

IN THE MATTER OF THE FA APPEAL BOARD

THE FOOTBALL ASSOCIATION

BETWEEN:

MILES CURRAN

Appellant

-and-

LONDON COUNTY FA

Respondent

DECISION AND WRITTEN REASONS OF THE APPEAL BOARD

Appeal Board: Ifeanyi Odogwu (Chair) – Independent Panel
Alan Darfi – Independent Panel
Marvin Robinson – Independent Panel

Secretary: Conrad Gibbons – Judicial Services Officer

Date: 2 October 2022

Introduction and Summary

1. On 21 May 2022, a Wimbledon & District Football League, League One fixture took place between Active Sports FC (“the Club”) and Kew Antigua (“Kew”) (“the fixture”). Miles Curran (“the Player/Appellant”), a player for the Club, was involved in an incident after the fixture with the Referee.
2. The Appellant was charged by London FA (“the County FA/The Respondent”). An FA National Serious Case Panel Disciplinary Commission, sitting on behalf of the Respondent (“the Commission”), found the allegation that the Appellant had assaulted or attempted assault a Match Official proved, in a decision dated 12 July 2022 (“the Decision”). The Appellant was suspended from all football activities for 5 years, required to attend a face-to-face Education Course to be completed before the expiry of the 5-year suspension, and the Club received 10

(Ten) Club Disciplinary points for the charge ('the Decision'). The Appellant brings these appeal proceedings against the Decision.

3. This is the decision and written reasons of the Appeal Board. By necessity it is a summary document, and it is not intended to be a record of all submissions and evidence adduced. For the avoidance of doubt, the Board carefully considered all the evidence and submissions made in this case.

Background Facts

4. The Appellant was an unused substitute during the Fixture. Early on, the Referee had cause to issue the Appellant a yellow and red card in quick succession for refusing to return and stand in the technical area for the coaching staff and substitutes. The Appellant was said to continue to shout abuse towards the Referee throughout the remainder of the match.
5. The incident that was the subject of the Improper Conduct Charge and is the relevant issue before this Appeal Board was captured by video footage. This was played at the initial hearing and was seen by this Board for the purposes of the appeal.
6. The footage showed that after the final whistle, the Appellant approached the Referee. The Appellant initially walked alongside the Referee bare chested, as the Referee walked to the touchline to collect his bag. The Appellant then walked away briefly whilst the Referee collected his bag and shook hands with several players and proceeded to turn around and started to walk across the pitch, away from where the players and coaching staff were.
7. As the Referee began to walk across the pitch, he becomes no longer visible on screen. The Appellant, who is stood nearby, is seen to suddenly charge towards Referee. Several players attempted to physically restrain him. The Appellant was holding a plastic water bottle and he thrust his arm towards the Referee causing water to spray from the bottle in the Referee's direction. The Referee said at the initial hearing that the water sprayed over him. The Appellant thrust his arm a second time, this time throwing his water bottle in the

direction of the Referee. The Referee said that the bottle hit him on the upper part of his body, though at the hearing there was a dispute between the parties as to whether the water bottle hit the referee or not.

8. The Appellant was charged on the 31 May 2022 for a breach of FA Rule E3.1 - Improper Conduct - assault or attempted assault on a Match Official by London FA ('the County FA/The Respondent'). Furthermore, an alternate charge of FA Rule E3 - Improper Conduct against a Match Official (including physical contact or attempted physical contact and threatening and/or abusive language/behaviour). The Appellant accepted the alternate charge but requested a personal hearing with regards to the primary charge of assault or attempted assault on a Match Official.
9. The details of the charges as set out in the Charge Letter, concerned the allegation that the Player:
 - *Threw a bottle at the referee*
 - *Was perceived by the referee of trying to attack him*
 - *Was restrained by his teammates from what the referee perceived as trying to attack him."*
10. Accompanying the charge letter was the evidence that the County FA relied upon. In response to the Charge, the Appellant submitted his evidence. The list of documents is set out in the Commission's Written Reasons at §14.
11. A disciplinary hearing was held on 07 July 2022 ('the Hearing'). The central issue was whether the 'assault' charge had been made out, as opposed to the lesser alternative charge of 'physical contact' which had been accepted. The Appellant accepted that his conduct on the day in question was inexcusable, rather, submitted that his actions were incorrectly classified as an assault. He submitted that the alternative charge of 'physical contact or attempted physical contact' would be the most appropriate classification for his conduct. The Commission concluded that the Appellant's conduct of "*throwing a bottle at the Referee and hitting the Referee did pass the threshold to be considered an Assault on the Referee*".

