

**IN THE MATTER OF AN APPEAL BEFORE THE APPEAL BOARD OF
THE FOOTBALL ASSOCIATION**

B E T W E E N :

DAVID GRAHAM

Appellant

- and -

SHEFFIELD & HALLAMSHIRE FA

Respondent

WRITTEN REASONS OF THE APPEAL BOARD

Context

1. This document sets out the written reasons of the appeal board (“the Appeal Board”) in the above proceedings (“the Appeal”), following a hearing of the Appeal on 09.12.22 (“the Hearing”) and a subsequent request for written reasons.
2. The Hearing took place as a paper-based review. Neither party attended but both provided written representations. The Appeal Board decided, at the Hearing, to dismiss the Appeal.
3. The Appellant had appealed against a decision (“the Decision”) by a disciplinary commission (“the Commission”), chaired by Ms Hall (“the Chair”), at a first instance hearing on 23.10.22 (“the First Instance Hearing”).
4. In summary: the Appellant was found by the Commission, on the balance of probabilities, to have engaged in improper conduct towards a referee (“the Referee”), including an instance of threatening behaviour, following a match on 18.09.22 (“the Match”) in which the Appellant had played for his club (“the Club”) and been sent off.

5. The Appeal Board was made up of Simon Lewis (legally-qualified chair), Peter Clayton and Nolan Mortimer. Conrad Gibbons acted as the secretary. The Hearing took place, in the afternoon, via Microsoft Teams.

Documents

6. The Appeal Board had been provided, in advance, with a bundle of documents relevant to the Appeal (“the Bundle”), running to 41 pages. The Appeal Board read and considered the Bundle with particular care.
7. The Bundle including the following:
 - (a) A letter dated 03.11.22, and an associated form, setting out the grounds of – and other details relating to – the Appeal (“the Grounds”).
 - (b) A formal response, to the Appeal, from the Respondent.
 - (c) Various papers relating to the First Instance Hearing.
8. The papers relating to the First Instance Hearing included:
 - (a) The notification of the charge against the Appellant (“the Charge”).
 - (b) The Appellant’s response to the Charge (pleading “not guilty”).
 - (c) The Referee’s report (“the Report”).
 - (d) Correspondence, shortly after the Match, between the Referee and a representative/administrator at the Club.
 - (e) A written statement from the Appellant.
 - (f) Various other written statements, in support of the Appellant, including but not limited to (i) the Appellant’s wife and (ii) a fellow player and teammate, Scott Emery (who was also subjected to a disciplinary sanction by the Commission, having pleaded “guilty” to improper conduct towards the Referee during an incident not unrelated to the one involving the Appellant).

- (g) The outcome letter, and the more detailed written reasons document (“the Reasons”), setting out the Decision.

The Decision

9. On 23.10.22, the Commission (with the Chair sitting alone) held the First Instance Hearing. In line with the Appellant’s express wish, the Commission considered the matter in the absence of the Appellant.
10. It is clear, from the Reasons, that the Chair considered and evaluated the evidence before the Commission, including the statements from the Appellant and those supporting him.
11. The Chair concluded, on the balance of probabilities, that the Appellant had committed the misconduct alleged and that the same amounted to a breach of FA Rule E3.1.
12. In essence, the Appellant was found, well after the end of the Match (and in the context of some verbal abuse directed towards the Referee from Scott Emery) to have told the Referee that he better “watch your back” on Mondays as the Appellant was going to “do him in” (or words to the same effect). The reference to “Mondays” was to days when the Referee and the Appellant might actually be playing football, together, on the same pitch.
13. The Chair set out the FA’s definition of “threatening behaviour” towards a match official (in the context of rule E3.1), which included (at paragraph 96.1) the following:

... words or actions that cause the Match Official to believe that they are being threatened. Examples include but are not limited to: the use of words that imply (directly or indirectly) that the Match Official may be subject to any form of physical abuse either immediately or later, whether realistic or not ...

14. Having found the Appellant to have committed the alleged act(s), the Chair went on to determine that the appropriate sanction/order (“the Sanction”) would be the following:
- (a) The Appellant shall be suspended, for 112 days, from all football and football activities for 112 days (“the Suspension”).
 - (b) The Appellant shall be fined £75.
 - (c) The Appellant shall undertake and complete a mandatory online education program, prior to resuming football activities.
 - (d) The Club shall receive 8 disciplinary points.

The Grounds

15. The Appellant exercised his right of appeal. The Appellant indicated, in the form and/or in the letter setting out the Grounds, that he wished to rely on one of four permissible grounds of appeal: the one relating to sanction.
16. In his letter, the Appellant wrote (among other things) the following:

I hereby give official notice to appeal the proven charge as an excessive punishment.

... I would be grateful if you would reconsider the punishment as I do feel it is excessive.

I respectfully ask that you consider allowing me to attend, play and be a participating member for my club Man V Fat (Doncaster) on an 11 a side basis ...

... I will respect the final outcome.

17. In doing so, the Appellant referred to the actual/potential adverse impact of the Suspension on his physical health, mental health, and, more specifically, his weight (or weight loss/management).
18. The sole ground of appeal, therefore, that the Appeal Board considered, pursuant to paragraph 2 of the relevant FA Disciplinary Regulations (i.e. those relating to “Non-Fast Track Appeals”), was that the First Instance Chair “imposed a penalty, award, order or sanction that was excessive”.
19. It was clear to the Appeal Board that the Appeal was limited to the Sanction imposed; and, in substance, more specifically, to the imposition, nature and/or length of the Suspension.

Principles

20. Regulation 12 of the FA’s appeal regulations, states:

An appeal shall be by way of a review on documents only ...

