Gillingham Football Club Limited

Paul Scally

Appellants

and

The Football Association

Respondent

Decision of the Appeal Board

1. This appeal concerns a finding of a Regulatory Commission, who after a hearing held in April 2015 found both Appellants to be in breach of FA Rule E3(1) in that the Appellants had together committed an act of race victimisation against their player Mark McCammon ("the Player"). Subsequently, and in July 2015 the Appellants were each fined the sum of £75,000 with the second Appellant in addition being ordered to undertake an education programme.

2. That finding and subsequent sanction are now appealed pursuant to a Notice dated 13th August 2015.

3. The Appeal Board sat at Wembley Stadium on the 15th September 2015 to hear the Appeal. The Board considered the entirety of the bundle of documentation that had been provided to them and heard helpful oral submissions presented by Michael Duggan QC on behalf of both Appellants and from Max Baines appearing for the Respondent. Judgement was reserved.

4. The facts of this case are set out at some length with admirable clarity in the various documents previously prepared in respect of this somewhat sad and rather protracted case. Accordingly, those facts are not rehearsed here in detail.

5. On the 30th November 2010 the Player alleged to the Club manager and the managers assistant that they were racist and that he had been the subject of racial discrimination. After an internal disciplinary hearing, the player was dismissed by his then club notice being given in a letter dated 31st January 2011. In that correspondence it was stated that one of the reasons for the Player's dismissal had been the accusation made by him concerning racism.

6. Proceedings were commenced by the Player in the Employment Tribunal. There was no dispute that the Player had accused the club officials of race discrimination. What was very much in dispute (and remains at the heart of this appeal) is whether the Player had a genuine belief in his accusation. Having regard to the relevant provisions of the Equality Act 2010, the

accusation would not have been a "protected act" within the meaning of Section 27 of the Act, if it was made on bad faith.

7. On the 27th July 2013 the Tribunal ruled that the Player had been the subject of race victimisation by dismissal and damages were awarded. The decision of the Employment Tribunal was subsequently upheld upon appeal by the Employment Appeal Tribunal sitting on the 3rd September 2013.

8. Some 12 months later on the 23rd September 2014 The FA Charged the Appellants with a breach of FA Rule E3(1) in failing to act in the best interests of the game and/or bringing the game into dispute by their conduct in committing an act of race victimisation in the dismissal of their player. In so charging the parties, The FA relied upon the provisions of Regulation 6.9 in the proof of their case, namely that;

   "*where the subject matter of a complaint or matter before the Regulatory Commission has been the subject of previous civil...proceedings, the result of such proceedings and the findings upon which such result is based shall be presumed to be correct and true unless it is shown, by clear and convincing evidence, that this is not the case".*

9. In their challenge to the charge, both Appellants raised a twofold defence. Firstly, that the allegation made by the Player on the 30th November 2010 was made in "bad faith" within the meaning of the Equality Act and accordingly was not a protected act within the legislation. Secondly, that the letter sent notifying the Player of his dismissal had inadvertently been mis-worded so as not to make clear that which had been the true reasoning of the club, namely that the Player had no belief in the truth of his allegations. Put shortly in that respect, he was not being dismissed simply because he had made the allegation.

10. The Commission heard comprehensive evidence to the effect that (in the Board's words) the dismissal letter was sent in error in that it did not contain those words that had been prepared in an earlier draft that had referred to the allegations being "...*wholly untrue and unacceptable*".

11. Having regard to the provisions of Regulation 6.9 employed by The FA and to the finding of the Employment Tribunal, the Regulatory Commission were bound to consider whether there was *clear and convincing evidence* to the requisite standard of proof in support of the contention that the Player had in fact made his allegation in bad faith and/or that the Player was not dismissed simply by reason of his having made the allegation (as the terms of the letter on any construction actually suggested).

12. The Regulatory Commission did not proceed to hear the case based solely on the findings of the previous Tribunal but rather took evidence from all the relevant parties. Crucially in the consideration of the Board, the Commission heard from the Player and so were well placed to judge him as a witness and best placed to judge his credibility. In such circumstances a Board sitting on appeal will be slow to interfere with the judgement of the Commission. There

would need to be compelling reasons available to a Board in order to reach a conclusion that the Commission's decision, with that benefit of seeing and hearing the witness, was 'unreasonable' in the sense of this appeal.