12. The Disciplinary Commission therefore unanimously found the Charge proved and imposed a suspension from all football activities for 5 years, required to attend a face-to-face Education Course to be completed before the expiry of the 5-year suspension, and the Club received 10 (Ten) Club Disciplinary points for the charge.

Appeal Grounds

13. The Appellant initially lodged an appeal on two grounds, the Respondent (1) Misinterpreted or failed to comply with the rules and regulations relevant to is decision; and (2) came to a decision on the facts of the case no reasonable such body could have reached.
14. Following the appeal hearing, and upon directions from the Board, the Appellant also formally brought an additional ground of appeal: that the Respondent (3) failed to provide a fair hearing.
15. In substance, the issues in the case always remained (1) the Commission's interpretation, or lack thereof, of Regulation 96.3 of the FA Handbook 2021/22, and (2) whether the Commission reasonably considered that the Appellant's actions constituted an assault on the Referee as per the Regulations.

The Appeal Hearing

16. During the appeal hearing, the Appellant was represented by Mass Ndow-Njie of Counsel. The Respondent was represented by Carl Long, the Investigations Officer at the County FA.
17. It was submitted on the Appellant's behalf that the definition of "Assault or attempted assault" is limited exclusively to "acting in a manner which causes or attempts to cause injury to the Match Official (whether or not it does in fact cause injury)" as appears in the beginning of Regulation 96.3. It was submitted that the words which follow are simply examples which may indicate when the definition is likely to be satisfied. However, those examples will only

constitute the offence insofar as the Appellant has acted in a manner which caused or attempted to cause injury to the Match Official. Accordingly, the fact that “throwing any item directly at the Match Official” is listed as an example is not conclusive.

18. It was argued that in order to determine the appropriate classification for the Appellant’s conduct, the Disciplinary Commission must have regard to the definitions of assault and physical contact, however, the Decision does not demonstrate that these definitions were considered at all. Mr. Ndow-Njie submitted to the Board that he had spent a considerable time addressing the interpretation and construction of Regulation 96.3 at the discipline hearing.
19. Mr. Ndow Njie argued that no reasonable Commission could consider the Appellant’s actions of throwing water and then an emptied water bottle at a Referee was acting in a manner which causes or attempts to cause injury.
20. The Respondent argued that the Regulation expressly provided examples of assault, which included, but were not limited to causing and/or attempting to cause injury by “throwing any item directly at the Match Official”. It was submitted that the actions in the spraying of water from a plastic water bottle, and consequently, the throwing of said water bottle at the match official came within this definition.
21. It was also argued that the Appellant’s assertion that he did not have any intent to cause injury is not relevant. They go further to assert the Appellant was very aggressive and were he not being held back, had the intent of causing injury to the Match Official. It was also submitted that the actions of spraying water and throwing the bottle were a result of the Appellant being held back and not being able to get closer to the Match Official.
22. The Respondent agreed with the Appellant that the actions committed are “very unlikely to cause serious injury. However, without specific clarity over what constitutes an injury, we would note that any action that has the potential to inflict any pain or mark on the referee falls into the threshold for assault based on the interpretation of the regulations for the 2022-23 season”

23. However, none of the above rationale appeared in the Commissions Written Reasons. In response to a question by a member of the Appeals Board on this point, Mr. Long for the Respondent accepted “I was not at the commission and was not the secretary in attendance. If it is not mentioned within the written reasons, I cannot tell you with any degree of certainty whether it was taken into account, purely because I do not want to speculate on something when I was not there.”

