

BEFORE AN APPEAL BOARD CONSTITUTED UNDER THE RULES OF THE FOOTBALL ASSOCIATION

B E T W E E N:-

SOUTHEND UNITED F.C.

Appellant

-and-

**THE FOOTBALL CONFERENCE LTD
(known as “THE NATIONAL LEAGUE”)**

Respondent

DECISION OF THE APPEAL BOARD

Introduction

1. On 20 September 2023, the Appeal Board held a personal hearing, via Microsoft Teams, of Southend United FC’s (“the Club’s”) appeal against a decision of the Respondent (hereafter “the National League”) on 23 August 2023. The effect of the National League’s decision had been to deduct ten points from the Club for what it was contended was the Club’s non-compliance with a licensing condition imposed by the National League on 23 July 2023.
2. On 21 September 2023, the Club was notified of the Decision of the Appeal Board in the following terms:

Appeal against a decision of The National League (“the Respondent”) by Southend United FC (“the Appellant”)

I am writing to notify you of the decision and orders of the Appeal Board that sat on Wednesday, 20 September 2023, to determine an appeal. This appeal was heard as a Personal Hearing, via video-conference on Microsoft Teams.

The Respondent, on 23 August 2023, notified the Appellant that they were to be deducted 10 League points. On 28 August 2023, the Appellant submitted a Notice of Appeal against this decision.

The Appeal Board, having taken into account the submissions of the parties and the Appeal Bundle careful consideration, make the following observations:

- a. *The Appeal Board thanks the parties for their written and oral submissions.*
- b. *The Appeal Board noted that the Appellant was appealing on the following grounds:*
 - *Failed to give the Appellant a fair hearing.*
 - *Misinterpreted or failed to comply with the Rules and/or regulations of The Association relevant to its decision.*
 - *Came to a decision to which no reasonable such body could have come.*
 - *Imposed a penalty, award, order or sanction that was excessive.*
- c. *The Appeal Board unanimously dismissed the appeal on all grounds. As such, the original decision stands.*
- d. *The Appeal Board order that the Appellant's appeal fee is to be forfeited and full costs incurred by the Appeal Board for the hearing are to be borne by the Appellant, with the amount of those costs to be confirmed in due course. There is no order for costs ordered in respect of the parties in bringing or responding to the appeal.*
- e. *This decision is to be read in conjunction with the Appeal Board's written reasons. The Appeal Board's decision is final and binding on all parties.*

Yours sincerely,

*Conrad Gibbons
Senior Judicial Services Officer
On behalf of the Appeal Board"*

3. In accordance with our indication to the parties at the end of the oral hearing of the appeal, these are the written reasons for that decision.

Procedural Matters

4. Following the Club's lodging of a Notice of Appeal on 28 August 2023, and an application made at that time for the appeal to be dealt with on an expedited basis, the present Chair was appointed. The Chair did not agree that this case should be dealt with according to the timescale for an expedited hearing, but nevertheless did indicate that a hearing date should be convened as soon as reasonably practicable.

5. On Monday, 18 September 2023, the Chair held a Directions Hearing by telephone and, to the parties' great credit, it became apparent that it was practical and realistic to convene a hearing of the appeal (to be conducted remotely) for the afternoon of Wednesday, 20 September 2023.
6. We would wish to commend all parties and the secretariat at FA Judicial Services for their cooperative approach to the preparation of this appeal.
7. We would also wish to pay tribute to the parties' advocates, respectively Mr De Marco KC for the Club and Mr Cukier for the National League, who provided us with well-structured and helpful summaries of their submissions consisting of a Notice of Appeal (in the case of the Club), a Response thereto (from the National League) and a Reply to the Response (from the Club). Our acknowledgement of the clarity and constructive approach that was apparent in their Written Submissions extends also to the oral argument in the hearing itself.

The reasons for our decision - in summary

8. We should say at the outset that we did not find this an easy case. The relevant rules governing the imposition of conditional licences and the consequences in the event that a condition of such a licence is not met could (and, we consider, should) be more clearly expressed than they are in the current rules.¹
9. Nevertheless, as will be apparent from the summary of our Decision included in the Notification Letter, the Appeal Board was satisfied that the National League had the power to impose the condition in respect of payment to HMRC that was not met. We also find that it was within the scope of the National League's power and authority to set a penalty (in this case, a 10 points deduction) as a term of that conditional licence, to act upon it in the event that the condition was not met and to do so without a formal or further hearing on the basis that it was a proportionate sanction.

¹ The rules that we have been working from in our electronic bundle are those of the Season 2022 / 2023. We drew this to the attention of the parties, but were assured that the rules for the relevant season 2023 / 2024 are in similar terms.

