

## INDEPENDENT APPEAL BOARD

### JUDGMENT

**Appellant:** Lee Warren

**Respondent:** Essex Football Association

**Decision under Appeal:** Essex Football Association Disciplinary Commission

**Date of Decision Appealed:** 6 November 2021

**Appeal Board Members:** Matthew O'Grady (Independent Chair)  
Nabila Zulfikar (Independent Football Member)  
Marvin Robinson (Independent Football Member)

**Appeal Board Secretary:** Conrad Gibbons

**Date of Appeal Hearing:** Thursday 16 December 2021

**Venue:** MS Teams

**Appearances:** Lee Warren  
Greg Hart (Governance Manager, Essex Football Association)

### Introduction

1. On 6 November 2021 the Essex Football Association Disciplinary Commission ("the Commission") found proved against Lee Warren ("the Appellant") a charge that the Appellant breached Football Association ("FA") Rule E3 ("the Rule"). The Rule reads, "A Participant shall at all times act in the best interests of the game and shall not act in any manner which is improper or brings the game into disrepute or use any one, or a combination of violent conduct, serious foul play, threatening, abusive, indecent or insulting words or behaviour.'
2. Having found the charge proved the Commission sanctioned the Appellant as follows:
  - a. £50 fine;
  - b. Three match ground ban; and

c. Completion of a FA Safeguarding Children Workshop

3. In an undated appeal notice the Appellant appeals against the Commission's decisions. Essex Football Association ("the Respondent") responds to the appeal.
4. We have taken the Appellant's notice of appeal to advance three grounds.
5. First, that the Respondent failed to give the Appellant a fair hearing. We discerned two limbs to this ground: 1) that the Respondent failed to give appropriate notice of the venue fixed for the hearing; and 2) the personal hearing made available to the Appellant was a remote hearing by MS Teams rather than an in-person hearing.
6. Secondly, the Commission came to a decision that no reasonable body could have come.
7. Thirdly, the Commission imposed a penalty, award, order or sanction that was excessive.

**The Appeal Hearing**

8. Both the Appellant and Respondent raised preliminary issues. Those preliminary issues were determined on the papers in a written decision by the Appeal Board Chair dated 10 December 2021.
9. At the hearing of the appeal the Appellant represented himself. The Respondent was represented by Greg Hart.

**Background**

10. It is common ground that on Sunday 10 October 2021 Hutton Youth U17 Blue played Brentwood Youth AFC U17 in the U17 Championship – Chelmsford Youth League.
11. The Referee submitted an Extraordinary Incident Report Form on the same date following the match ("the report"). The report reads:

'In the 82nd minute of the game I awarded Hutton a free kick for a defender shouting "my ball", this distracted the forward from going for the ball. At this point [the Appellant] came down the touchline to confront me about this free kick even (sic) though his team had been awarded 2

free kicks for the same offence. Due to his aggressive behaviour I sent him off and sent him away

After he started to go away from the pitch I clearly heard and saw [TK] shout "the referee's a knob!" As this was audible from a distance away

With this [the Appellant] came back and was again shouting at me so I told him to leave but he refused so I had no option but to abandon the match. After this I had both [KL] and [CW] come (sic) to me and say aggressively "you're shit ref!" Both were sent off

12. The report went on to read:

'In the 1st half I awarded Brentwood (sic) several free kicks and [the Appellant] said nothing. In the 2nd half I awarded a free kick against his team and he became very aggressive towards me and was shouting at me saying free kick I'd given had been done away with 4 Years ago and he'd bet his fine I was wrong, even (sic) though I know the offence is impeding a (sic) opposition player by word or action the same as shouting bang to distant a player while shooting. After he was sent off he went a few steps away but came back and he refused to leave.

I told him several times to go but he said he was reporting me for abuse of my powers as a match official. He told me he was the child welfare officer.'

13. On 19 October 2021 the Appellant was charged by the Respondent.

14. The charge replied upon the Referee's report and several written statements by spectators and other participants.

15. The Respondent's 'Misconduct Charge Notification' was dated 19 October 2021. Relevantly, that notice stated:

'A hearing date has been set for the 7pm 5<sup>th</sup> November 2021 (sic). If the charge party request a personal hearing or a verbal plea as their response, we will aim to hear this on the aforementioned date (sic).

[The Appellant] is charged with misconduct ... and is required to submit a response to the charge(s) by 26/10/2021.'

