

**APPEAL BOARD OF THE FOOTBALL ASSOCIATION
BETWEEN:**

SARAH BURN (Appellant)

-and-

DURHAM FA (Respondent)

DECISION OF THE APPEAL BOARD

Warning to the reader of this document. This document contains reference to offensive and/or discriminatory language.

BRIEF INTRODUCTION

1. The Appeal Board conducted a hearing on Wednesday, 13 April 2022, to determine an appeal by the Appellant, against the decision of a Disciplinary Commission dated 4 March 2022.
2. This hearing was conducted over Microsoft Teams, without objection from any party.

THE APPEAL BOARD

3. The members of the Appeal Board were:

- Jeff Lewis (Chair);
- Tapan Debnath;
- Glenn Moulton.

4. No objection was raised concerning the composition of the Appeal Board.

5. The Secretary of the Appeal Board was Conrad Gibbons, the Judicial Services Officer and whose assistance was greatly appreciated.

ATTENDEES

6. The Appellant attended the hearing and represented herself.

7. The Respondent was represented by John Topping, Company Secretary.

8. Craig Lee also attended the hearing as an FA observer but took no part in (and did not observe) the Appeal Board's discussions.

9. The Appeal Board is grateful to both the Appellant and Mr Topping for their submissions and assistance during the appeal hearing and for the courteous and appropriate manner in which they both conducted themselves in the hearing.

BRIEF BACKGROUND FACTS

10. At the material time, the Appellant was a player for Durham Cestria LFC First ("Durham").

11. On 2nd February 2022 Durham was playing a fixture against Norton & Stockton Ancients LFC First (“Norton”).
12. Sophie Tierney (ST), a Norton player, stated that, during play, she made a tackle which resulted in a foul, as a result of which the Appellant lost possession of the ball. ST alleged that the Appellant reacted by saying *“I’ve just pulled your pants down you retard”*.

FIRST INSTANCE DECISION

13. On 9 February 2022, the Respondent charged the Appellant with Improper Conduct (including foul and abusive language), contrary to Rule E3 of the Rules of the Football Association and with Improper Conduct (aggravated by a person’s Ethnic Origin, Colour, Race, Nationality, Faith, Gender, Gender Reassignment, Sexual Orientation or Disability), contrary to Rule 3.2 of the Rules of the Football Association.
14. In the briefest of terms, the allegation was that during the relevant match, the Appellant breached the said Rules by making the comment “you absolute retard” or similar.
15. ST made a statement, which was in the form of an email, in support of the charges, in which she said:

“[The Appellant] lost control of the ball and reacted by saying, “I’ve just pulled your pants down you retard”. I then asked [the Appellant] why she would say something like that and she laughed in my face. This was right in front of spectators and others (sic) players and officials. I was embarrassed but also angry that she would use such a derogatory term...There is no place for this language in football or in society...I brought it to the attention of the referee who said he didn’t hear it, but that he would report it.”

16. Another Norton player, Bianca Owens (BO), also made a statement (also in the form of an email) stating:

“Sophie Tierney gave away a free kick for a foul on their number 7. The number 7 laughed and said “I’ve just pulled your pants down you retard.” The referee was very close by and I shouted him and said “Ref you must have heard that... He didn’t answer me as he said he was booking our player for the foul first. He then said he didn’t hear it and must have blocked it out. He then talked to our captain and Sophie about it during a stoppage in play later in the game. Immediately after the incident, the Durham Cestria captain Jen Knowles then spoke to the number 7 and ended the conversation with, “there are some things we can and can’t say.”.... When the referee called Sophie and our captain over during a stoppage in play ten minutes or so later, I also went over and explained that I was the team secretary so would like to listen to what happened. I didn’t hear the incident as I was much further away but Sophie was very upset about it. The referee told me he would report the incident.”

17. A further, brief statement (also in the form of an extract from an email) was made by Sacha Millward, another Norton player.
18. The incident was also reported (in terms that the Appellant had used the phrase “you absolute retard”) to ST in an Extraordinary Incident report filed by the referee. The referee stated that he did not hear such a remark and was reporting it because it had been reported to him.
19. The Appellant vigorously denies having made such a statement and says that ST was constantly being spoken to by the referee throughout the duration of the game for having made constant reckless challenges. The Appellant made a statement (in the form of letter) in which she denied the allegations made against her and asserted that ST had carried out a number of mistimed challenges on her and made comments such as “I am going to put you in a fucking wheelchair”.
20. Following a non-personal hearing, an FA Disciplinary Commission, constituted of a single member, (“the Commission”) found the matter proven and passed the following sanction:
 - (a) 7 match suspension;

(b) A fine of £60.

