

IN THE MATTER OF THE APPEAL BOARD OF THE FOOTBALL ASSOCIATION

BETWEEN:

RYAN SMITH

Appellant

and

KENT FA

Respondent

WRITTEN REASONS OF THE APPEAL BOARD

Introduction

1. The Appeal Board (the '**Tribunal**') was appointed under The Football Association's (the '**FA**') Disciplinary Regulations – Appeals 2022/23 (the '**Appeal Regulations**') to determine an appeal brought by Ryan Smith (the '**Appellant**') by an undated Notice of Appeal (the '**Notice**').
2. By way of the Notice, the Appellant appealed against the decision of the Disciplinary Commission (the '**Commission**') dated 10 July 2023, to sanction the Appellant to an eight-match ban from all football activities as from 28 July 2023 and a fine in the sum of £70.00.
3. The appeal was heard at 10am on 28 November 2023 in Wembley Stadium (the '**Appeal Hearing**'). The Appellant attended in-person along with Counsel for the Appellant, Mr. Owen Kessack. The Respondent was represented in-person by Mr. Jonny Ricketts, the Football Services Lead. Mr. Paddy McCormack, the Judicial Services Manager for the FA, acted as the Secretary for the Appeal Hearing.
4. The Tribunal had before it (1) the papers before the Commission; (2) the Commission's written reasons (3) the Appellant's grounds of appeal; (4) the Respondent's response
5. This document constitutes the written reasons for the Tribunal's decision. The Tribunal considered the entirety of the materials that the parties put before it. If it did not explicitly refer to a particular point, document, or submission, it should not be inferred that it had overlooked or ignored it; as mentioned, the Tribunal considered the entirety of the materials put before it.

Background

6. On 12th May 2023, the Respondent charged the Appellant, a player of Lydd Town FC with;
 - i. Charge 1: Misconduct for a breach of FA Rule E3.1 (Including foul and abusive language).
 - ii. Charge 2 - Misconduct for a breach of FA Rule E3.2 – Improper conduct – aggravated by a person’s Ethnic Origin, Colour, Race, Nationality, Faith, Gender, Gender Reassignment, Sexual Orientation or Disability.
 - iii. It was alleged that the Appellant used abusive and/or indecent and/or insulting language contrary to FA Rule E3.1, and it was further alleged that this was an aggravated breach as defined by FA Rule E3.2 because it includes a reference to Sexual Orientation. This referred to the comment(s) “Complete Faggot” or similar.
 - iv. Charge 3: Misconduct for a breach of FA Rule E3.1 (Including foul and abusive language).
7. It was alleged that the Appellant engaged in behaviour that was improper contrary to FA Rule E3.1, and it was further alleged that this constituted use of threatening and/or abusive language/behaviour as defined in FA Regulations. This referred to the comments “*you little nonce*” and /or “*I know where you live*” and/or “*watch your next goalkeeping session*” and/or “*Getting in*” and/or “*Cunt*” or similar.
8. The Appellant denied all charges and a personal hearing was requested.
9. A Commission was convened to adjudicate this case at 7.00pm on Monday 19th June 2023 as a personal hearing. It was to be conducted “virtually” via Microsoft Teams (the ‘**Principal Hearing**’).
10. The Commission determined that the Appellant did send the social media messages and found that both the E3.1 Charge, together with the aggravated charge (ID 11270359) were both PROVEN. Similarly, the Commission found the E3.1 charge (Case ID 11270361) was also PROVEN.
11. The Commission decided that the appropriate sanction was as follows:
 - a) The Appellant serve 5 matches suspension from all football activities. This shall commence immediately after the 8 matches suspension imposed by the Commission has been served.
 - b) The Appellant is fined £70.00 (Seventy Pounds).
 - c) 9 Club penalty points shall be credited to the Appellant’s Disciplinary Record.

12. The Appellant appealed the Commission's decision in an undated Notice of Appeal and Statement of Facts.
13. The Appellant sets out 4 grounds of appeal, these being:
 - i. The Commission failed to give the Appellant a fair hearing; and/or
 - ii. Misinterpreted or failed to comply with the Rules and/or regulations of The Association relevant to its decision; and/or
 - iii. Came to a decision to which no reasonable such body could have come; and/or
 - iv. Imposed a penalty, award, order or sanction that was excessive.

The Appellant's Submissions

14. Mr. Kessack began his submissions on behalf of the Appellant by saying that he (the Appellant) had not had a fair hearing for a number of reasons. Firstly, the Appellant and his witnesses had gone to the time and effort to appear before the Commission to give oral evidence in support of his case. Further, this allowed the Commission to test both via cross examination.
15. On that point, the Tribunal was informed by Mr. Kessack that the Appellant's witness, Mr. Wilson Guest, was subject to cross examination by the Commission for around 45 minutes during the Principal Hearing. Mr. Guest found this stressful and embarrassing at times - being someone who is not used to standing in front of others in a situation like this and having to recall matters in detail. The Tribunal was informed that Mr. Guest attempted to give honest answers.
16. The Respondent had listed one witness for the Principal Hearing – Mr. Harry Earls. However, Mr. Earls failed to appear and no reason was provided to the Commission other than the fact that Mr. Earls was unwilling to attend in order to give oral evidence.
17. Mr. Kessack submitted to the Tribunal that the appropriate negative inference should have been drawn by the Commission and referred to the case of *Raja v Van Hoogstraten [2005] EWHC 2890 (CH)*¹ in support on the basis that the Respondent's only witness was unwilling to attend the Principal Hearing to give oral evidence.
18. More enquiries should have been made as to Mr. Earls non- attendance. Moreover, the Commission should have attributed more weight to this non-appearance.
19. The burden of proof lay with the Respondent and, in this context, there was no first-hand evidence for the Commission to consider or test. The Commission failed to acknowledge this in its written reasons.

