

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

BETWEEN:

LEE GIBBONS (Appellant)

-and-

AMATEUR FOOTBALL ALLIANCE (Respondent)

WRITTEN REASONS

1. The Appeal Board conducted a hearing on Monday 25 January 2022 to determine an appeal by Mr Lee Gibbons ("**the Appellant**") against the decision of a Disciplinary Commission ("**the Commission**") on behalf of the Amateur Football Alliance ("**the Respondent**") arising from a hearing on 9 November 2021, notified on 10 November 2021 and appealed by the Appellant in a notice of appeal dated 23 November 2021, notice of an intention to appeal having been given on 16 November 2021. The Respondent had determined on 9 September 2021 that the Appellant had contravened FA rules E3.1 and E3.2.
2. The charge ("**the Charge**") arose from a match between Civil Service Fourth and Ibis Eagles Reserves on Saturday 25 September 2021. The Charge was in the following terms:

"It is alleged that Lee Gibbons used abusive and/or insulting language contrary to FA Rule E3.1 and it is further alleged that this is an aggravated breach as defined by FA Rule E3.2 because it includes a reference to Ethnic Origin/Colour/Race, this refers to the comment "that's why brown people don't play football."

3. The Commission, having determined that the Appellant was guilty on the charge, as evidenced by a results letter dated 10 November 2021 gave the Appellant a 7-match ban, imposed a £75 fine plus 6 penalty points and a mandatory education course. These sanctions were subsequently suspended pending the outcome of this appeal.
4. The appeal hearing was a personal hearing held by MS Teams, the Appeal Board comprising Mr Christopher Stoner QC (Chair), Mr Kristian Jones and Mr Alan Darfi. Mr Conrad Gibbons of the FA Judicial Services acted as secretary to the Appeal Board.
5. The Appellant was represented by Mr Stuart Sanders of Counsel, whilst the Respondent was represented by Ms Melanie Armstrong. The Appellant and Mr Patrick Carton, the Appellant's club captain, were also in attendance but played no role in the hearing itself.
6. Ms Armstrong indicated she wished to add nothing to the Response to the Notice of Appeal, the County FA not having played any role in the previous hearing. The Appeal Board thanks Ms Armstrong for confirming this and Mr Sanders for his submissions and both for their assistance in the documents within the Appeal Bundle.
7. The parties were informed by a Decision Letter, sent by email by Conrad Gibbons on behalf of the Appeal Board and dated 25 January 2022, that the Appeal Board had allowed the appeal, but only on the basis that the Commission took into account an irrelevant consideration when reaching its decision with the arguments that the Commission also failed to take into account relevant considerations being dismissed. The Appeal Board also directed that the matter be remitted back for a rehearing by a separate and independent FA National Serious Case Panel and that no order be made as to costs, but that the appeal fee be returned.
8. The Respondent made an application pursuant to Rule 11.26 of the FA Handbook for written reasons for the decision to be provided. This document contains the written reasons for the Appeal Board's decision.

Background

9. The crux of the Charge is evidenced by the statement of Mr Chand Shah of Ibis Eagles ("**Mr Shah**") who stated:

“During the game on Saturday 25th September 2021, I was racially abused by the number 14 (I believe this was the number he was wearing) of the opposition team civil service.

... About 10-15 minutes later, we were on the attack and I got tackled by two players from the opposition team, one of the players being the number 14. I felt like I pulled my muscle and was on the floor and he came up to me and said “that’s why brown people don’t play football.

I waited till the ball went out of play to speak to the referee and informed him of the racial abuse I just received and once again he said he didn’t hear anything which I feel isn’t good enough.”

10. The papers include a short statement from the referee, who was not able to attend the Commission hearing, confirming that the complaint had been made and that he had not heard anything. This evidence does not appear to have been disputed.

