

APPEAL BOARD OF THE FOOTBALL ASSOCIATION

BETWEEN:

DARLINGTON FOOTBALL CLUB

Appellant

-and-

THE NATIONAL LEAGUE

Respondent

DECISION OF THE APPEAL BOARD

Hearing: 10 June 2021

Appeal Board:

David Casement QC (Chairperson) Independent Specialist Panel Member

Andrew Adie Independent Football Panel Member

Matt Wild Independent Football Panel Member

Michael O'Connor Lead Judicial Services Officer - Secretary

Club:

Jonathan Jowett Company Secretary

David Johnston Chairman

The National League:

Mark Ives General Manager

Background

1. The general background to this appeal is that as a result of the global pandemic football clubs have been severely affected by the inability to admit fans to matches and have thereby lost substantial parts of their revenue. Government support was provided to clubs in the National League, National League North and National League South in the form of Government grants for the period up to December 2020 however despite the hopes or expectations of many the Government decided that financial support thereafter would generally be in the form of loans. That change in the type of financial assistance was met with great disappointment by clubs. There was also a well-publicised and substantial increase in the rate of infection in December 2020 and January 2021, leading to a further national lockdown being announced by the Government on 4 January 2021.
2. On 22 January 2021 the National League (“the League”) temporarily suspended the Step 2 Competition with immediate effect for two weeks until 6 February 2021. It was clear that, subject to any decision being made to end the season early, fixtures after 6 February 2021 would be effective. On 1 February the League circulated to clubs written resolutions the outcome of which would determine whether Step 1 and/or Step 2 clubs would continue the season or whether the season would end and be declared null and void with no promotion and relegation, subject to the approval of the Football Association.
3. On 17 February 2021 the required number of votes were lodged with the League. Step 1 voted against ending the season whereas Step 2 voted to end the season. The result of the vote was declared on 18 February 2021. During the 12 day period between 6 February (when the temporary suspension of the season ended) and 17 February (when the result of the resolutions to end the season was announced) the Club, and a number of other clubs, failed to play scheduled fixtures.

4. Darlington Football Club (“the Club”) was charged with one breach of Rule 8.39 of the National League Rules (“the Rules”) for failing to fulfil one fixture namely, on 16 February 2021.
5. By a decision dated the 25 March 2021 (“the Decision”) an independent panel (“the Panel”) found the Club to be in breach and imposed a fine of £2000. Further a 2 points deduction was ordered although this was suspended on terms that the Club was not found guilty of a breach of Rule 8.39 in season 2021/22.
6. By Notice of Appeal dated 16 April 2021 the Club has appealed the Decision on the grounds that the Panel:
 - 6.1 failed to give the Appellant a fair hearing;
 - 6.2 misinterpreted or failed to comply with the regulations relevant to the decision;
 - 6.3 came to a decision that no reasonable body could have come;
 - 6.4 imposed a sanction that was excessive.
7. The parties have confirmed they have no objection to the appointment or the composition of the Appeal Board.

Rules

8. Rule 8.39 provides:

Where a match has been postponed for any reason, the two Clubs concerned must agree within the seven (7) days of the postponement a new date (which shall, save in exceptional circumstances, be within 42 days of the original date) and in default the Board is empowered to order Clubs to play on a date it considers suitable. The Competition Secretary shall determine the new date.

Any Club without just cause failing to fulfil an engagement to play a Competition match on the appointed date shall for each offence be liable to expulsion from the Competition and/or such other disciplinary action the Board may determine, including

the deduction of up to a maximum of three points from the offending Club's record, any expenses incurred by the opponents, and a fine.

In the event of a Club being in breach of the previous paragraph of this Rule then the Board may award points to the Club not at fault as if the match had been played and the League table shall reflect the position as if the match had been played with the result awarded by the Board. (underlining added)

9. Appendix A to the Rules sets out the Disciplinary Procedures- Appeals 2020/21.

10. Regulation 2 of Appendix A provides:

The grounds of appeal available to Participants shall be that the body whose decision is appealed against:

2.1 failed to give the Participant a fair hearing; and/or

2.2 misinterpreted or failed to comply with the Rules and/or regulations of The Association relevant to its decision; and/or

2.3 came to a decision to which no reasonable such body could have come; and/or

2.4 imposed a penalty, award, order or sanction that was excessive.

11. Regulation 10 of Appendix A provides:

New Evidence

10. The Appeal Board shall hear new evidence only where it has given leave that it may be presented. An application for leave to present new evidence must be made in the Notice of Appeal or the Response. Such application must set out the nature and the relevance of the new evidence, and why it was not presented at the original hearing. Save in exceptional circumstances, the Appeal Board shall not grant leave to present new evidence unless satisfied with the reason given as to why it was not, or could not have been, presented at the original hearing and that such evidence is relevant. The Appeal Board's decision shall be final. Where leave to present new evidence has been granted, in all cases the other party will be given an opportunity to respond.

12. Regulation 21 of Appendix A sets out the powers of the Appeal Board including the power to allow or dismiss the appeal. It further provides at Regulation 21.6 that the Appeal Board has the power to order that any costs, or part thereof, incurred by the Appeal Board be paid by either party or be shared by both parties in a manner determined by the Appeal Board.

