IN THE MATTER OF AN APPEAL TO THE APPEAL BOARD OF THE FOOTBALL ASSOCIATION

MR MIKKEL BECK

Appellant

-and-

THE FOOTBALL ASSOCIATION

Respondent

DECISION AND WRITTEN REASONS OF THE APPEAL BOARD

Introduction

1. This is the Decision and Written Reasons of the Appeal Board sitting on this Appeal brought by Mr Mikkel Beck (**the Appellant**) against the sanction imposed by the Regulatory Commission on 25 February 2022 to impose a suspension of 8 months from all Intermediary Activity from 4 March 2022 reached on paper following his admission of a breach of Rule E1.2 by breach of Regulation A3 of the FA Regulations on Working with Intermediaries 2017/18 (**the Decision**).

2. The Appellant does not appeal other aspects of the sanction imposed on that occasion.

3. We have been appointed by Sport Resolutions (UK) as the FA Appeal Board in this appeal. The Appeal Board is constituted as follows:
    a. Louis Weston (Chair) – Independent Specialist Panel Member
    b. Ken Monkou – Independent Football Panel Member
    c. Michael O'Brien – Independent Football Panel Member

4. We have no conflict of interest in respect of any of the parties to the appeal and the Appellant had no objection to our sitting as the Appeal Board.

5. We have been provided with a Bundle which contains the Decision, the evidence that led to it, as well as the documents generated in respect of the Appeal. We have also received decisions of the Regulatory Commission and FA's Appeal Board in other cases. We have read and reviewed all those materials and we only summarise the contents of those materials in these reasons.

6. At a hearing conducted by Teams on 28 April 2022, in which the Appellant was represented by Mr Thomas Horton, of Squire Patton Boggs (UK) LLP and the Respondent by Mr David Dainty we received very clear, helpful, and skilful submissions for which we are grateful.

7. We recognise, record and emphasise that we have had the benefit of oral submissions and the Regulatory Commission did not.

8. Following that hearing we announced our decision that the appeal should be allowed to the extent that we suspended a part of the suspension for a period of 18 months, the suspended part was 2 months, that is one quarter of the total suspension.

9. We set out below our reasons for doing so under these headings:
    a. The Background.
    b. The Decision.
    c. The Appeal:
    d. Outcome.

The Background

10. The Appellant is a football intermediary with many years of experience and before this matter was in excellent standing with the FA. He is based in Europe and has worked with many national associations during his career. Whilst he has worked under the obligations of the FA before and since, in 2017 he had not done so for some years. He did not therefore in 2017 have any then current familiarity with the FA Rulebook. He accepts of course he is bound by the Rules whether he has detailed understanding of them or not.

11. In 2017 the Appellant was involved in the transfer from Valencia CF to Brighton and Hove Albion (**the Club**) of Mat Ryan (**the Player**).

12. The Appellant in his witness statement provided to the Regulatory Commission accepted that he had informally represented the Player on at least three other occasions before the 2017 transfer. He had never had a Representation Contract for the Player but in those earlier transactions he had acted as an intermediary for the club and given the benefit of his experience and opinion on the transaction to the Player.

13. In 2017 as a part of the transfer process a form entitled Intermediaries Declaration Form (**the IM1**) was required to be completed. The IM1, amongst other things, details the intermediary's involvement in the transfer and the IM1 is sent to the FA.

14. In the IM1 that related to the transfer dated 1 July 2017 the Appellant signed and recorded that:
    a. He acted for the Club only,
    b. Omitted that he had acted for the Player,
    c. In Annex 2 of the Form which required details of the remuneration in a Dual Representation case, left those details not completed.

15. For his services the Appellant was paid £1,170,000 plus VAT.

16. In fact, as the Appellant has accepted, he was in 2017 acting as an intermediary for the Player as well as for the Club. As such to say otherwise and to say that he only acted for the Club was false and to fail to complete Annex 2 of the IM1 was misleading particularly so when he was receiving remuneration.