21. It also ordered her to attend an Online Equality Course before the end of her suspension.

THE APPEAL REGULATIONS

22. Regulation 2 of the “Appeals - Non-Fast Track” Regulations (“the Regulations”) sets out the grounds upon which the Appellant may appeal the first instance decision(s) – they are:

“... the body whose decision is appealed against:

2.1 failed to give that Participant a fair hearing; and/or

2.2 misinterpreted or failed to comply with the Rules and/or regulations of The Association relevant to its decision; and/or

*2.3 came to a decision to which no reasonable such body could have come;
and/or*

2.4 imposed a penalty, award, order or sanction that was excessive.”

23. Regulation 12 states:

“An appeal shall be by way of a review on documents only. The parties shall however be entitled to make oral submissions to the Appeal Board. Oral evidence will not be permitted, except where the Appeal Board gives leave to present new evidence under paragraph 10 above.”

24. Regulation 21 sets out the powers of the Appeal Board including the power to allow or dismiss the appeal. It further provides at Regulation 21.6 that the Appeal Board has the power to 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.

NEW EVIDENCE

25. The Appellant requested that a statement of Russell Dutton dated 14th March 2022, which was not before the Commission, be taken into account by the Appeal Board.

26. Regulation 10 of the Regulations states:

“The Appeal Board shall hear new evidence only where it has given leave that it may be presented. An application for leave to present new evidence must be made in the Notice of Appeal or the Response. Such application must set out the nature and the relevance of the new evidence, and why it was not presented at the original hearing. Save in exceptional circumstances, the Appeal Board shall not grant leave to present new evidence unless satisfied with the reason given as to why it was not, or could not have been, presented at the original hearing and that such evidence is relevant. The Appeal Board’s decision shall be final. Where leave to present new evidence has been granted, in all cases the other party will be given an opportunity to respond.”

27. No reason was given by the Appellant as to why the evidence of Mr Dutton was not, or could not have been, presented to the Commission, but the Appeal Board informed the appeal hearing that it had formed the preliminary view that Mr Dutton’s statement did not add a great deal to the Appellant’s case but that it was minded to allow Mr Dutton’s evidence to be admitted and would give appropriate weight to it. This was on the basis that the Appeal Board wished, out of a sense of fairness, to give the Appellant the opportunity to put before the Appeal Board any new evidence which she wished it to consider. Mr Topping was given the opportunity to make representations against this but, very helpfully, did not oppose the Appeal Board’s suggestion in this regard.

28. The evidence of Mr Dutton was duly admitted into evidence.

SUBMISSIONS (INTRODUCTION)

29. The following is a summary of the principal submissions made to the Appeal Board.

30. It does not purport to contain reference to all the points made, however the absence in these reasons of any particular point, or submission, should not imply that the Appeal Board did not take such point, or submission, into consideration when it considered the matter.

31. For the avoidance of doubt, the Appeal Board carefully considered all the materials provided, and submissions made, with regard to this case.

32. The Appellant submitted that the Commission had:

- Ground 1: failed to give the Appellant a fair hearing; and/or
- Ground 2: come to a decision to which no reasonable such body could have come; and/or
- Ground 3: imposed a penalty, award, order or sanction that was excessive.

SUBMISSIONS

Grounds 1 and 2

33. Grounds 1 and 2 can be taken together, as to all intents and purposes they overlap with each other.

34. The Appellant accepted that she had not taken the opportunity to orally address the Commission or to use the hearing before the Commission to cross-examine the Respondent's witnesses (notwithstanding that she challenged their evidence). She stated that this was an issue which she had taken up with her club.

35. The Appellant stated that she had opted not to attend the hearing before the Commission, as she did not consider that it would advance the matter any further. Her rationale for this was that the only evidence before the Commission was witness accounts which appeared to her to be summaries relayed vicariously by email from a third party. She also considered that there was no impartial or independent evidence to corroborate the accounts provided by ST. The Appellant considered that all of the evidence before the Commission had been hearsay evidence and that, because of the quality of the evidence against her, no reasonable body could have come to the decision which the Commission reached. The Appellant considered that she had thereby been left without a viable means to advance a defence.
36. The Appellant said that one of the accounts relied upon by the Respondent was from ST's partner and that therefore it was not impartial. The Appellant further submitted that ST's partner was not in the immediate vicinity at the time when the alleged statement was made and could not therefore have heard any words which had been uttered.
37. The Appellant considered that the accounts on which the Commission relied in reaching its decision were unreliable, as they were fragmented accounts which were conveyed via an email chain and not in the correct format of witness statements.
38. The Appellant stated that ST had changed her account of events and that accordingly her evidence is undermined. The basis for the Appellant's assertion in this regard is that the referee's report says that *"The first part of the sentence [ST] did not hear, however it finished with "YOU ABSOLUTE RETARD" - but that ST's account states "I have just pulled your pants down you retard"*. Thus, the Appellant states that the absence in ST's account of the word "absolute" represents a change in ST's evidence.
39. The Appellant goes on to say that if ST's evidence were correct that the Appellant *"laughed in [ST's] face ... right in front of spectators and others (sic) players and officials"* then it is extremely likely that the referee would have seen or witnessed this. The