Relevant Rules

24. Assault or attempted Assault against a Match Official is described on page 209 of the FA Handbook as being:

“96.3 Assault or attempted assault: acting in a manner which causes or attempts to cause injury to the Match Official (whether or not it does in fact cause injury), examples include, but are not limited to, causing and/or attempting to cause injury by spitting (whether it connects or not), causing and/or attempting to cause injury by striking, or attempting to strike, kicking or attempting to kick, butting or attempting to butt, barging or attempting to barge, kicking or throwing any item directly at the Match Official.”

25. Physical contact or attempted physical contact against a Match Official is described on page 209 of the FA Handbook as being:

“96.2 Physical contact or attempted physical contact: physical actions (or attempted actions) that are unlikely to cause injury to the Match Official but are nevertheless confrontational, examples include but are not limited to: pushing the Match Official or pulling the Match Official (or their clothing or equipment)”

Findings of the Appeal Board

26. The role of the Appeal Board is to exercise a supervisory jurisdiction. It is not the role of the Appeal Board to substitute its own decision for that of the Commission just simply because it would have made a different decision at

first instance. Therefore, the Board must apply the following principles to this ground of appeal:

- 1) An appeal such as these proceeds by way of a review of the decision of the Commission; it is not a rehearing.
- 2) It is not open to the Board to substitute their decision for that of the Commission simply because the Board might themselves have reached a different decision.

If the Commission has reached a decision which it was open to the Commission to reach, the fact that the Appeal Board (or a different Regulatory Commission) might have reached a different decision is irrelevant. To put it another way, it is not for the Appeal Board to 'second guess' the Commission.

- 3) The Appeal Board should be slow to interfere with evidential assessments and factual findings made by the Commission. It should only be interfered with if they are clearly wrong or if wrong principles were applied. This is likely to be where there was no evidential basis whatsoever for a finding of fact that had been made, and/or where the evidence was overwhelmingly contrary to the finding of fact that had been made.

- 4) The test for the Board to apply in determining whether the Commission acted '*irrationally*' or '*perversely*' or '*came to a decision to which no reasonable body could have come*' is essentially the *Wednesbury* test applied in public law in cases of judicial review.

- 5) Any appellant who pursues an appeal on the ground that a Regulatory Commission has come to a decision to which no reasonable such body could have come has a high hurdle to clear or a high threshold to pass.

- 6) The Board ought to accord the Commission a '*significant margin of appreciation*' when considering matters such as evidential assessments, factual findings, and any exercise of discretion by the Commission.

27. The heart of this case concerned Regulation 96.3 of the FA Handbook 2021/2022. The central issues for the Board in this appeal were whether the Commission correctly interpreted and reasonably applied this provision to the facts. This was at the crux of the Appellant's case.

28. The Board were concerned that, notwithstanding this importance, nowhere in the Written Reasons is there any analysis or treatment of Regulation 96.3 whatsoever. These concerns were raised by the Appellant in its Notice of Appeal:

“19. Within the Decision, the panel concluded that the Appellant’s conduct of “throwing a bottle at the Referee and hitting the Referee did pass the threshold to be considered an Assault on the Referee”.