13. In finding the case proved against the Appellants, the Commission made clear that not only did they find there to be *no* clear and convincing evidence of bad faith on the part of the Player but rather they found that the Player *had* made his allegations in good faith. At paragraphs 21 and 22 of their written reasons the Commission observed that they saw;

    " *...no realistic basis for concluding.....that the player made his allegations...in bad faith... it is impossible to suppose that...the allegations were calculated or contrived or that [the player] did not believe them himself..."*

14. Further and similarly, the Commission whilst acknowledging that the solicitors then acting for the Appellant club had failed to incorporate the phrase Mr Scally had drafted for the dismissal letter (see paragraph 10 herein above), concluded that there was *"...no evidence...that the club's (and Mr Scally's) true reason for dismissing Mr McCammon was that he had made the allegations...when he did not believe they were true.....In fact we find clear and convincing evidence the other way"* (Reasons paragraph 33).

15. By their Notice of appeal, the Appellants now contend that the Regulatory Commission fell into error in reaching their conclusion that there was *no* clear and convincing evidence that the findings of the Employment Tribunal were not correct and true. In so doing the Appellants, by their Notice of Appeal and in the written submissions handed to the Board at hearing, echoed the twofold elements of the defence that they had both presented to the Commission.

16. At paragraph 12 of their Notice the Appellants averred in their grounds of appeal that the Commission;

    (i) misinterpreted or failed to comply with the rules or regulations relevant to its decision; and /or

    (ii) came to a decision to which no reasonable Regulatory Commission could have come.

17. At the outset of the hearing before the Board Mr Duggan QC clarified that the first ground was not one that was to be pursued. The Appellants case was presented on the basis of the second ground, namely the consideration of the "reasonableness" of the Commission's decision.

18. In addition, the Appellants contended that the fines respectively awarded against them were excessive.

19. The Appellants had in their Notice of Appeal made application to adduce fresh evidence at the appeal. Again, that application was not pursued when raised as a preliminary issue at the hearing with Counsel for the Appellants.

Finding of Breach

20. The Board reminded itself that the burden was on the Appellants to satisfy the Board that the Commission's conclusion that there was no clear and convincing evidence was a conclusion that no reasonable Commission could have reached. This was not an exercise in replacing the Commission's conclusions on the facts with those of the Board such as they might have been. The appeal was not a rehearing. The Board was concerned solely with the question as to whether the Commission's decision was so unreasonable that it was of a kind that no other Commission could have arrived at. That, as is always noted in appeals of this kind, is a significant challenge of proof to the Appellant parties, particularly the Board notes again, where it was the Commission that had the advantage of assessing the credibility of the parties as they gave evidence.

21. In written submissions in support of the grounds advanced, the Appellants made reference to the question of delay in the proceedings. The Board enquired how it was to be suggested that such 'delay' sounded as part of the unreasonableness alleged upon appeal. Mr Duggan QC helpfully explained that the assertion amounted to no more than a concern on the part of the Appellants that the Board might consider their failure to appeal the Employment Appeal Tribunal decision has been somehow indicative of their acceptance of the findings (to their detriment). The Board indicated that no such inference was to be drawn. It is abundantly clear from the totality of the history of this case that the Appellants did not accept the factual and other findings made against them.

22. In support of the contention that there was clear and convincing evidence that the Player *was* acting in bad faith, the Appellants sought to rely, inter alia, on the Player's untruthfulness (as it was alleged to be). The sense of that point and its analysis appears in various different forms and in different descriptions throughout the body of the Appellants' Notice and subsequent written submissions.

23. At paragraph 3.3 of their written submissions the Appellants put it succinctly that, " *...the [Commission] found...[the Player] had acted untruthfully in so many respects that the [Commission] should have found that [the Player] could not have believed his allegations of racism when he made them ... or alternatively he knew them to be untrue*".

24. In addition, it was said that the Player's conduct at and after the time the allegation was made, was inconsistent with a genuinely held belief. As Mr Duggan QC was to describe it, an exercise in being able to examine the "mindset" of the individual by his conduct providing a 'window into the mind'. A detailed analysis of the particular parts of the evidence said to support those contentions appeared principally at paragraph 15 of the Appellants' Notice.

25. Each matter raised by the Appellants was considered by the Board in its deliberations. This Decision Note is neither designed or intended to be

comprehensive in its comment upon each and every point made. It seeks to illustrate the prinipal considerations made by the Appellants and the Board's thinking thereon.

26. In oral submissions the Appellants suggested that the Player had been found by the Commission to be untruthful on all the 'centrally important' issues. The Board concluded that a more exacting study of the findings of the Commission did not readily support such an all embracing contention.

27. It is however right, that the Commission found as a fact (and contrary to the evidence given to them by the Player) that the Player had been "*skiving*" on the November day in question. The Appellants suggested that such a finding "demonstrated that [the player] could not be believed". The Board unreservedly agree that it is clear that the Player could not be believed on *that* point. However, it was the Appellant's case that the conclusion to be dawn from that finding was that the Commission (in the words of the Appellants) "found he was not telling the truth".

