with the charges" or words to that effect. It has not been explained to me what these words are taken to mean but in my judgment whatever they mean it is clearly only the view of a third party. This could not have been a matter of any weight before the Commission and I note that it is not referred to in the Commission's findings. There was also no challenge made at the time the statement was made. I reject this challenge.

28. Finally it is contended that the refusal of the Commission to provide its reasons for its decision until after Mr Holden had lodged his appeal is a ground of procedural unfairness which enables the Commission's decision to be set aside. In fact after the response to the Appeal by Mr Holden was served (including the Commission's reasons) he was able to utilise the reasons to prepare another document entitled "Response to the CCFA Document" which he submitted to the Appeal Board. No prejudice arising from the delay in providing the Commission's reasons has been identified to me. I am satisfied that the delay did not in any way prevent Mr Holden from presenting his case on appeal.

29. In my judgment there was no procedural unfairness before the Commission which Mr Holden is entitled to utilise in challenging the decision of the Commission. The Appeal Board was therefore correct in finding that there was no procedural unfairness before the Commission.

Procedural Unfairness: The Appeal Board

30. First, Mr Holden contends that the Second Respondent lodged its reply to the Notice of Appeal three days late. There is a dispute between the parties as to

whether it was one day or three days late. That dispute is of no consequence in these proceedings because no prejudice has been identified by Mr Holden. It is entirely insufficient to identify a breach of a rule, no matter how slight, and without identifying any prejudice seek to penalise the party at fault let alone seek to set aside a decision. This ground is rejected.

31. Secondly, I am told and it is common ground that the Appeal bundle did not contain the evidence that had been advanced by Mr Holden. The appeal bundle was circulated on 4 April 2013 and re-circulated with the full materials on 7 April. The hearing took place on 14 April. There could have been no conceivable prejudice to Mr Holden and none has been identified. I am also conscious that there was no challenge in respect of the facts before the Appeal Board. This ground is rejected.

32. Thirdly, it is asserted that there was procedural unfairness because two members of the County Football Associations were amongst the Appeal Board. This is an assertion of apparent bias. The Appeal Board held *"(a) neither of the County FA representatives had any connection with Cheshire FA, (b) each County Association is an independent company limited by guarantee and has no connection with each other, and finally (c) knowledge of County proceedings is essential to the fairness of the proceedings."* I agree with the Appeal Board's conclusions in respect of this point: Nwabueze (supra). I reject this ground.

Conclusion

33. In my judgment the decisions of the Appeal Board and that of the Disciplinary Commission were correct in finding that this case fell within Rule 14.2(c) of the Rules. There was an assault which resulted in physical and emotional injury to the match official. This was a particularly bad example of an assault on a match official involving a headbutt and a painful grabbing of the

testicles.

34. I have considered the various challenges to the procedural fairness of the Disciplinary Commission and the Appeal Board. For the reasons set out above I reject each of the grounds advanced. I also reject the suggestion that cumulatively they amount to procedural unfairness because there was no prejudice caused by any of the alleged breaches.

35. I have considered the final submission made on behalf of Mr Holden at the hearing namely that, even if I am against the claim in respect of everything else, I should still consider mitigation so as to reduce the 5 year suspension. The decision was made by or on behalf of Mr Holden not to advance any mitigation before the Commission. I cannot therefore interfere with the decision of the Commission in respect of the length of suspension, there is simply no proper basis upon which to do so and none was identified to me.

36. The claim is therefore dismissed and period of suspension of 5 years will remain in place.

37. I will hear further from the parties in respect of any ancillary applications including costs.

38. The seat of this arbitration is England.

DAVID CASEMENT Q.C.

5 October 2014