20. However, the Decision failed to explain the “threshold” that the panel considered. Further, the decision did not make a single reference to the definitions of assault a [sic] or improper conduct as they are outlined within the FA Handbook”

29. The inability to properly address the Decision in the absence of adequate reasons was a notable feature of the Appeal. The ability of a party adversely effected by a decision to understand the reasons for it is fundamental to the fairness of such a determination. As Lord Bridge observed in Save Britain's Heritage v No 1 Poultry, the right to reasons is the analogue of the common law requirement that justice should not only be done, but be seen to be done: [1991] 1 WLR 153 at page 170F. Similarly, Lord Phillips MR stated in English v Emery Reimbold & Strick Ltd, that "justice will not be done if it is not apparent to the parties why one has won and the other has lost": [2002] EWCA Civ 605, Paragraph 16.
30. A party should be able to see reasons for the conclusion upon a particular issue, if the ultimate decision turns on the resolution of that issue: [2002] EWCA Civ 605, Paragraph 16. The right to reasons for decisions also serves a practical purpose. Without detailed reasons, the Appeal Board cannot scrutinise the Board’s internal logic so as to determine if it was in error.
31. The Board provided both parties, but most pertinently the Respondent, the opportunity to further address this concern by way of further written submissions after the oral hearing. Further written submissions were gratefully received from both parties. Upon careful consideration, the Board remained of the view that the Decision was unfair.
32. The Board allowed the appeal on the grounds that the appellant was not given a fair hearing based on the inadequacy of the written reasons. For the avoidance of any doubt, the appeal also could have been upheld on the basis that it misinterpreted or failed to comply with the rules and regulations relevant to its decision or that it came to a decision which no reasonable body could have come to for the same reasons.

33. The Board, in accordance with Regulation 21 of the Non-Fast Track Appeal Regulations, used their powers to determine the matter themselves. Having considered all the evidence presented to them, the appeal board found the charge proven, on the basis of FA Rule E3 - Improper Conduct against a Match Official (including physical contact or attempting physical contact and threatening and/or abusive language/behaviour). We came to this view for the following reasons:

- (1) Our interpretation of Regulation 96.3 "Assault or attempted assault" is that it is strictly limited to Participants who have acted in a manner which caused or attempted to cause injury to the Match Official. We agreed with the Appellant's submissions on this.
- (2) Notwithstanding "throwing any item directly at the Match Official" is listed as an example, and may be instructive in some cases, this is not intended to be determinative. Each case turns on its own facts. The Regulation expressly states it is an "example". What is needed in addition is evidence that the action caused or was an attempt to cause injury to the Match Official. This was the clear intention of the drafters, and any ambiguity must be decided in favour of the Participant and against the regulator as a principle of legal construction.
- (3) There was no evidence the Referee was injured by the Appellant's actions.
- (4) We did not consider there to be sufficient evidence that the Appellant intended to injure the Referee on the balance of probability. The Appellant was clear and consistent in his account, that he had no intention to cause injury. This was supported by the video footage.
- (5) Even taking the case at its highest, the Appellant's actions were unlikely to cause injury to the Referee.
- (6) Physical contact or attempted physical contact against a Match Official was considered to be the appropriate category, because the Appellant's actions were in our view unlikely to cause injury to the Match Official but are nevertheless confrontational,

34. In considering sanction, we considered this to be a serious incident. The Player acted in a confrontational and aggressive manner. He threw water and an object at the Match Official in circumstances where he had already been dismissed. There could be no suggestion that this occurred in the heat of the moment. Our entry point was therefore at the upper end of the sanction guidelines.
35. We then considered the Player's credit for early acceptance of the Charge, and his record. Significant mitigation was also provided by way of confidential medical records.
36. Pursuant to the FA Regulations on sanction, the Board having considered the aggravating and mitigating circumstances ordered that the Participant be suspended for 365 days from the date of the initial interim suspension. For the avoidance of doubt, **the suspension shall run until 31 May 2023.**
37. The Participant is also ordered to pay a **fine of £100** to the Respondent, and ordered to complete a bespoke face-to-face education programme as determined by the FA before the time-based suspension is served.
38. There was no order as to costs and the appeal fee is to be returned. The Appeal Board's decision is final and binding on all parties.

Ifeanyi Odogwu (Chair)

Marvin Robinson

Alan Darfi

2 October 2022