17. As it happens this transfer was not the only transfer involving players moving to the Club in which intermediaries recorded their involvement in the transfer as being for club alone, when in fact the intermediary had in fact acted for both Player and Club. That conduct took place over a number of seasons.

18. The Regulatory Commission that decided this case also determined cases involving charges of Breach of FA Rule E1.2 and Regulation A3 of the FA Regulations on Working with Intermediaries as applied in the relevant year:
    a. *Olafur Gardasson* decision of 25 February 2022, in which Mr Gardasson was suspended for 6 weeks (3 of which were suspended for 12 months) in a case in which he received fees of £5,000 ex VAT having unsuccessfully contested the charge.
    b. *Elliott Fillingham* decision of 25 February 2022, in which Mr Fillingham was suspended for 4 weeks (2 of which were suspended for 12 months) in a case in which he received £3,640 ex VAT having admitted the charge and received credit against sanction of one third.
    c. *Gary Porter* decision of 25 February 2022, in which Mr Porter was suspended for 4 weeks (2 of which were suspended for 12 months) in a case in which he received £2,500 ex VAT having admitted the charge and received credit against sanction of one third.
    d. *Bruno Satin* decision of 25 February 2022, in which Mr Satin was suspended for 3 months in a case in which he received £65,380 ex VAT having unsuccessfully contested the charge.
    e. *Ben Thatcher* decision of 25 February 2022 in which Mr Thatcher having admitted two charges in respect of two transfers in which he had received a total of £91,800 plus VAT was suspended for 4 months on each charge concurrently having admitted the charge and received credit against sanction of one third.

19. In another such case this Appeal Board on 12 April 2022 gave its reasons for allowing the Appeal of Mr Pinhas Zahavi against a suspension of 3 months, and allowed the appeal to the extent of the suspension being reduced to 2 months. That case involved a commission payment of £70,000 ex VAT.

20. In each of those decisions the Regulatory Commission was the same, and in each case the decision records that the intermediary was of good character both before and since the specific incident and the incident took place some years previously.

21. Further, in each case the Regulatory Commission asked itself whether there were '*clear and compelling*' reasons (the test in the 2021/2022 Rules) for suspending the period of a suspension. Only in those cases where the Regulatory Commission found that the amounts involved were not substantial did the Regulatory Commission suspend a part of the suspension.

22. Underlying those decisions is the fact that if an intermediary is recorded as acting for the Club only when in fact the intermediary was also acting for the Player is that:
    a. There is a loss to HMRC. That is because any payments made to the intermediary relating to services to the Player are taxed as a benefit in kind and liable to income tax, NI contributions, and VAT (if paid) whereas if the intermediary acts only for the club there is a lower tax burden due to the absence of income tax, NI contributions and VAT (if paid). The HMRC is entitled to the proper tax and the apportionment of services between Player and Club ought properly to be made.
    b. There is an inaccuracy of recording to the FA. The protections of identification of who is acting for who and in what circumstances are lost and the FA is misled as to the true circumstances of the transaction.

The Decision.

23. The Decision in this case is annexed hereto. In it the Regulatory Commission made these findings (references are to paragraphs of the Decision)
    a. The Appellant received £1,170,000 plus VAT (¶9).
    b. The Appellant had an established relationship with the Player (¶16)
    c. The Appellant's mitigation:
        i. A full admission at an early stage (¶16) for which one third credit was given (¶24).
        ii. No previous disciplinary record (¶18)
        iii. Remorse (¶21)
        iv. The events were historic (¶21),
    d. Aggravating features were:
        i. The fees were significant (¶18).

ii. HMRC was deprived of significant revenue (¶21).

e. This was a serious breach of the intermediaries' regulations (¶22).

f. There were no 'clear and compelling reasons' to suspend a part of the suspension (¶24).