11. The Appellant provided a witness statement in which he denied making the comment or indeed any racist comment. As to on-field matters he said:

“The game on Saturday was a game that Civil Service 4th dominated (as reflective in the score line). Ibis players, unsurprisingly, became frustrated as the game went on and a few late challenges went on (most on me). This resulted in some verbal back and forth between myself and the Ibis left winger. Nothing that would be unsurprising to hear on a football pitch (although the Ibis player did start referring to my mum which I laughed off). When he then missed a chance, I said to him that he should swap positions with his left back as he was much better.”

12. The Appellant’s statement also contains a paragraph on what happened in the bar after the game. Mr Shah’s statement does not, but the Appeal Board does not find that surprising as it concentrated on the complaint and what Mr Shah was saying had been said on the pitch.

13. As regards what happened in the bar the Appellant’s statement said:

“... In the bar, I was made aware of an allegation from an IBIS player. I initially dismissed it as I assumed, they were winding me up. It then became apparent it was

not a wind up. A different IBIS player from the same team then demanded on the allegor that he said what was said, but he would not repeat.”

14. As to events in the bar, Mr Dimond’s statement said:

“In the Civil clubhouse it got a little heated as my squad sat very close to Civil and #14, and demanded to understand what was said and, if that’s not what he said, what he had said. We did not get an answer.”

15. Finally, on events in the bar, Mr Solomon’s statement says:

“I found Lee in the bar and explained what I had been told by the IBIS players. He explained to me that he had made no such remark to any player during the game. I fed this back to the IBIS squad who were also present in the bar. There were various conversations between members of the respective squads which resulted in something of an impasse as the IBIS player was stating that the remark was made, the Civil player was stating that it was not and nobody else present seemed to have heard it.”

16. It has been necessary to refer to what happened in the bar, as one of the grounds of appeal relates to that time, even though the charges relate to what happened on the pitch. The Commission had the benefit of hearing evidence from Mr Shah, Mr Dimond, the Appellant and Mr Solomon, including cross-examination.

17. The Commission produced contemporaneous written reasons, for which the Appeal Board are very grateful. As to Mr Shah the Commission stated, at paragraph 6 of its written reasons:

“During cross examination at the hearing, CS came across as a credible witness. CS was clear and consistent in answering questions. CS confirmed that the alleged comment was made to him in the aftermath of a fair challenge from LG which left CS on the ground injured, perhaps up to 30 seconds after the challenge as LG walked past. Regarding the comment in question, CS confirmed that he was ‘110%’ certain of what he had heard from LG. CS described a brief conversation post match in the bar with LG whereby LG had said to him ‘you’re full of it’, to which CS had responded ‘you’re just sitting there, grinning’. CS confirmed that, despite the fact that after the comment he had continued playing the game directly up against LG, for the remainder of the game he passed the ball on whenever it came to him rather than get into further

confrontation with LG. CS stated that the comment had really 'got to' him and that he had to take a few days off work. CS had followed up with the Victim Support assistance offered by the FA by way of phone conversations."

18. As to the Appellant the Commission stated, at paragraph 11 of its written reasons:

"During cross examination at the hearing, LG did not come across as a credible witness. LG gave evidence about several aspects of the day which were either inconsistent or did not tally with accounts from persons other than CS including i/ Whether LG had engaged in argumentative exchanges with CS prior to the incident (LG initially claimed that he had said literally nothing at all to CS, despite his own statement referring to a comment from LG about the IER left back being a better player – also, RS later revealed that LG had told him that he had called CS 'shit'); ii/ Whether LG had shaken hands with CS at the end of the game (LG changed his response to this question several times between whether he did not shake hands or could not remember before settling on an answer that he did not shake hands with CS. It is perhaps surprising in itself that somebody should remember exactly who they shook hands with post match unless something of note had occurred between the players. LG contended that nothing of note had happened); iii/ Whether LG engaged in any exchanges in response to the allegation when in the bar post match (LG had stated that he was 'not asked about what he said by anybody' which contradicted the testimony of DD, RS and CS). LG appeared uncomfortable on the subject of race when asked to describe the ethnicity of CS."

19. The Commission also found expressly that Mr Dimond was a credible witness and although not referring to the point expressly, appears to have determined the same in respect of Mr Solomon. It is important to observe that at paragraph 15 of its written reasons the Commission determined the foregoing paragraphs were only a summary of the key evidence provided and did not purport to contained reference to all points made.

