

APPEAL BOARD OF THE FOOTBALL ASSOCIATION

BETWEEN:

DULWICH HAMLET FOOTBALL CLUB

Appellant

-and-

THE NATIONAL LEAGUE

Respondent

DECISION OF THE APPEAL BOARD

Hearing: 7 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:

Ben Clasper 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 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 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. Dulwich Hamlet Football Club (“the Club”) was charged with four breaches of Rule 8.39 of the National League Rules (“the Rules”) for failing to fulfil four fixtures namely, on 6,9,13 and 16 February 2021.
5. By a decision dated the 25 March 2021 (“the Decision”) an independent panel found the Club to be in breach and imposed a sanction of £2000 per breach giving a total fine of £8000. Further a points deduction was ordered, 2 points per fixture, 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 12 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 an award or 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 that it was not provided with a fair hearing by the Panel:
 - 13.1 the Panel was not provided by the League with the financial information and emails referring to such that had been sent by the Club to the league over a number of months prior to the decision being taken. The letter submitted by the Club in response to the charges referred to the Club having sent over 50 emails on the subject. The Panel was therefore not provided with the full information to be able to make the Decision.
 - 13.2 the Panel did not set out its reasons for arriving at the Decision. In particular the Panel did not set out why the Club did not have just cause in failing to fulfil the fixtures given the reasons set out by the Club.
14. The Club also contends that the Panel failed to comply with its own rules:
 - 14.1 Rule 8.39 provides there is a breach only if the Club did not have "just cause." The Panel did not refer to just cause in any documentation relating to the Decision.
 - 14.2 the Panel recognised the extreme circumstances for the purposes of mitigation on sanction but did not do so in respect of identifying just cause, the latter being a complete defence.

- 14.3 Rule 8.39 was invoked by the League in circumstances whereby continuing the season would cause clubs to trigger insolvency events and take loans that could not be undertaken.
 - 14.4 a precedent had been set whereby a subset of clubs being unable to fulfil fixtures due to financial reason was a just cause so as to halt the whole competition. That rationale should have been adopted by the Panel so as to find just cause on the part of the Club.
 - 14.5 whereas the Club, as all clubs, have a right to request a postponement however the League had adopted a blanket policy of refusal without consideration of the request.
15. Further the Club contends that the Panel reached a decision that no such reasonable body could have come to:
- 15.1 it is obvious that the Decision is unreasonable in all the circumstances;
 - 15.2 the decisions prior to the charges have brought many clubs to bankruptcy, however to then charge them for failing to meet fixtures is clearly unreasonable;
 - 15.3 the Panel accepted in the Decision that clubs had been misled about the availability of funding;
 - 15.4 the Club was not in the category of either having testing available or substantial financial reserves to keep going.
16. The Club also maintains that the sanction imposed in the Decision was excessive:
- 16.1 the Club has £836.55 in its account. The Panel has imposed a fine of £8000 which will bring about insolvency.
 - 16.2 the “suspension” of the 8 point penalty is meaningless because next season will see the Club in the same position, namely without funding.

- 16.3 the Club was targeted by the League. Some other clubs “gamed” the system by purporting to be ready to play but waiting for the other clubs to declare they could not make the fixture.
17. The Club also points out that the directors of the Club were concerned to comply with their duties as directors under Company law. The Club also submits that someone from the board of the League had informed the Club that the outcome of this appeal could be resolved in a certain way, namely accepting that half of the fine could be suspended and the other half would not be pursued by the League. It is unclear what the relevance of this latter point is and of which the Appeal Board is unaware however for the avoidance of any doubt this Appeal Board is independent and impartial and has heard of no such suggestion.
18. In the Club’s Reply to the League’s Response the Club set out a large amount of material and annexures in particular numerous emails, financial statements and cashflow analyses. This information and documentation was not before the Panel, there is no application to adduce this material under Regulation 10 and in any event the League strongly objects to it being adduced at this appeal stage. We shall deal with that question later in this decision.