Appellant states that this submission is supported by the evidence of BO, who states in her statement *“The referee was very close by”*.

40. The Appellant asked the Appeal Board to take into account the fact that in her employment she delivers to over 2000 young people every year who often have disabilities themselves. She said that, given this backdrop, the Appeal Board can properly conclude that she would not have used such derogatory language.
41. The Appellant takes this point further, by drawing to the Appeal Board’s attention that she herself has a speech impairment and that, she having been called a “retard” (and other connotations of it) in the past, she would not have used such terminology.
42. The statement of Mr Dutton corroborates that the Appellant works with children with disabilities and has a speech impediment herself and says that, having known the Appellant since late 2020 and having been her representative since March 2021, he does not consider that she has used any inappropriate language in his presence.
43. In response, the Respondent submitted that the Commission’s decision was reasonable based on all of the evidence before it. The Respondent highlighted that it was the Appellant’s decision to have the case dealt with as a non-personal hearing and that she thereby deprived herself of the opportunity to question the said witnesses.
44. The Respondent also submitted that the Appellant’s denial that she used the words “retard” was contained in her statement which was before the Commission and that the bases for her challenge to the veracity of the evidence of ST and the other witnesses were also before the Commission.

Ground 3

45. Although the Appellant advanced as a ground of appeal that the Commission’s penalty, award, order or sanction was excessive, under questioning at the appeal hearing she conceded that this submission was only in the context that she did not

consider that the charges against her ought to have been found proven. She accepted that if she had made the comment that was attributed to her then the sanction would be a fair one.

LEGAL TEST FOR ALL GROUNDS

46. As is clear from Regulation 12 (supra), the task of the Appeal Board is to conduct a review of the first instance decision, and not a de novo hearing. In other words, the Appeal Board is not considering the matter afresh but, instead, reviewing the first instance decision.

47. Guidance on how this review should be carried out is to be found in, inter alia:

(a) The FA v Bradley Wood, 20 June 2018, which states, at paragraph 23:

“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.”

and

(b) The FA v José Mourinho, 18 November 18, which states, at paragraph 54:

“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'."

48. Accordingly, the Appeal Board applied the following principles in its approach to the grounds of appeal:

- An appeal such as this proceeds by way of review of the decision of the Commission. It is not a rehearing of the evidence and arguments at first instance;
- It is not open to the Appeal Board to substitute its own decision for that of the Commission simply because the Board might themselves have reached a different decision at first instance;
- If the Commission has reached findings of fact which it was reasonably open to the Commission to reach, the fact that the Appeal Board might have reached a different factual finding is irrelevant;
- The Appeal Board will be slow to intervene in evidential assessments and factual findings made by the Commission. Evidential assessments of the Commission should only be interfered with if they are clearly wrong ("Wednesbury" unreasonable and/or irrational and/or perverse) or if wrong legal principles were applied to the making of those factual findings;
- The only likely scenario for the Appeal Board to interfere with factual findings of the Commission is where there is no proper evidential basis for a finding of fact

that has been made and/or where the evidence was overwhelmingly contrary to the finding of fact that has been made;

- The test for the Appeal Board in determining whether the Commission acted irrationally and/or perversely and/or “Wednesbury” unreasonably, or came to decision to which no reasonable such body could have come, is essentially the Wednesbury unreasonableness test applied in administrative law to cases of judicial review;
- Any Appellant who pursues an appeal on the ground that a Disciplinary 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 overcome.

DISCUSSION

49. The Appeal Board had little difficulty in preferring the submissions of the Respondent and, accordingly, concluding that the Commission had, at all times, afforded the Appellant a fair hearing. The Appellant had had the opportunity to request a personal hearing before the Commission and had made a conscious decision not to do so. From her submissions, it appeared as though she had taken the view that the evidence against her was of such poor quality that the charges against her would not succeed; that was something of a “high risk” decision, and the Appellant must bear the consequences of it, bearing in mind the principles as set out above.