24. The Regulatory Commission imposed a fine of £35,000 and gave the Appellant a warning as to future conduct in addition to a suspension. Noting this is not a precise position we were told the fine was amongst the largest imposed on an intermediary. The Appeal however was only as to the suspension.

25. The Decision is silent as to the Appellant's state of mind in completing the IM1 incorrectly.

The Appeal.

26. The Appeal was brought in time and in compliance with the Rules.

27. The Appellant submitted that there were errors on behalf of the Regulatory Commission in failing to reach a decision which a reasonable body could have reached and/or was a sanction that was excessive. In oral argument the issues really became:

a. Was a sanction of 12 months excessive before discounting by admission leading to an end point of 8 months?

b. Was it right not to suspend a part of that 8 months?

28. We address the Appeal broadly following the scheme of the Appellant's Notice of Appeal.

"Excessive" and Proportionality

29. The Appellant argues that we should only allow an appeal if we find the sanction to be excessive (the language of Regulation C 2.4). We agree.

30. What is meant by "excessive" is set out in the decision in *Wilfried Zaha v The Football Association* (Appeal Board February 2019) at ¶34: '*materially more than was necessary or proportionate in the circumstances of the case*'.

31. It was contended by the Appellant that the Regulatory Commission had not expressed that it was seeking to act proportionately. We again agree.

32. It is however a false point, a Decision with Reasons is not required to set out expressly every matter that has been considered and when a Regulatory Commission expresses itself as here to be '*determining the appropriate sanction… [taking] into account any aggravating and mitigating factors*' (¶16) and has set out more than once the factors it has considered (¶24) it is not necessary for the Regulatory Commission to express every principle it has followed in reaching a sanction where there is no real doubt that it has done so.

Length of Sanction

33. The central point on the issue of excessive sanction was that the Appellant contends that there is no explanation of how the starting point of 12 months suspension after mitigating and aggravating features were set out but before credit for admission was reached in this case. We agree that the Decision does not explain that level of sanction.

34. This was a case in which there were no guideline sanctions, and the Regulatory Commission was approaching the case with no such assistance. In such a case in which sanction in the sporting context is being considered there is likely to be a need to consider two matters. First, what is the level of culpability. Second, what is the level of harm or risk of harm that arises from the breach. The first matters looks to the involvement of the actor, the second the consequences or potential consequences of the act in the context of the sport.

35. Particularly in this case and because the charge against the Appellant was of an offence of strict liability (see *FA and Middleton,* 24.9.15 at ¶5.10) the issue of culpability turned on the Appellant's state of mind in relation to the inaccurate information in the IM1.

36. The Decision does not identify what finding was made as to the Appellant's state of mind. We invited the parties to consider whether we should decide on that issue, being as we are, in the same evidential position as the Regulatory Commission. They agreed that we should do so, and so we do.

37. There are potentially different 'intentions' that might be associated with the breach charged.

38. At one end there is a case where the intermediary intentionally misled the FA on an IM1 form with the intention of avoiding a revenue liability to the Player the intermediary in fact was representing. Such a case obviously involves an intention in relation to both the commission of the breach and an ulterior intention to bring about a benefit. At the other extreme would be a case where an intermediary signed one form in confusion for another whilst having no ulterior intention at all. The range of intentions informs culpability.

39. In his response to the charge, and on the appeal, the Appellant contended that he had acted inadvertently and at worst negligently.

40. We have considered that contention, and we reject it.

41. In our view the Appellant intentionally signed the IM1 when he knew that it contained false and incorrect information. We reach that view for these reasons:
    a. The Appellant in his witness statement makes clear he thought there '*should be a dual representation contract in respect of the Transfer'* (¶25).
    b. The Appellant in fact was acting for both Player and Club. In, for example:
        i. In texts between the Appellant and the Club the Appellant in early June 2017 was negotiating terms for the Player (Bundle at [348-54]),
        ii. In an email from the Club to the Appellant of 9 June 2017 the Club records '*terms [for the Player] are not at the level you have requested',*