¹ Non- attendance of a material witness - [Raja v Van Hoogstraten \[2005\] EWHC 2890 \(Ch\) \(19 December 2005\)](https://www.bailii.org/uk/ew/cas/2005/2890.html) ([bailii.org](https://www.bailii.org))

20. On the other hand, the Commission chose to take a different and contrary stance regarding the non-appearance of one of the Appellant's witnesses, as stated in its written reasons at para 91:

“There was no evidence provided by Mr Byrd in this case so this third hand evidence could not be considered with confidence on its reliability and it could not be tested”.

21. Mr. Kessack submitted that the Appellant (and his witness) had been punished for attending the Principal Hearing and, furthermore, the Commission attacked minor discrepancies between the Appellant and Mr. Guest.

22. Mr. Kessack then turned to the second ground of appeal.

23. The Appellant had provided ample evidence that he had changed his mobile phone number and it had not been established who exactly had committed the act (i.e. sending the messages). The Respondent had the burden of proving this and had not taken the necessary steps to do so by not taking reasonable steps to ascertain ownership of the mobile number. This was a breach of fair procedure.

24. In relation to the third ground, Mr. Guest (the individual responsible for the alleged actions) actually admitted this during the Principal Hearing. Despite the admission and additional evidence available, Mr. Kessack found it perplexing that any reasonable body would come to the decision it had in these circumstances.

25. Mr. Kessack made no submissions in relation to the last ground – that the Commission imposed a penalty, award, order or sanction that was excessive.

26. Mr. Kessack concluded his submissions on behalf of the Appellant by saying that the Commission's decision to uphold the charges against him had been flawed despite evidence in the Appellant's favour. As such, the Tribunal should reassess the charges imposed on the Appellant.

The Respondent's Submissions

27. Mr. Ricketts addressed the issue of the non-attendance of the Respondent's witness. He did not know why Mr. Earls had not attended the Principal Hearing; however, it is the Commission's role to test evidence.

28. Mr. Ricketts believes that the non-attendance was dealt with in the written reasons at page 167, para 82, where it states:

“Mr Earls did not attend the Personal Hearing. He informed the Kent FA that he would not be willing to attend and the Commission Chair considered that the case should proceed without his attendance. His evidence was factual and related to the content of the messages. His evidence was captured in the

screenshot that he submitted to the Association. It was for the County FA to prove their case and Mr Earls was not, in any event, able to confirm who had actually sent the media messages, that would be for the County to prove their case on the balance of probability.”

29. It was a matter for the Commission to determine and they decided that the case should continue due to the circumstances of the charge.

30. Mr. Ricketts had no further submissions on behalf of the Respondent.

Determination

Fair Hearing

31. The Tribunal considered the Appellant’s and Respondent’s submissions at length.

32. The Tribunal was concerned that the Commission had not treated the witnesses from both parties fairly. To the mind of the Tribunal the Commission had not applied sufficient weight to, or drawn sufficient negative inference from, the fact that Mr Earls had chosen not to appear before it without explanation.

33. Whilst the evidence from the Appellant’s witness, Mr Byrd was dismissed at para 91 of the Commission’s decision:

“There was no evidence provided by Mr Byrd in this case so this third hand evidence could not be considered with confidence on its reliability and it could not be tested”.

34. The written evidence and potentially important oral evidence from Mr Earls was treated differently as seen at para 82 of the Commission’s decision:

“Mr Earls did not attend the Personal Hearing. He informed the Kent FA that he would not be willing to attend and the Commission Chair considered that the case should proceed without his attendance. His evidence was factual and related to the content of the messages. His evidence was captured in the screenshot that he submitted to the Association. It was for the County FA to prove their case and Mr Earls was not, in any event, able to confirm who had actually sent the media messages, that would be for the County to prove their case on the balance of probability.”

35. The Tribunal felt that Mr Earls was an important witness and that his oral evidence ought to have been heard and tested by the Commission. To the mind of the Tribunal, Mr Smith was prejudiced by the non-appearance of Mr Earls. It was quite clear to the Tribunal that the Commission had erred in relation to giving the Appellant a fair hearing. The Appellant (and his witnesses) had been willing and eager to provide oral evidence on two occasions, whereas the Respondent’s key witness was unwilling to appear before the Commission.

36. Whilst the above is not indicative, key evidence was not considered by the Commission and there was an over reliance on hearsay evidence. To compound this, the Commission appeared to adopt double standards when treating evidence (or lack thereof) provided by the parties.
37. On this basis alone, the Tribunal considered that the Appellant had not received a fair hearing.
38. Mr. Earls failure to appear before the Commission (as a key witness) and the Respondent's removal of him from the Respondent's charge, indicated a lack of adherence to proper procedure.
39. The Tribunal took all of the above into account when considering this ground of appeal. Given that the Commission's decision making had been flawed and/or skewed when weighing the evidence, it had failed to give the Appellant a fair hearing on that basis alone.
40. The Appeal Board ordered that the relevant decision & sanctions imposed on the Appellant by the Commission be immediately quashed.
41. The Appeal Board further ordered that this case be referred back to the Kent FA to recharge, if the CFA wishes to do so, by 31 January 2024.
42. Due to the appeal succeeding on the fair hearing ground, the Appeal Board made no findings on the remaining grounds relied upon.
43. The Appeal Board's decision is final and binding on all parties.

David Winnie

Christine Harrop-Griffiths

Stuart Ripley

11/12/2023