28. No where in the reasons provided by the Commission do they express themselves as having found the Player not to be telling the truth - as it were - in respect of all matters. After all, the Commission found that the Player was telling the truth on the "key issue" as it was described to be in the case, namely the question of genuine and honest belief, held in good faith. The Appellants assertion is in the view of the Board unsustainable.

29. Moreover, the Board were of the opinion that the fact that the Player had his credibility questioned in respect of one (and other) matters incidental to the principle issue in the case does not in good sense or good law mean that a Commission should thereafter regard *all* his evidence as inevitably incredible. The task of the Commission was to judge the witness in the round and give such weight to his evidence in all the circumstances as they found them to be. A finding of untruthfulness in aspects of the Player's evidence does not mean that it is unreasonable to then treat other parts of the same witness' evidence as credible and worthy of belief.

30. In respect of those other 'circumstances' the Appellants suggested that the Player's conduct was inconsistent with having a genuine belief and rather were no more than words spoken in what was suggested to be a "rant".

31. The Board carefully considered each element of those matters relied upon in this regard by the Appellants, taking account as they did elsewhere of both that which was said on behalf of the Appellants and that which had been presented on behalf of The FA.

32. In particular, the Board had regard to the argument that the Player had been found to be "*agitated*" *"angry*" and "*resentful*". It was said that it should be inferred from such emotions and demeanour that they were inconsistent with a player acting in good faith. The Board fail to see any merit at all in that analysis. An angry out pouring of emotion could, in the collective experience and judgement of the Board, be equally consistent with a man pushed to

speak his mind as he genuinely believed it to be. To suggest, as the Appellants necessarily must, that to conclude other than the circumstance speaking of bad faith would be unreasonable, is itself a wholly unreasonable proposition.

33. The Board were drawn to a similar conclusion in respect of the Appellants' interpretation of the words allegedly spoken by the Player at the relevant time to the fact that another "*little white boy"* had been treated differently. The Player was to deny those comments but the Commission found it 'probable' that they were spoken. The Appellants suggested that use of such language indicated that the Player had racist thoughts in mind and accordingly the Commission should have then found the words to be consistent with a false outburst just a little time later.

34. Again, the Board see no merit in the approach of the Appellants. Rather, the Board see the force in the submission made by The FA to the effect that it is equally reasonable to infer that the Player was genuinely concerned about the way he was being (as he saw it) racially discriminated against, and so began vocalising his genuinely held concerns - however misplaced they had in fact been.

35. This example well illustrates how a series of words spoken, with a particular demeanour are fairly and properly capable of being interpreted in two different ways - as the different submissions of the Parties reveal. The instance does not, as Mr Duggan sought to suggest, provide either a clear or convincing insight into the Player's mind of a kind would render it unreasonable to rely upon his assertion upon the key question in the case.

36. It was further suggested by the Appellants that the fact that the PFA had (on the hearsay account given by Mr Scally) considered the Player's conduct to be no more than a "rant" was a still further illustration of an attitude that was said by the Appellants to be inconsistent with a genuine belief. The Board attach no weight to the observations (if indeed they were so made) from a person or party who was not present at the relevant time of the events. The Commission were significantly better placed to judge all the circumstances of the case having heard evidence of the events from the witnesses concerned.

37. A point that was of greater significance was that made for the first time in the written submissions presented on behalf of the Appellants to the effect that it was suggested that the Player had not directly raised the issue of discrimination at his club disciplinary hearing (which was recorded and subsequently transcribed). The point is less meritorious when the context and totality of those proceedings are considered. As the Employment Tribunal had noted there was no investigation at all about the accusations at the hearing, because, as the Tribunal were to conclude, Mr Scally had discounted them from the outset.

38. Taken individually and collectively, those matters of credibility and circumstance advanced by the Appellants do not in any sense render the conclusion of the Commission unreasonable. It was not unreasonable for the

Commission to have found the Player credible on the central issue to the case in circumstances where there was far from clear and convincing evidence upon which to conclude that the Player was beyond belief per se. The Commission were not unreasonable - as is necessarily inferred from their approach - in concluding that the extraneous circumstances were not necessarily inconsistent with his allegation.

39. That conclusion is in the Board's opinion supported by an important piece of evidence that the Commission expressed to be a part of their reasoning, namely the fact the Second Appellant himself gave evidence to the Commission that was equivocal as to whether the Chairman himself thought the Player had a genuinely held belief. The evidence documented at paragraph 34 of the Commission's reasons details how the Appellant had expressed in his own words the possibility that the Player did indeed believe what was being said. Such a position is wholly inconsistent with the suggestion as it now put that the Commission were unreasonable to conclude, as they did, that the Player had told the truth on that point.