    The Appellant plainly was acting for the Player and his interests.

c. The IM1 is not a complicated form. Its questions are not difficult. They are not unclear. The first question on the first page is '*Has the Player used an intermediary: Yes or No'*. The answer given was No.

d. The IM1 in fact in this case (as we return to below) went through at least one earlier iteration. In email exchanges between the Club and the Appellant's lawyer, to which the Appellant was copied in, on 15 June 2017:

   i. The Appellant's lawyer explained that the Club had sent an IM1 that had completed the IM1 with details of the Appellant's remuneration inserted in Annex 2. That is only consistent with the Appellant acting for the Player and the Club. The lawyer asked if this was a '*simple mistake'* .

   ii. The Club replied that it would take that out and explained why stating '*although this has never been queries before as the question on the page says… is the intermediary being remunerated for services to the Registering Club? I cannot therefore tick any box because if I tick 'yes' then I have to fill in payment details and if I tick 'no' then I am telling a lie'*

   It appears that such an exchange ought to have put a red flag/alarm bell in the mind of the Appellant that there was something awry with this transaction, that answering a question correctly could not be achieved by the Club.

42. Overall, we decide that it is very clear, although we decide it on the balance of probabilities, that the Appellant knew he was acting for the Player and nonetheless was prepared to complete the IM1 in a way that stated the opposite. He acted intentionally in signing the incorrect IM1 knowing those matters.

43. We also make clear that we do not consider that the Appellant did this with a view to any benefit for himself and we have no evidence, and it is not suggested, that he did it in any way to benefit the Player.

44. The reason the IM1 came to be completed as it was completed we find was because the Club in an oral conversation with the Appellant on 12 June 2017 (Appellant's statement ¶28) and in a WhatsApp message between the Club and the Appellant on 14 June 2021

confirming it, had said to the Appellant that the form could and should be completed this way, the reason given orally was because the Appellant did not have a Representation Contract for the Player and that is consistent with the WhatsApp message.

45. The position in the round we find is this:
    a. The Appellant was representing the Player and should have had a Representation Contract and he expected to be acting on a dual representation basis,
    b. The Appellant did not have a Representation Contract with the Player,
    c. When the Club was told this by the Appellant, the Club on 14 June 2021 told the Appellant it would prepare the paper work and there was no need for the Appellant to do any paperwork with the Player,
    d. The Club then did prepare paperwork with the Appellant acting only for the Club and not for the Player (although in an earlier iteration it appears to have drafted the IM1 with Annex 2 completed) and sent it to the Appellant,
    e. The Appellant notwithstanding what he ought to have done was content to follow the lead of the Club.

46. The motive of all of this appears to have been to 'get the deal done' without troubling to complete more forms and any delay in the transaction. In short, we consider it likely that the Appellant did not state matters properly because he was happy not to go to the trouble of forming an agreement with the Player.

47. We do not think it likely that the Appellant intended to cause a loss to HMRC. Our view is that the Appellant was reckless as to the consequences of stating he acted only for the Club. In short, he gave the matter little or no thought when he ought to have done.

48. As to the harm or potential harm of the breach the Appellant's submissions are these:
    a. First, that there was no harm because the monies that were lost to HMRC have been repaid or offered to be repaid by the Club. We do not accept this submission at all, the fact of discovery of the loss has led to its cure, were it not discovered the loss would be there. It is a false point.

b. Second, that the quantum of the potential loss is not relevant to sanction in terms of suspension but only to the level of fine. We disagree. We consider that the extent of the potential harm is a significant feature because the potential harm is to the good reputation of the sport, its regulation and the reputation and regulation of intermediaries. That consideration informs both the level of suspension and the level of a fine. This was on any view a very significant sum and whilst there may be the same level of culpability in a case which has a small consequence and a case which has a large consequence, the consequences matter and fall to be reflected in sanction.