Summary of the Club's Grounds of Appeal and Submissions

13. The Club contends in its Notice of Appeal and as it had set out in its written representations to the Panel:
 - 13.1 the Club had just cause not to play the fixture that was the subject of the charge and in any event the charge is not legally or logically sustainable;
 - 13.2 the season is null and void and therefore for legal purposes the season including all of its fixtures is to be regarded as never having existed;
 - 13.3 in respect of just cause, it was completely reasonable and just for the Club to consider it inappropriate that it should take on debt, or to continue to incur losses, spending money on league fixtures in respect of which there was a reasonable prospect of them becoming null and void and being expunged;
 - 13.4 further, in respect of just cause the Club had a legal duty of care to its employees as well as to their families and work colleagues not to increase the risk of infection. There was no testing available and this should have been taken into account by the Panel;
 - 13.5 further, the League is estopped from denying that it was represented to the Club and to other clubs that grant funding would be provided to make up for the loss of gate receipts and that is the basis on which the Club commenced the season;
 - 13.6 specifically in respect of the grounds of appeals, the Club was not given a fair hearing because the Panel did not consider in any proper way the representations made by the Club. It did not take on the serious impact of the

- pandemic in terms of risk to health or finances. The Decision is inadequate given the paucity of reasoning;
- 13.7 the Panel failed to properly apply the Rules in particular the concept of just cause;
 - 13.8 the Decision was obviously unreasonable such that no reasonable body could have come to it.
 - 13.9 the sanction was excessive in respect of the Club in all of the circumstances.

Summary of the National League's Response and Submissions

14. The position of the League is as follows:

- 14.1 the Panel was entitled to arrive at the Decision based upon the evidence and submissions before it;
- 14.2 the season was declared null and void and therefore the results of fixtures were expunged. That has no effect upon breaches of the Rules which remain subject to disciplinary proceedings;
- 14.3 the Panel took into account the obvious effects of the pandemic both in terms of risk to health and its financial impact;
- 14.4 the Club failed to adduce sufficient evidence to establish just cause in not fulfilling its obligations under the Rules by not playing the fixture in question. It adduced no evidence and certainly no detailed evidence in respect of its financial ability to meet the fixture. Further no evidence was adduced to challenge the sufficiency of the protocols that were in place to ensure the safety of players and staff at games. The protocols had been approved by the Government and The FA on medical advice. These were the same protocols that the Club played under since the start of the season;
- 14.5 the Club decided that it did not want to expend money on playing the fixture because it thought it likely the season would be terminated. That was a choice and was not just cause;
- 14.6 the fine imposed was less than the lowest end of the guidelines. Such a fine could not be described as excessive.

15. The League reminds the Appeal Board that it is not rehearing these charges but rather is reviewing the decision of the panel to determine if the grounds of appeal are made out.

Decision of the Appeal Board

16. The Appeal Board only reviews the Decision of the independent Panel, it does not carry out a rehearing. It follows that it does not matter that the Appeal Board might have arrived at a different conclusion on breach or on penalty.
17. The Panel made it clear that it had taken into account all of the submissions of the Club. Given the written submissions of the Club were before the Panel the Appeal Board accepts that those were properly considered by the Panel. The short reasons provided by the Panel show that the submissions of the Club were rejected on their merits. Given the nature of the issues and the lack of evidence provided by the Club the Panel was entitled to come to the Decision. There was no failure to provide the Club with a fair hearing.
18. The declaration that the season is null and void is not to be confused with the setting aside of a contract so that it is void ab initio. The Club has confused those matters. The Appeal Board considers that the season being declared null and void means that the results of the season are expunged. It has no effect on breaches of the Rules which remain susceptible to disciplinary proceedings. Whether those breaches are anti-doping breaches, misconduct or any of the many other potential breaches of the Rules or other regulations such as The FA rules that might be committed during a season, they are unaffected by a season being declared null and void.
19. The submissions and evidence placed before the Panel by the Club amounted to mere assertion in respect of the issue of just cause. By way of example, instead of providing a detailed analysis of its financial position including finance statements and most importantly forecasts going forward the Club advanced assertions that it was not

reasonable for it to take on a loan. That is the Club's choice whether it takes on debt or not but mere choice is not a matter of just cause. Further, in respect of the safety issues the Panel was well aware of the health issues facing the nation and football in particular. The Club had been playing under the protocols and without testing since the start of the season. The Club did not adduce evidence to challenge the sufficiency of the protocols. Again the Club relied upon mere assertion. It is notable that the Club did in fact play a match after the fixture in question namely in the FA Challenge Trophy. It received a donation of test kits but the fixture itself was not tested ie the other team and staff were not obliged to be tested, yet the Club played that match. The Panel was entitled to note that many other clubs did continue to honour their fixtures. In the absence of proper evidence in answer to the charge the Club was found to have breached its obligations. The Panel was entitled to arrive at that conclusion.

20. The references in the appeal to estoppel are confused. There is no identification of the type of estoppel that is referred to but it is assumed it is a reference to estoppel by representation. Even if such an unequivocal representation was made, which is denied by the League, that would have no impact on the ability of the League to bring a charge or the Panel to reach the Decision. The representation could not provide just cause even if it had been relied upon by the Club. The Club was obliged to play the fixtures, not because it agreed to play matches, but because it was obliged by the Rules to meet the fixtures. There was no representation that the Club could decide not to play fixtures.
21. The penalty imposed was less than the guideline tariffs. The Panel took into account the pandemic and the financial impact on all clubs. The sanctions cannot be said to be excessive.
22. It is the unanimous decision of the Appeal Board that the appeal is dismissed.

Costs

23. The Appeal Board has considered the submissions made by the parties in respect of costs. The suggestion by both parties is that the costs paid by the party that loses the appeal be reduced to take account of the fact that, it is said, normally appeals such as these are not chaired by an independent specialist panel member. That would effectively leave The Football Association to pick up part of the costs in respect of an appeal to which it is not a party.
24. In our judgment it is appropriate for the losing party to pay the costs incurred by the Appeal Board. The Club is therefore ordered to pay the sum of £1600 within 30 days.
25. The appeal fee is retained.



David Casement QC (Chairperson)
Signed on behalf of the Appeal Board
Dated 14 June 2021