40. The second limb of the Appellants arguments on appeal centred on the content of the dismissal letter. Again no detailed repetition of the facts specific to this point is required. The Commission (as set out in particular at paragraphs 26 to 40 of the reasons) acknowledged that the club had in mind to express the fact that the allegations were "*wholly untrue and unacceptable"* but that the phrase never found its way into the dismissal letter.

41. The Commission carefully set out their reasoning as to why in their considered opinion that omission and its surrounding circumstances as revealed in the evidence heard before the Commission, did not in fact lead them to a conclusion that there was clear and convincing evidence that at the material time the Appellants considered the bad faith of the Player to be a reason for his dismissal. The evidence spoke of the Appellant's firmly held view (rightly) that the allegations were unfounded, but the Board concur with the Commission's analysis that there is no clear and convincing evidence upon which to base a finding that the Player was dismissed for reasons other than his having made the allegation as was stated in the correspondence. It was not therefore, the Board find, unreasonable for the Commission to conclude as they did.

42. That conclusion is again, as The FA were to assert, supported by the fact that Mr Scally had revealed himself upon his own evidence to be equivocal about the Player's state of mind. Again, that is inconsistent with a proposition made now that there could be clarity as to the Player's mindset as the Appellants would now have it to be.

43. Having considered all the material and submissions before them, the Board arrived at the firm conclusion that the Commission were <u>not unreasonable</u> to have arrived at the verdict they did. It was not unreasonable for the Commission to have concluded that there was no clear and convincing evidence that the finding of the Tribunal was other than true and correct. It was reasonable to have concluded that the alleged breach was found to be

proved. Accordingly the appeal against the finding of the Commission is dismissed.

Sanction

44. The appeal is limited to the imposition of fines.

45. The excessiveness or otherwise of the penalty has to be viewed in the context of the gravity of the offending and the message required to be sent to the game. Both were factors the Commission clearly expressed themselves as having in mind. The Board agree with the Commission's reasoning, for instance at paragraph 47 of the reasons, that *"...these are very serious offences*". That is the starting point for the consideration as to whether the sanction imposed is excessive.

46. The Board first considered whether it was excessive to impose a fine on either Defendant. The Commission set out its reasons for concluding that a fine was necessary in this case as detailed at paragraphs 47 to 55 of their written reasons. The Board are of the view that in the circumstances of this offence the Commission *could* reasonably have imposed a sporting sanction. It was not unreasonable to impose a fine in the case of both Appellants.

47. Having decided that the imposition of a fine was right in principal and not excessive, the question for the Board was whether the level of the fines imposed could properly be described as excessive. The appropriate level of the financial penalty is an exercise in weighing the seriousness of the breach against those factors that could properly be regarded as mitigating that breach, considering the case of the Appellants on their individual merits. The Board considered those matters that had been put before them on behalf of the Appellants including those detailed and emphasised in the written submissions provided to the Board on the day of hearing.

48. Having considered all relevant matters, the Board do not regard the imposition of fines in the sum of £75,000 as excessive in principal. In so concluding, the Board agree with the Commission's conclusion that "..substantial fines are needed to mark the seriousness of the offences and to make clear that clubs must make sure that they establish sufficiently robust anti-discrimination structures and procedures....". The Commission had in the conclusion of the Board fairly balanced the need for substantial punishment with those features of the respective individual cases that could properly be taken to mitigate that punishment. The Board consider such penalty as being nearer the top of the appropriate scale, but not "excessive".

49. Having so concluded, the Board then considered whether the level of the fines should be reduced in the case of either Appellant by reason of their particular financial circumstances.

50. The Second Appellant provided no detail of his financial circumstances to the Commission. No application was made in the Notice of Appeal to seek to

adduce any fresh evidence in that regard, nor was any further reference made to those circumstances in the hearing before the Board.

51. Accordingly, the Board saw no reason to reduce the fine in the case of the Second Appellant and his appeal is dismissed in that regard.

52. The Commission were provided with the First Appellant's accounts. No application was made to adduce fresh evidence in respect of updated accounts, but during his submissions Mr Duggan averred to the still less favourable circumstances of the Appellant club as they are now said to be.

53. Taking account of the First Appellant's financial resources as they were clearly before the Commission and the burden the substantial fine would have upon them as a club or their size and resources, the Board came to the conclusion that a fine in the sum of £75,000 was properly described as excessive within the meaning of the appeal regulations.

54. In that respect the appeal is allowed in the case of the First Appellant. The sanction of a fine will be varied to impose a fine in the reduced sum of £50,000. Such sum in the view of the Board meets the justice of the case.

55. The Second Appellant will pay half the total costs of the appeal. No costs are awarded against the First Appellant and their appeal fee is returned.

Richard Smith QC
Peter Barnes
Brian Talbot
24 September 2015