49. We note as is apparent from the other cases which this Regulatory Commission considered at the same time, the Regulatory Commission was faced with a range of cases on different facts (summarised above). When looked at together it is clear that the Regulatory Commission imposed different sanctions dependent upon the sums involved and whether there was an admission of breach of the Rules. We do not see error in that.

50. We make clear that we do not consider that there is a direct correlation between quantum of potential harm and sanction. As harm and culpability rise the sanction will increase but it will plateau rather than continue in steady rise.

51. As to the end point of assessment of culpability and potential harm the position we reach is that this was a serious breach because it was intentional, the Appellant was reckless as to the potential consequences and the actual consequences were significant loss of revenue to the HMRC (albeit now repaid).

52. It is right that in other cases, such as *Speight* (Appeal Board 2 March 2021), *Kleinman* (Appeal Board 21 April 2015) and *Middleton* (Appeal Board 24 September 2015) where there have been different breaches of the Rules lesser or different sanctions have been applied than in those appellants' cases. As has been said before we do not consider that a cross comparison of cases in different years and on very different facts has the clarity that would allow us to reach a view that the Appellant's sanction was thereby wrong or excessive.

53. Obligations on intermediaries are clear and breach of them is likely to be considered a serious matter, particularly so when the sums involved are significant and there is a loss to the HMRC.

54. Further, here there was a false communication to the FA and the Player lost the protection of the Representation Contract he was entitled to. They of themselves are serious matters.

55. We consider therefore that as against the range of harms and the level of culpability a suspension was plainly justified and a suspension of over 12 months was justified in this case of intentional breach, reckless as to consequences, (high culpability) and the very significant losses that were caused by it to HMRC and significant misleading of the FA and loss of protection to the Player (high harm/potential harm).

56. Against that assessment the points of mitigation that we have not addressed above are:
    a. Good character (which we accept),
    b. Co-operation with the FA (which we accept),
    c. Remedial measures demonstrated by entering dual contracts in subsequent matters (which we accept),
    d. Early plea and real remorse (which we accept to be genuine), and
    e. Instigation.

57. We consider "Instigation" discretely below.

58. Balancing those other features, we do not consider that reaching a point of 12-month sanction from which one third was deducted was wrong or excessive. Accordingly having regard to the discount for accepting the charge a sanction of 8 months suspension was justified and is not excessive.

Effect of Sanction and suspension of suspension

59. As to the effect of sanction the Appellant argues that the Regulatory Commission imposed a sanction which would impact on the Appellant in two transfer windows ie

Summer 22 and Winter 22/23. We agree that the effect of the sanction was to impact on one transfer window, we are not persuaded on the evidence before us that a sanction ending on 4 November 2022 in fact has the effect on the Winter window that is alleged.

60. However even if that were the effect, we do not consider there is any fault in that. The Regulatory Commission is clearly aware of the consequences of a sanction and as it was put in *Kleinman* (Appeal Board 19 May 2015) at ¶44: *'Suspensions are bound to hurt – that is the point of them. If the financial damage from suspension is going to be unusually heavy in a particular case, then that is something that the agent or intermediary (who is after all best placed to know that) should think about before committing the breach'* .

61. As to suspending the suspension the Appellant made two points.

62. First, it was argued that Decision wrongly uses the test of '*clear and compelling'* in deciding whether to impose a suspension of a suspension. The argument made was that at the time of the breach that qualification was not in the Rules and that to apply it on the current Rules offended the maxim '*tempus regit actum'*.