16. An undated and unsigned response was returned to the Respondent. The Appellant did not disagree that he authored the response. That response noted that the Appellant contested the charge and wished for a personal hearing to take place (i.e. a hearing at which witnesses would be present and examined).
17. At 1:07pm on Tuesday 26 October 2021 (10 days before the personal hearing scheduled to take place on Friday 5 November 2021) the Respondent requested of the Appellant the names of the people who would attend the personal hearing. That email informed the Appellant that the hearing would take place using video conferencing technology.
18. At 4:04pm on Tuesday 26 October 2021 the Appellant replied to state that he 'will be requiring a personal hearing in an environment where [he is] able to question the referee in person, and in the presence of the tribunal members.'
19. At 4:44pm on Tuesday 26 October 2021 it was reiterated on the Respondent's behalf that the hearing would take place using video conferencing technology.
20. This exchange repeated itself on several occasions, with the Appellant noting that he was 'demanding' a hearing which took place physically in person.
21. On Friday 29 October 2021 the Appellant informed the Respondent that he would not participate in a hearing conducted using video conferencing technology. The Respondent invited the Appellant to consider whether he wished the hearing to take place on an alternative date or to cancel the personal hearing outright.
22. This exchange also repeated itself over the following days. At 11:03am on Friday 5 November 2021 the Appellant emailed the Respondent and stated, 'I will not be bullied into participating in a hearing that is not in my best interests.'
23. At 2:47pm on Friday 5 November 2021 the Respondent informed the Appellant that failure on his part to give basic information about who he planned would attend the hearing would cause the hearing to be treated as a 'non-personal hearing'.

### **The Hearing Before the Commission**

24. In its written decision the Commission identified that the hearing proceeded as a non-personal hearing (i.e. an unattended hearing conducted on an assessment of the written material only). The Appellant did not attend.
25. The Commission concluded that requirements of procedural fairness 'had been adhered to'. The Commission refused the request for a hearing to take place other than using video conferencing technology.
26. The Commission considered the written material before it and concluded that the charge was made out to the required standard. In light of the conclusions which we, the Appeal Board, go on to make, it is not necessary for us to discuss the reasons given for the findings made.

### **Submissions of the Parties**

27. The Appellant addressed the Appeal Board. The Appellant adopted in oral submissions those arguments he made in writing in his notice of appeal. The Appellant argued the hearing was unfair because it was inconsistent with required notice periods and was not held in a format that he required. The Appellant was highly critical of the appointed Referee. The Appellant's perceptions of the Referee did not assist him to advance the specific grounds of appeal he raised.
28. The Respondent, through Mr Hart, relied upon the Commission's written decision and the Respondent's written response to the appeal. It was submitted that the procedures adopted by the Commission were neither procedurally nor substantively unfair to the Appellant. It was submitted that it was not sufficient for the Appeal Board to conclude that it might have decided the case differently, the appeal on substantive grounds could only be allowed if the decision is one in which no reasonable body could have reached.
29. Mr Hart was questioned about the Commission's procedures. Mr Hart was taken to regs 124-125. Mr Hart told the Commission that the 'venue' for the hearing was by WebEx. Mr Hart accepted on behalf of the Respondent that when read together, regs 124 and 125 required that the Appellant is given a minimum of 14 days' notice of the date, time and venue fixed for the hearing. Mr Hart conceded that notice of the venue for the hearing was given on Tuesday 26 October 2021, which was less than 14 days before the hearing.
30. Mr Hart explained that the Respondent's procedures for an abandoned match are to delay fixing a venue for a hearing until a response to the charge is received, even though that may result in notice of the venue fixed

being given less than 14 days' prior to the hearing. Mr Hart explained that had the hearing been held face-face the process adopted would have been the same.

31. In light of the concessions he offered, Mr Hart further conceded that the Commission's conclusion that it had 'adhered' to the requirements of the relevant Regulations had to be wrong. He did not go on to concede that this meant the appeal was made out and left that conclusion for us to consider.

### **Appeal Board's Conclusions**

#### **Fairness of the Hearing: Notice of the Hearing Venue**

32. The Commission's duty was to ensure that the hearing was fair. Fairness includes substantive and procedural fairness. Put simply, a process that is procedurally unfair or which fails to follow specified standards of procedural fairness is less likely to result in a hearing that is substantively fair because, for example, it denies an adequate opportunity to prepare a case or ensure witnesses are available.

33. The FA Handbook specifies minimum standards of procedural fairness. Regulations 124 and 125 read (emphasis added):

'124 The Participant, through their Club Secretary, shall be notified of:

124.1 the date, time and venue fixed for the hearing; and

124.2 the attendance of any witnesses in support of the Charge, in particular the Match Official(s) on whose report the Charge has been issued.

125 Both the Participant issued with the Charge and the Match Official(s) concerned should be given a minimum 14 days' notice of details of the personal hearing ...'

34. In our judgment these Regulations must be read together with each other. We find that the 'details of the personal hearing' for which at least 14 days' notice must be given are those matters specified in reg 124.1.