20. Having recited the evidence, the key paragraph determining the matter is paragraph 17 of the Commission's written reasons, where they state:

“In determining what was likely to have happened, The Commission concluded that the likelihood of CS having deliberately fabricated a comment, particularly with such unusual wording, was extremely small. CS clearly still appeared shaken by the incident and was undeniably upset post match and thereafter. There was very little doubt from The Commission that CS believed that he had heard the comment as described.

The Commission considered the fact that no other person had heard the comment, despite others presumably being in reasonably close proximity. The Commission concluded that, although this fact did not assist the case against LG, this did not mean that the comment had not been made as described. Bearing in mind societal attitudes, it is arguably more likely that a discriminatory comment, if used, is more likely to be spoken to a deliberately limited audience than to a wider audience.

The Commission assessed that the key aspect of the case was one man’s word against another. There was a significant difference in the credibility of those individuals with CS coming across as consistently credible whereas LG did not.

In addition, there was the key question of what had actually happened if the situation was not as described by CS. Having determined that fabrication was extremely unlikely, the Commission assessed other possibilities. Mishearing was deemed by The Commission as an unlikely explanation. LG had simply denied saying anything to CS which ruled out any exploration of this avenue. Mistaken identity also seemed to be extremely unlikely given CS’ level of certainty about what he heard and from whom he heard it. The Commission determined that there was no alternative explanation which carried any great degree of likelihood.

The Commission determined that, on the balance of probability, the most likely reality was that LG had used the sentence attributed to him by CS.”

[Our underlining added for emphasis].

Appeal

21. The Appellant advanced arguments based on paragraph 2.3 of the Appeal Regulations, namely that the Commission “*came to a decision to which no reasonable body could have come.*”

22. During the Appeal Board hearing Mr Sanders confirmed that it was suggested that the Commission had reached a decision to which no reasonable body could have come in two ways:

(1) Firstly, that the Commission failed to take into account relevant considerations, as to which two points were advanced, namely:

(i) That Mr Shah gave evidence that in the bar after the game the Appellant had said “you’re full of it” which, it was said “*was expressly contradicted not only by [the Appellant] but also by both other witnesses who gave evidence to the Commission.*”

(ii) That in describing what was alleged to have been said on the pitch Mr Shah gave evidence that the words were spoken *immediately* following a two-player challenge, whilst he later said it was up to 30 seconds later.

(2) Secondly, that the Commission took into account an irrelevant consideration, namely the Appellant’s response to questions from the Commission on the ethnicity of Mr Shah.

23. As the Appeal Board allows the appeal on the second of these grounds, this will be considered first.

24. The Notice of Appeal, supported by Mr Sanders’ submissions, was to the effect that in assessing the Appellant’s credibility the Commission took into account a finding that the Appellant appeared uncomfortable on the subject of race when asked by the Commission to describe the ethnicity of Mr Shah.

25. The Notice of Appeal observes that there was no suggestion the Appellant was or should have been aware of the precise ethnicity of Mr Shah, nor how he chooses to characterise his own ethnicity. It was said that in pursuing this line of questioning, in the context of a serious charge, it was inevitable that the Appellant would have been uncomfortable. It was said that in drawing an inference from the Appellant’s apparent discomfort, the Commission was taking into account an irrelevant consideration.

26. That such questioning occurred was confirmed by the chair of the Commission who in the Response to the Notice of Appeal said:

“Very little or no weight was given to [the Appellant’s] apparent uncomfortable response to the question on ethnicity. The Commission explored [the Appellant’s] description of [Mr Shah’s] ethnicity to explore how [the Appellant] might describe it. For example, had [the Appellant] referred to [Mr Shah] as ‘brown’, the Commission may have inferred that this made it more likely that [the Appellant] had made the alleged comment. The Commission simply noted that [the Appellant] was uncomfortable when answering the question. No mention was made in the decision summary (para 17) that this factor was taken into account.”