63. Our view is this:
    a. Latin not being anyone's preferred language we take the submission to mean that the law as it applied at the time of the offence is the law that governs it. We agree with that, but that submission is tied only to substantive breaches that is issues of liability. It informs the principle that no person should be subject to retroactive disciplinary action. The Regulatory Commission did not so act. The Decision involved no retroactive consideration, the Appellant was charged with a breach of the then current Rules.
    b. Issues of sanction fall to be determined on the principles current at the time the sanction is imposed. That is subject to the 'milder law/lex mitior' principle that if the law relevant to the sanctioning of the offence has been amended the less severe law ought to be applied at the time of sanction. What is less or more severe arises from restraint of discretion either by way of minimum or maximum

sanction. Those principles are set out in the decision of the Supreme Court in *R v Docherty* [2016] UKSC 62 and apply in this context by analogy.

c. '*Clear and compelling'* is not a substantive legal change of rules on liability nor a change in maximum or minimum; rather it is declaratory of a principle of sanctioning and has not worsened the sanction that a person is at risk of. It should therefore be applied to this case because it is the current expression of how suspension of suspension should be considered at the time of sanction.

Instigation

64. It is argued forcefully on behalf of the Appellant that standing back from this case it is clear that the Appellant is a man of good conduct, long experience and has never transgressed as regards the FA before. His evidence and the contemporaneous evidence, it is said, makes clear that the Club was the instigator of the false information on the IM1. It was neither the Appellant's suggestion nor was it at his instigation.

65. The FA in response do not dispute the fact that the Appellant on the evidence was led into the form of this transaction by the Club. Mr Dainty properly concedes that is the picture on the evidence.

66. We agree and we consider that concession is properly made. The WhatsApp message from the Club to the Appellant on 14 June states: *Commission agreement can't be done until the morning… I'd suggest getting the deal done and signed. Your working for us so don't need to go on any paperwork [the Player's] end and in the morning [the Club] will have your paperwork on commission'* in a later message '*we can handle commission paper work later today between lawyers'.* Those messages support the Appellant's evidence in his witness statement.

67. The Decision does not consider at all the issue of how the transaction came about and whether it was at the Appellant's instigation.

68. We consider it ought to have done and we have therefore done so because not to has led to an excessive sanction and/or a decision which is one a reasonable decision maker would not have made.

69. We consider that the evidence in the round is that the Appellant was acting for the Player, expected to be acting on a dual representation basis but was asked to complete the forms incorrectly by the Club because it suited the Club and the speed of the transaction to have it done that way. Whilst the Appellant ought to have said 'No'; we accept his recent inexperience in acting in cases in this jurisdiction and the clear terms of the advice from the Club led him to justify to himself that he could so act, when standing back he ought to have known he could not.

70. We have considered how that matter ought to be reflected in sanction when it does not appear in the Decision. Our view is that it is a *'clear and compelling reason'* to suspend a part of the period of suspension and we do suspend one quarter of the suspension for a period of 18 months from the date of the sanction imposed by the Regulatory Commission.

71. In compliance therefore with Regulation 43b we decide:
    a. A sanction of 8 months suspension is appropriate in this case.
    b. The fact that the false matters in the IM1 were so stated to be false arose at the instigation and suggestion of the Club, in circumstances where we accept the Appellant would not otherwise have so acted is a 'clear and compelling reason' within Regulation 43.
    c. We consider the period should be for 18 months and one quarter of the sanction should be suspended.
    d. We consider that the suspended part should be activated if there is any further breach in that period of the Regulations on Working with Intermediaries

Outcome

72. The Decision we make is that:

    (1) The Appeal against the suspension of 8 months is refused.

(2) The Appeal is allowed to the extent that the Appellant is suspended from all intermediary activity until 4 September 2022 (a period of 6 months from 4 March 2022), and the suspended part of the suspension (of 2 months) will not take effect unless, prior to 4 September 2023, the Appellant commits an offence contrary to the Regulations on Working with Intermediaries.

(3) decision of the Regulatory Commission otherwise stands:

a. The Appellant is given a warning as to his future conduct in respect of his observance of the Regulations on Working with Intermediaries

b. The Appellant is fined £35,000.

Louis Weston
Chair of the FA Appeal Board

Michael O'Brien
Independent Football Panel Member

Kenneth Monkou
Independent Football Panel Member

28 April 2022