Summary of the National League’s Response and Submissions

19. The position of the League is as follows:
- 19.1 the League maintains that the question of what amounts to just cause was a matter for the Panel to decide on the material before it;
- 19.2 the Club did not place any detailed financial information or report before the Panel. Given that was the only basis advanced by the Club to contend there was just cause, the Panel was entitled to find that there was no evidence to support the Club’s defence that it had just cause;
- 19.3 it was for the Club to place all materials before the Panel that it wished to have included in its response to the charges. The obligation was not upon the

League let alone the independent Panel to decide what materials the Club might want to rely upon. There is no justification for any criticism of the League or the Panel for the Club's failure in this respect. There is no justification for introducing those materials at this appeal stage;

- 19.4 the meaning of "just cause" is limited to those matters that are entirely outside the control of a club. In the present case the Club acted not upon just cause but because it was its preference not to fulfil the fixtures. Put another way it was convinced the season would be declared null and void and therefore it decided it would not play;
- 19.5 the Club, as with other clubs, was aware that the suspension declared in January was temporary and the final outcome of the resolutions that were put to the vote by clubs depended upon the counting of those votes ;
- 19.6 the Panel was not obliged under the Rules to provide detailed reasons. Reasons were in fact provided. A member of the Panel can be requested to answer questions at the appeal;
- 19.7 the League had given permission for clubs to obtain loans on certain terms;
- 19.8 the League reminds the Appeal Board that the test for unreasonableness under the Rules is a high hurdle;
- 19.9 protocols were approved by the Government and The FA so as to enable games to be played in the League without testing. That was the same basis upon which Clubs had played since the start of the season;
- 19.10 "It is not reasonable to punish Clubs for not fulfilling fixtures at a time when everyone knew it was likely that those fixtures would be void, they are literally asking Clubs to waste money they don't have." The League maintains this is a telling statement by the Club and shows that it was a matter of the Club's preference not to play rather than a matter of just cause ;
- 19.11 the sanctions imposed represented a reduction on the lowest end of the guideline sanctions. As such and having taking into account all of the mitigation referred to by the Club, those sanctions cannot be said to be excessive.

20. 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

21. 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.
22. The first issue for the Appeal Board to determine is whether the Club is entitled to rely upon new evidence that was not placed before the Panel in the response to the charges. The response to charge document was clear that the response to the charge was to be enclosed with that document. The provisions of Regulation 10 are also clear that an explanation must be provided as to why the new evidence was not and could have been provided at the original hearing before the Panel. The Appeal Board is not satisfied with the explanation of the Club. The Club accepts it was a mistake not to provide it. It assumed the League would provide the materials to those who were making the decision. That was an unwarranted assumption. All documentation and financials provided on appeal that was not before the Panel is therefore excluded.
23. The Appeal Board has considered all of the arguments and grounds of appeal advanced by the Club. Whilst the Appeal Board has sympathy for the position the Club is in the outcome of this appeal turns on whether the Club has established the grounds of appeal. The Appeal Board concludes that the Club has failed to establish the grounds of appeal. Some of the arguments went much wider than the grounds of appeal and in particular in respect of independent review in respect of the distribution of monies. Focussing on the grounds of appeal we find as follows:
- 23.1 on the material before them the Panel was entitled to reach the conclusion that the Club did not have just cause not to fulfil the fixtures. Absent detailed financial information and reports the Panel did not have the material to even

begin to consider the assertion by the Club that to continue to play matches would trigger an insolvency event. The Decision cannot be said to be unreasonable;

23.2 the onus was on the Club to provide the financial information and documentation. It failed to do so. The League was not under an obligation to place previous emails and documentation before the Panel to advance the Club's case for it. The Club's assertion that the Panel failed to give the Club a fair hearing is misplaced;

23.3 during the hearing the Club submitted that the Decision was appealable because it was based on two premises: other clubs were able to play on and the decision to play on was in the control of the Club. Submissions were then made by the Club as to why factually these assertions were wrong. We find these were another way of utilising financial information about the state of the Club which was not before the Panel;

23.4 the reasoning of the Panel in the Decision, whilst short, is sufficiently clear to understand why it reached the decision that it did. There was no failure to comply with the terms of the Rules. It is clear the Panel was addressing the question of just cause which was so prominent in the Club's response to charge;

23.5 the appointment of the independent Panel, as opposed to the Board deciding the charges, was entirely appropriate given the Board would have been conflicted. In any event it is a matter for the Board whether to appoint an independent panel in any given case;

23.6 unfairness in bringing the charges in the first place and the further suggestion that some clubs were not charged whilst others gamed the system amounts to speculation in the absence of real evidence. In any event such was not placed before the Panel;

23.7 the fine and suspended points deduction were not excessive given the information before the Panel at the time it made the Decision.

24. It is the unanimous decision of the Appeal Board that the appeal is dismissed.

Costs

25. 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.

26. 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 of the date of this decision.

27. The appeal fee is retained.



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