27. The Appeal Board accepts the submission that the Appellant would not necessarily have been aware of Mr Shah’s ethnicity or how he characterises his ethnicity and determines that in the context of the Charge it is not at all surprising that the Appellant was and/or appeared uncomfortable with the line of questioning. The Appeal Board considers there was, on the part of the Commission, what seems a rather clumsy attempt to get the Appellant to use the word ‘brown’ which would then have been, in the Commission’s view, corroboration of what had been alleged to have been said on the pitch. In this context, that the Appellant appeared uncomfortable on the subject of race is, in the view of the Appeal Board, an irrelevant consideration as to his credibility.
28. Attention then turns to how this point was considered. The Appeal Board notes the Chair of the Commission stating that very little or no weight was given to the finding as to the Appellant’s discomfort. However, the Appeal Board also notes the Chair’s comment that it was not expressly referred to in paragraph 17.
29. The Appeal Board is unable to accept the thrust of the last statement, namely as being corroborative of the suggestion little or no weight was given to the point. The credibility of the Appellant was clearly identified in paragraph 11 of the Commission’s written reasons (recited above) and that included the point in issue, expressed as “*LG appeared uncomfortable on the subject of race when asked to describe the ethnicity of CS.*” After careful consideration, the Appeal Board accepts the submission made by Mr Sanders that the correct way of construing paragraph 11 of the Written Reasons is that considered as a whole it contains two reasons why the Appellant did not come across as a credible witness, the first being that he gave evidence about several aspects of the day which were either inconsistent with or did not tally with the accounts from persons other than Mr Shah, of which three examples are then particularised, and, secondly, that he was uncomfortable when asked about race.

30. When attention turns to paragraph 17 of the Commission's written reasons and, in particular, that part underlined in the recitation above, the credibility of the Appellant and Mr Shah is rightly identified as a key aspect. It is said there was a significant difference in credibility, and in the context of the totality of the written reasons that difference is identified from considering paragraphs 6 and 11 (as recited above). In paragraph 11 the Commission gave two reasons for saying the Appellant was not credible and one of them was a point which in the Appeal Board's view simply should not have been taken into account, namely that he was uncomfortable when asked about Mr Shah's ethnicity.
31. The Appeal Board then asks itself about the impact of the Commission having taken this point into account. Whilst the Appeal Board is aware that the Chair, in response to the Appeal said that it was given no or very little weight, when the juxtaposition of paragraphs 11 and 17 of the Written Reasons is considered the Appeal Board considers that they do not support such an assertion. As already stated, the point is one of two reasons given for questioning the Appellant's credibility and is then, in essence, referred back to as part of the '*key aspect*' identified in paragraph 17.
32. The Appeal Board has considered very carefully the rhetorical question of whether the finding that the Appellant was uncomfortable when asked about Mr Shah's ethnicity, which it concludes was an irrelevant consideration, was insignificant to the overall reasoning of the Commission, in which case even as an irrelevant consideration it would not affect the overall result. However, on the information available to the Appeal Board, it concludes it simply cannot say the point was insignificant: it was significant enough to be one of two reasons articulated as being the reasons why the Commission did not consider the Appellant to be a credible witness. Whilst the Appeal Board is satisfied that the first reason given in paragraph 11 was the principal reason affecting the Appellant's credibility, it is simply unable to determine that the second reason can be said to be 'insignificant'.
33. Accordingly, the Appeal Board considers the ground of appeal to be established.
34. It was also said the Commission's decision was one that no reasonable Commission could have come to because it failed to take into account two relevant considerations, namely what were said to be inconsistencies in Mr Shah's evidence.