35. Whilst the point was not taken before us, it might be argued that giving slightly less than 14 days' notice of the venue fixed for the hearing in the context of giving satisfactory notice of the date and time for the hearing, does

not lead to unfairness. It might be said that not knowing the venue fixed does not prevent proper case preparation.

36. Such an argument is attractive, but cannot sit alongside the contents of The FA Regulations.
37. The contents of regs 124-125 do not represent this Appeal Board's judgment about what is required for a procedurally fair hearing process. They represent The FA's judgment. The FA could have judged that a fair hearing process is satisfied by providing the date and time for the hearing not less than 14 days' prior to the hearing and advising of the hearing venue nearer to the date. However, it has not exercised that judgment. The Regulations strictly require ('...*shall* be notified...') that all three details be provided. There is no discretion to vary this notice period.
38. In our judgment the plain language of the Regulations cannot be evaded. On the Respondent's own concession, it failed to give notice of the venue fixed for the hearing in accordance with reg 125. The Commission erred in concluding this regulation had been 'adhered' to. As a result the hearing was unfair because procedural fairness was compromised.
39. Accordingly, we allow the appeal on this ground.

#### Fairness of the Hearing: Format of Hearing

40. The Appellant contends that the hearing that was to have taken place would have been unfair because it would have taken place using video conferencing technology. This ground of appeal is wholly without merit for two reasons.
41. First, by the Appellant's own choice (as we find the case to have been) a hearing by video conferencing technology did not actually take place. The Appellant appeals against something that did not actually occur.
42. Secondly, and putting to one side the fact that this ground of appeal is hypothetical, there is no merit in the argument that the way in which the Commission intended to proceed would have been unfair.
43. In October and November 2021, judges sitting in Courts and Tribunals up and down the country dealt with serious matters (and still do) in hearings conducted using video conferencing technology. They heard from witnesses. They listened to submissions and arguments. They issued decisions on applications. Appellant

courts in this country (and across the world) have concluded that hearings conducted remotely can be fair. This matter, whilst of tremendous importance to the Appellant, does not come close to the seriousness of the cases being dealt with in Courts and Tribunals by video conferencing technology.

44. Whilst it is the Appellant's perspective that his own best interests required a hearing conducted in-person, the considerations for the Commission were far wider. The task for the Commission was not to narrowly promote the Appellant's best interests, but to facilitate a fair hearing and promote the interests of justice being achieved.
45. We have not seen any argument presented by the Appellant to the Commission (nor by the Appellant to us) that would in any way lead us to conclude that a hearing by video conferencing technology would have been incompatible with fairness or the interests of justice.
46. It is the Appellant's case that the Commission needed to have the advantage of seeing the demeanour of witnesses in response to his challenge of their evidence. We are reminded of the observations of the Equal Treatment Bench Book that:<sup>1</sup>

'Science and a growing understanding indicates the difficulties with, and the possible fallibility of, evaluation of credibility from appearance and demeanour in the somewhat artificial and sometimes stressful circumstances of the courtroom. Scepticism about the supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness is not new.'

47. MacDonald J reached the same conclusion in *CCC v R (SGO or ICO)* in the High Court:<sup>2</sup>

'24. The need for care with witness demeanour as being indicative of credibility has also been highlighted by the Court of Appeal in *Sri Lanka v. the Secretary of State for the Home Department* [2018] EWCA Civ 1391. The Court of Appeal observed that it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth, noting research suggesting that interlocutors cannot make effective use of demeanour in deciding whether to believe a witness and some evidence that the observation of demeanour diminishes rather

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<sup>1</sup> <https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>, p 273.

<sup>2</sup> [2019] EWHC 2782 (Fam) at [24]-[26].



than enhances the accuracy of credibility judgments. Within this context, Leggatt LJ stated as follows at [40] and [41]:

"[40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanour, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

[41] No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the way it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts."

In *Sri Lanka v. the Secretary of State for the Home Department* Leggatt LJ thus made a clear distinction between the demeanour of the witness and the content of their evidence. The authors of *Phipson on Evidence* at [12-36] also emphasise the central role that the content of a witnesses evidence plays in the evaluation of the credibility of that evidence:

"The credibility of a witness depends on his knowledge of the facts, his intelligence, his disinterestedness, his integrity, his veracity. Proportionate to these is the degree of credit his testimony deserves from the court or jury. Amongst the more obvious matters

affecting the weight of a witness's evidence may be classed his means of knowledge, opportunities of observation, reasons for recollection or belief, experience, powers of memory and perception, and any special circumstances affecting his competency to speak to the particular case—all of which may be inquired into either in direct examination to enhance, or in cross-examination to impeach the value of his testimony."