The Relevant Factual Background

10. The factual background is relevant context for understanding how the relevant condition came to be imposed and, indeed, to assessing whether providing for a 10 points deduction in anticipation of non-compliance was a reasonable sanction and proportionate in all the circumstances.
11. We took the factual history to be (for all practical purposes) uncontroversial, and we adopted as accurate (or at least as substantially unchallenged) the chronology summarised in paragraph 4 and as recited in an Annex of the Club's submissions in Reply.
12. The relevant history includes the substantial financial difficulties faced by the Club, in particular since November 2021 when it was placed under a player registration embargo. Those difficulties included non-compliance with financial reporting rules and a failure to pay outstanding debts to football creditors and HMRC. Such financial difficulties continued through 2022 and into 2023.
13. On 4 April 2023 the Club was granted a licence to participate in the 2023/2024 season on condition it submitted its accounts for the years ending July 2020 and 2021, pay all outstanding debts to football creditors and discharge its then outstanding debt to HMRC. The Club was warned that a failure to provide a satisfactory response within 7 days would result in a recommendation to the League that a licence for the 2023/2024 season would be refused.
14. No response was forthcoming and on 19 April 2023 the Club was advised that the recommendation would be that such licence should indeed be refused. However, on 5 May 2023 the League wrote advising that it was prepared to grant a conditional licence for the forthcoming season on terms that required the submission of accounts by 31 May 2023 and if that happened, further conditions would be imposed requiring payment in full of all football creditors and of the debt to HMRC.

15. There followed discussions between the Club and the League about a possible sale of the Club in mid-July which would result in the discharge of all debts and on 12 July 2023 the Insolvency and Companies Court adjourned a winding-up petition until 23 August. On 14 July the Club responded to an email from the League explaining that progress was being made and promised further information would be forthcoming soon.
16. No such information was forthcoming and, between 12 July 2023 and 14 July 2023, the Club's Chairman and the National League's General Manager exchanged emails wherein the Club's Chairman gave an update in relation to the progress that was being made to comply with the licence conditions / purported conditions.
17. The Club complied with the first condition and on 23 July 2023 the National League wrote to the Club confirming that it would not be recommending that The FA revoke the Club's licence provided that:
 - i. the Club pays all outstanding Football Creditors (as per the list sent by the Club, and any others that may not be in on the list), to be paid by Monday 24th July 2023
 - ii. all HMRC debt to be discharged even if the court hearing is further adjourned past the 23 August 2023.'
18. The National League went on (in their letter dated 23 July) to purportedly introduce a new condition, namely that the Club pays HMRC and Football Creditors on time for the remainder of the football season (the 'New Condition'). In their letter dated 23 July 2023, the National League said:

'In addition, having discharged all outstanding Football Creditors by Monday 24 July 2023, and all HMRC debt by 23 August 2023, it will be a condition of the licence to ensure all new or any Football Creditors debts or HMRC debt are cleared on time to the satisfaction of the League at any point during the 2023-2024 season. [...]
19. In their letter dated 23 July 2023, the National League predetermined a sanction for non-compliance with the Purported Second Condition, the Third Condition and the New Condition. The National League said that:

‘the Club will be subject to an immediate and automatic 10 points deduction. This is in addition to any other action deemed appropriate by the League when considering the new debt.’

20. The Club paid Football Creditors before the deadline imposed. Further inroads were made in relation to the petition debt and the balance has been reduced from £320k to £170k, which balance remained outstanding on 23 August 2023.
21. On 23 August 2023, the Court adjourned the winding up petition to 4 October 2023 and, later the same day, the League wrote to the Club imposing a 10-point deduction as a result of the failure to discharge the HMRC debt constituting a breach of the Club’s earlier undertaking and of the terms of its conditional licence.
22. It is the legality of the imposition of that condition, the reasonableness of such condition (and process that should follow an apparent contravention) which are at the heart of this appeal.

The Issue in a Nutshell

23. Reduced to its simplest formulation, the Club’s contention is that the condition imposed by the National League on 23 July 2023, requiring the Club to discharge all outstanding debts to Football Creditors by Monday, 24 July 2023 and “*all HMRC debt by 23 August 2023*” was *ultra vires*, and further open to challenge because it included a pre-determination of the sanction for non-compliance with that condition, namely an “*immediate and automatic 10 points deduction*”²
24. The Club’s position, essentially, is that there is no rule or implicit power that entitles the National League to have imposed that condition and that it would in any case be (and is) objectionable for the sanction for non-compliance to be so draconian and pre-determined and applied without any form of hearing. It is submitted that it is therefore irrelevant that there was no attempt to challenge the condition(s) imposed on 23 July 2023 because the

² See, for example, paragraph 15 of the Notice of Appeal and the summary at paragraph 13 of the Club’s Reply to the National League’s Response to that Notice of Appeal.

lack of any power to impose such condition(s) means that the decision was *ultra vires* and therefore, by definition, a nullity.