21. Accordingly, it was not, in other words, for the Appeal Board to hear the whole case afresh, as it were: the Appeal Board’s role was and is limited to a “review” of the Decision (and one based, generally, on the papers).
22. Regulation 21 sets out the powers open to the Appeal Board.
23. More broadly, the Appeal Board had regard to the following guidance from paragraph 23 of the 2018 case of The FA v Bradley Wood:

When considering evidential assessments, factual findings and the exercise of a judicial discretion in the context of an appeal by way of review, a Commission must be accorded a significant margin of appreciation. Accordingly, such evidential assessments and factual findings should only be disturbed if they are clearly wrong or wrong

principles have been applied. That threshold is high and deliberately so. When assessing whether a sanction is unreasonable the same margin of appreciation applies. It is not for the Appeal Board to substitute its own opinion or sanction unless it finds that the Commission's decision as unreasonable.

24. Similarly, the Appeal Board had regard to the following guidance from paragraph 54 of the 2018 case of The FA v Jose Mourinho:

It is not open to us to substitute our decision for that of the Commission simply because we might ourselves have reached a different decision. If the Commission has reached a decision which it was open to the Commission to reach, the fact that we (or a different Regulatory Commission) might have reached a different decision is irrelevant. To put it another way, it is not for us to 'second guess' the Commission; ... We are permitted to 'intervene' only when there has been an error or principle by the Commission. To put it another way, we are not permitted to interfere with the decision of the Commission unless we are satisfied that the Commission has gone 'plainly wrong'.

25. In practice: the Appeal Board approached the Appeal on the basis that, in summary, it would not be entitled to interfere with the Sanction – including, most notably, the decision to issue the Suspension – unless the decision to issue the same was one which, objectively viewed in all the circumstances, fell outside the range of reasonable options open to the Commission.

Guidelines

26. With the above principles in mind, the Appeal Board also had regard to what might properly be referred to as sanctioning guidelines set out within the FA regulations (“the Guidelines”).

27. Where a Charge such as the one brought against the Appellant (i.e. of threatening behaviour towards a match official) has been found proven, the Guidelines state:

Sanction range (Suspension)

A Disciplinary Commission shall impose an immediate suspension within a range based on the category of offence committed (as set out below) ...

Unless otherwise stated, the lowest end of the applicable range shall operate as a standard minimum suspension. A Disciplinary Commission may impose an immediate sanction in excess of the upper limit in circumstances where aggravating factors of significant number or weight are present.

Threatening behaviour

[1] suspension from all football activity for a period of between 56 days and 182 days. The recommended entry point, prior to considering any mitigating or aggravating factors, is 112 days.

[2] a fine of up to £100, with a mandatory minimum fine of £50.

[3] an order ... to complete an education programme ...

Conclusions

28. It was the unanimous judgment of the Appeal Board that it cannot properly be maintained that the Suspension (of 112 days for all football activity) was an “excessive” sanction/penalty/order.
29. In the Appeal Board’s view: the nature and duration of the Suspension was, in all the relevant circumstances, and on the basis of the Commission’s factual findings (which were not the subject of any direct challenge in the Appeal), comfortably within the range of options reasonably open to the Commission. Indeed, a longer period of suspension might potentially have been justified had one been issued, having regard to the Guidelines. Some

panels might potentially have arrived at shorter period, some might have gone longer; but the Commission's conclusion cannot be said to be "excessive". As such, it would not be appropriate for the Appeal Board to interfere with the Suspension.

30. The Appeal Board noted that the Suspension was slightly below the mid-point of the Guidelines (which would be 119 days), and set at the "recommended" entry point.
31. The Guidelines expressly refer to "all football activity" for the relevant period.
32. It was clear to the Appeal Board, from the Reasons, that the Chair was aware of the Appellant's otherwise materially unblemished disciplinary record. Other than that, though, there were no other material mitigating factors (or, at least, none that were sufficiently significant) to take into account and potentially give credit for when it came to consideration of an appropriate and proportionate sanction.
33. The Chair had expressly found, as recorded within the Reasons, that the relevant threat was specific to an event and therefore credible; and referred to the adverse effect that the Chair had accepted it had had on the Referee's feelings of personal safety. Such matters could properly be considered to be aggravating factors.
34. The Appeal Board considered the points raised in the Grounds relating to the Appellant's mental/physical health and wellbeing, and weight management. The Appeal Board noted that there was no supporting evidence (such as medical evidence) in relation to the same. But, in any event, such points were not sufficient, to alter the overall analysis/judgment of the Appeal Board. Among other things, the Suspension is not, when viewed in a wider context, set for a particularly lengthy period of time, and there are other ways in which the Appellant might exercise in the meantime.

35. For the avoidance of doubt: the Appeal Board also came to the view the Sanction was not excessive in any other material way: in relation to the fine; the online education course; or the penalty points for the Club; etc.
36. In coming to the conclusions above, the Appeal Board also kept in mind the overarching objectives of the regulatory scheme more generally. The wider purpose of that scheme, must, in part, be to provide some measure of protection for those who wish to participate in the game of football, with some additional and particular protection for those, such as the Referee, who participate as match officials. In addition, it is important to uphold proper standards of conduct and to maintain wider public confidence in the game. Such matter and considerations, along with the other circumstances of the case, outweighed the points referred to in paragraph 34 above.
37. The Appeal was therefore dismissed.
38. The Appeal Board also concluded that, in all the circumstances, no order for costs against the Appellant (or any other party) would be appropriate; but that, given the outcome, the appeal fee should and would be forfeited.

SIMON LEWIS

13.12.22