Within the context of the foregoing legal principles, this court must bear in mind that the assessment of the credibility and reliability of the parents should coalesce around matters including the internal consistency of their evidence, its logicity and plausibility, details given or not given and the consistency of their evidence when measured against other sources of evidence (including evidence of what the witness has said on other occasions) and other known or probable facts. The credibility and reliability of that parent should not be assessed simply by reference to their demeanour, degree of emotion or other aspects of their presentation. This of course works in both directions. It is as problematic to rely on an impression that a witness has an 'honest' tone, manner or presentation, for example that they appear "genuinely upset", as it is to rely on an impression that the tone or manner of a witness appears 'dishonest', for example that they cross their arms or look at the floor. These principles must apply both when the court is evaluating the parent in the witness box and when the court is evaluating the significance of the observations of other's regarding the parent's demeanour at a given point.'

48. We conclude the Appellant's contention that the Commission might not be able to fairly assess the evidence of witnesses was misplaced.

49. We dismiss this ground of appeal.

#### An Unreasonable Decision and Excessive Penalty

50. It is not necessary for us to decide any further grounds of appeal. Indeed, we consider justice would be best served by us not expressing any view on the Appellant's substantive arguments as our orders will leave these for a fresh Commission to consider.

## **Remedy**

51. Having determined the appeal should be allowed, reg 21 permits us to:

- a. Exercise any power which the body against whose decision the appeal was made could have exercised, whether the effect is to increase or decrease any penalty, award, order or sanction originally imposed;
- b. Remit the matter for re-hearing;
- c. Order that any appeal fee be forfeited or returned as it considers appropriate;
- d. Make such further or other order as it considers appropriate, generally or for the purpose of giving effect to its decision;
- e. 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.

52. The Respondent's evidence sets out a prima facie case against the Appellant. No witnesses appeared before us and therefore we are not well placed to re-hear the matter ourselves and exercise the powers of the Commission. The appropriate remedy is for the matter to be remitted and re-heard with proper notice being given to the Appellant. A fresh panel should hear the charge.

53. Whilst a Disciplinary Commission must meet to consider a charge of misconduct causing the abandonment of a match within 28 days, in our judgment our powers in reg 21 take precedence over reg 95 to the extent our exercise of those powers is inconsistent with reg 95. Any other reading would render our powers (and the entirely appeal process) a nullity.

54. This judgment is not intended to express any view one way or the other on the merits of the Appellant's defence of the charge. Nor is this decision intended to bind the Commission that re-hears the charge on the format and procedures for it to adopt in re-hearing the charge (other than those procedures we order). It may be that a hearing using video conferencing will be fair in the circumstances. It may not be. It will be for the Commission to make that determination in light of any arguments presented by the Appellant.

55. This is the unanimous judgment of the Appeal Board. The orders that follow are necessary in our judgment to ensure the efficient re-hearing of the matter, noting that it will now fall to be heard outside of the 28 day window.

## **ORDERS**

1. The appeal is allowed.
2. The sanction imposed by the Commission is quashed.
3. The matter is remitted for re-hearing before a panel constituted of members who did not sit on the original Commission.
4. By **12 noon on Friday 31 December 2021** the Respondent must email to the Appellant a charge notice which states the date, time and venue fixed for hearing of the charge.
5. The date and time fixed for the hearing must not be before Monday 17 January 2022.
6. By **12 noon on Monday 10 January 2022** the Appellant must email to the Respondent a fully completed (including signed and dated) response to the charge in the form at page 52 of the appeal bundle and any written evidence he relies upon to contest the charge.
7. Should the Appellant fail to comply with order 6 (including a failure to sign and date) then, unless the Commission decides otherwise, the charge shall be treated as unchallenged by the Appellant and determined at a hearing in his absence.
8. By **12 noon on Monday 10 January 2022** the Appellant must inform the Respondent by email of any witnesses he intends to bring to the hearing.
9. Should the Appellant omit to inform the Respondent of any witnesses to attend the hearing in accordance with order 8 then, unless the Commission decides otherwise, the Appellant shall not be permitted to rely on any witnesses at the re-hearing other than himself.
10. By **12 noon on Monday 10 January 2022** the Appellant and Respondent must email to each other and the Commission any preliminary points they wish the Commission to determine, what they want the Commission

to decide (e.g. adjournment of the hearing and change of hearing venue) and why the Commission should decide the preliminary points in the way they want.

11. The Appellant and Respondent must reply to the others' preliminary points stating that they are agreed, opposed and the reasons for the agreement/opposition by **12 noon on Wednesday 12 January 2022**.
12. By **12 noon on Friday 14 January 2022** the Commission must issue written decisions on the preliminary points raised by the parties.
13. The parties have liberty to apply to the Appeal Board Chair to vary these procedural orders.
14. No order as to costs.

Matthew O'Grady (Chair of the Appeal Board)

Dated: 22/12/2021