50. In the circumstances, the Commission had to base its decision on the written evidence before it. It is clear from its written reasoned decision (“Written Reasons”) that it took into account all of the evidence, including the statement provided by the Appellant. Whilst the Appeal Board accepts that the only first-hand evidence of the derogatory terms allegedly used by the Appellant was that

of ST, the Appeal Board concluded that there is nothing in the Commission's decision to suggest that the Commission gave undue weight to ST's evidence or indeed to the evidence of any of the other witnesses. The Appeal Board's view was also that the Commission also gave due weight to the evidence of the Appellant.

51. As paragraph 16 of the Commission's Written Reasons states, the assessment of the evidence is entirely a matter for the Commission members. In circumstances whereby it has to assess the evidence based purely on written submissions, its task is made more difficult, but, in the Appeal Board's view, it is clear that the Commission carefully considered its findings and applied the appropriate test to establish whether the alleged breach of the FA Rules was established.
52. The Appeal Board is satisfied in particular that the reasons for the Commission's finding that, on the balance of probabilities, the Appellant made the comment as alleged, which reasons are set out at paragraph 19 of its Written Reasons, are sound. In particular, the Appeal Board considers that the fact of contemporaneous disclosure at the time the comment was made (see sub-paragraph (i) of paragraph 19 of its Written Reasons) was a powerful factor, as it rules out the possibility that the allegation was fabricated after discussion after the event.
53. Similarly, the fact that BO reported the matter to the Norton captain, Jen Knowles (JK), at the time of the event and that (even on the Appellant's own evidence) JK approached the Appellant at the time of the event to report what she (JK) had been told had been said makes the possibility that the allegation was fabricated considerably less likely. That said, the Appeal Board does consider that "minimises" might have been a more appropriate word than "negates" in the last sentence of sub-paragraph (i) of paragraph 19 of the Commission's Written Reasons.

54. The Appeal Board does not consider that the Commission's decision would have been any different had the evidence of Mr Dutton been before it, particularly as much as the essence of what Mr Dutton says is contained in the statement of the Appellant, which was before the Commission.

55. In accordance with the principles set out immediately above, the Appeal Board retired to consider the parties' submissions.

FINDINGS ON GROUNDS 1 – 2

56. The Appeal Board came to the following, unanimous conclusions:

- The Respondent was plainly correct in bringing the charges;
- The Commission had plainly considered all relevant material in coming to its findings of fact;
- There was nothing to suggest that the Commission had erroneously considered any irrelevant material in coming to its findings of fact; It was for the Commission to apply due weight to the evidence, and it had done so appropriately;
- The issues identified by the Commission in its Written Reasons, and the detailed considerations therein, demonstrate that the Commission applied its mind, both appropriately and correctly, to the relevant issues;
- The decision reached by the Commission was entirely within the boundaries of reasonable decisions available to a Commission;
- Accordingly, the appeal on Grounds 1 and 2 must be dismissed.

Ground 3

57. As stated above, the Appellant's appeal against the sanction was effectively confined to a submission that the charges should not have been found to be proven, and effectively, therefore, this ground of appeal follows the outcome of the appeal on Grounds 1 and 2.

58. Nevertheless, the Appeal Board independently considered the sanction imposed by the Commission. It came to the view that the Commission had correctly considered the appropriate sanction and penalty and the severity of the offence and all other aggravating and mitigating factors.

FINDINGS ON GROUND 3

59. The Appeal Board came to the unanimous conclusion that, by reference to the FA Sanction Guidelines, the Commission had reached an appropriate decision as to sanction.

CONCLUSION

60. In summary, the Appeal Board:

- Dismissed the Appeal on all grounds;

61. Accordingly, this decision of the Appeal Board shall be final and binding and there shall be no right of further challenge.

MISCELLANEOUS REMARKS

62. The Appellant stated in her submissions that the finding of the Commission had caused difficulties to her in relation to her employment. Whilst that is obviously a matter which is outside the remit of the Appeal Board, the Appeal Board would wish to make clear, in case it is not clear already, that it has not made any positive finding that the Appellant used the word “retard” or any similar derogatory language; it has decided only that the decision of the Commission to conclude on the balance of probabilities, based on the evidence before it (and also taking into account the statement of Mr Dutton), that the Appellant had used such words or language was not “clearly wrong”. The Appeal Board is not in a position to state whether it would have reached a different conclusion (or indeed if it considers that the Commission may have reached a different conclusion) if oral evidence and/or cross-examination of witnesses had taken place before either body.

Signed:

21 April 2022

Jeff Lewis

[for and on behalf of the Appeal Board]