35. The first point taken was that Mr Shah said in evidence before the Commission that the Appellant shouted at him “you’re full of it”. In so far as it was said this was not in his statement, the Appeal Board considers there is nothing in the point given that, as identified above, Mr Shah’s statement concerns itself directly with events on the pitch.
36. It is also said this evidence was “*expressly contradicted*” by the Appellant and both other witnesses who gave evidence to the Commission. There is a conflict as to what was said by Mr Dimond: the Appellant states through his Notice of Appeal that Mr Dimond said that he did not recall this comment. However, the Chair of the Commission in the response to the Notice of Appeal states that he does not recall or have a written note of Mr Dimond being asked about the point directly.
37. No application was made to adduce a note of the evidence of the hearing and the Appeal Board must consider the documents it has. It is not satisfied that the Appellant has shown that Mr Dimond “*expressly contradicted*” Mr Shah’s evidence. Even if he gave evidence that he did not hear it, and there is also a discrepancy as to whether his evidence was that he was not present the whole time, that does not mean the words were not said. Mr Dimond’s written statement is clear that exchanges were heated.
38. Further the Appeal Board has no evidence that Mr Solomon did not hear the words in issue. Again, no application was made to adduce a note of the evidence before the Commission. Most notable the Notice of Appeal is silent on this point, aside from asserting Mr Solomon “*expressly contradicted*” Mr Shah’s evidence. Mr Solomon’s statement is silent on the point and the Commission’s written reasons do not assist. The mere fact Mr Solomon was present in the bar is not, in the Appeal Board’s view, sufficient to determine that he would have heard the words.
39. The Appeal Board was clearly of the view that the inconsistency as alleged in the Notice of Appeal was simply not established and that this point must be dismissed.
40. That leaves the allegation the Appeal Board failed to take into account a relevant consideration, namely that Mr Shah changed his evidence on the time when the alleged words were spoken. It was alleged that his initial evidence was that they were spoken ‘immediately’ after a two-man tackle on Mr Shah. However, the word ‘Immediate’ appears no-where in the Appeal Bundle save in the Notice of Appeal.

41. The Commission Chair, in the response to the Notice of Appeal, states that Mr Shah did say it happened 'straight after' the tackle and then stated it was up to 30 seconds later. The Appeal Board is very conscious that Mr Shah's answers in cross-examination would have been dictated by the exact questions put. The Appeal Board is unaware of what those questions were.
42. The Appeal Board notes that the Commission, at paragraph 6 of its Written Reasons found that Mr Shah had confirmed that the alleged comment was made in the 'aftermath' of a fair challenge which left Mr Shah on the ground injured. The Appeal Board notes that Mr Shah's statement says that he was on the floor when the Appellant "*came up to me*" without any temporal limitation, thereby highlighting the importance of the questions put in cross examination.
43. In the absence of any evidence that Mr Shah said 'immediate' and rejecting any suggestion that, in context, 'straight-after' means the same as 'immediate' the Appeal Board considers that the Appellant has failed to establish there was any inconsistency in Mr Shah's evidence for the Commission to have regard to and accordingly dismisses the argument on this ground.
44. Finally, the Appeal Board has to determine which of its powers under paragraph 21 of the Appeal Regulations to exercise. The Appeal has been allowed on a narrow technical ground, where the Appeal Board are simply unable to say, other than it was not insignificant, what impact the irrelevant consideration had. The Appeal Board are also mindful that large parts of the Written Reasons were not challenged, including some important points such as the first example given in paragraph 11 as to the Appellant's inconsistent evidence and the fact the referee confirmed that Mr Shah complained to him during the game that a racist comment had been made.
45. In all the circumstances the Appeal Board were firmly of the view that it was not in a position to state that the ground on which the Appeal has been allowed would necessarily have resulted in the Charge being dismissed. Accordingly the appropriate course is to remit the matter for a rehearing.

46. Accordingly, the Appeal Board directed that the decision letter be sent confirming that that the Appeal be allowed on the sole ground that the Commission took into account an irrelevant consideration; that the sanctions imposed on the Appellant by the Commission be quashed, as the issues of whether the charge is proven and, if so, what sanctions are appropriate will be for the new Commission; that there be no order on costs, but that the appeal fee be returned.

Dated 25 January 2022

A handwritten signature in black ink, appearing to read 'Christopher Stoner', is written over a horizontal line of small, repeating characters.

Christopher Stoner QC

(Chair)