25. Arising out of that short summary, the Club offers what we shall treat as three grounds of appeal³. As is recorded in the notification of our decision, the first is that the National League failed to give the Club a fair hearing. The second is that it “*misinterpreted or failed to comply with the Rules and / or regulations of the Association relevant to its decision*”. The third is that the decision that the National League reached (that is the imposition of the ten point deduction as notified on 23 August 2023) was one to which no reasonable body could have come. Fourthly (though probably not distinctly), it is submitted that the imposition of that “*penalty, award, order or sanction... was excessive*”.
26. In our view, the first and central question is whether the National League had the power to impose the condition in those terms on the licence it granted to the Club. It is, we think, common ground⁴ between the parties that if the National League was entitled to attach such a condition and was entitled to pre-determine the consequences of a breach of such condition, then that would only be defensible if the pre-determined sanction was a reasonable and proportionate one: that is to say, if the sanction was inherently unreasonable (the example discussed in submissions was a condition requiring the Club to hand over the keys to its stadium in the event of such a default) then the condition imposed would be regarded as *ultra vires*.
27. That being so, we consider that it is not decisive of the matter that the Club did not exercise its right of appeal against the term of the licence which, as will be apparent from the summary of the rules that we set out below, should have been lodged within five working days of the notification of the decision to be appealed against (in context, that would be the decision to impose the condition on the licence on 23 July 2023). If a condition had been imposed with no legal authority, then (as Mr de Marco KC submits) it was a nullity and there would be nothing against which to lodge an appeal. On the other hand, insofar as the reasonableness or otherwise of the condition and the sanction which was pre-determined is in issue, the fact that the condition as imposed could have

³ Strictly, there are 4 grounds (as we noted already). We address the third and fourth as a single issue.

⁴ And, if it were not, it is the approach we could consider appropriate.

been challenged by such an appeal process may be considered relevant to the reasonableness of the condition and the sanction provided.

28. There was very little between the parties on matters of law. Our attention was drawn to the quotation from *Lewis & Taylor Sport: Law & Practice (4th Ed)*, Bloomsbury 2021 at E7.51 and 7.52, and to the Award in CAS2014/A/3516, *George Yerolimpos v World Karate Federation* at paras. 103-104.
29. Those who wish to study the fuller text of that extract and the authority cited will, we consider, find what is said there to be entirely uncontroversial and to represent a statement of trite law. As Mr De Marco KC correctly observed, it is of fundamental importance that a sports governing body acts only in accordance with its rules and, if it brings a charge or imposes a sanction, it must do so in accordance with the rules if and only if those rules proscribe the misconduct alleged or provide for the governing body to exercise its powers in the sort of circumstances arising in the particular case.

The Relevant Rules

30. The key section of the rules is found in Appendix Q – The “*Licensing System*”. We shall quote what we consider to be the relevant sections of that Appendix in full:
31. The section dealing with definitions includes specific references to licences / conditional licences and unconditional licences. Hence:

*“**Licence**” means the annual licence required to be held by a Club who wishes to be a member of a Competition, which may be either an Unconditional Licence or a Conditional Licence.*

*“**Licence Criteria**” – as stated in Annex 1, each of which is a Criterion.*

*“**Conditional Licence**” – a Licence with conditions attached to be met by a Club within a period determined by the Competition in which the Club holding the Licence is allocated by the Leagues Committee. Such period is not to exceed 1 March in the Membership Year to which the Licence relates. Save in exceptional circumstances, a Conditional Licence cannot be granted to a Club for successive Membership Years in respect of the same Criterion.*

*“**Unconditional Licence**” – a Licence without any conditions attached.”*

32. It is also useful to record the following “*general provisions*” which are set out at paragraph 1:

“1. *General Provisions and Application of the Licence*

- 1.1 *The Association operates a Licensing System for Clubs at Steps 1 to 4 of the National League System. The Association has delegated to each Competition the operation, determination and monitoring of the Licence as set out in this Licensing System (“the delegated powers”). The Association retains the right to apply the operation, determination and monitoring of the Licence as set out in Section 2 below. The Competition may in accordance with the Rules delegate its responsibilities under this Licensing System to a Sub Committee or similar body.*
- 1.2 *A Club must hold a Licence to be a member of a Competition.*
- 1.3 *A Licence is granted for a Membership Year. In each Membership Year the Competition must monitor the compliance of each Club in relation to the Licence Criteria unless the Licence has been withdrawn by the Competition or has been or is to be surrendered by a Club.*
- 1.4 *If at any time during a Membership Year the Competition becomes aware that a Club no longer fulfils any of the Licensing Criteria then the Competition shall review that Club’s Licence in relation to the non-fulfilment such that a Licence may be withdrawn, suspended or have conditions imposed or varied or have financial penalties imposed upon it.*
- 1.5 *A Club must give written notification to the Competition of which it is a member of any breach of any Licence Criterion within 5 working days of the breach occurring.*
- 1.6 *If a Club’s Licence is suspended then that Club cannot participate in the Competition from that date until the expiry of seven days from the day the default is remedied, unless otherwise agreed by the Competition. If the Competition refuse or withdraw a Licence then that Club cannot participate in the Competition.*
- 1.7 *A Club that does not hold a Licence to be a member of a Competition may apply to The Association to be placed elsewhere within the National League System in accordance with the National League System Regulations but shall not be automatically entitled to such a place.”*

33. When we come to provide our analysis of the meaning and effect of these Rules, we consider that it is paragraph 1.4 which is of particular importance.

34. The “*Licence Criteria*” are referred to in paragraph 4. We quote:

“4. LICENCE CRITERIA

4.1 The Licence Criteria are as set out in Annex 1. Each Licence Criterion is to be met for a Club to be granted an Unconditional Licence. A Conditional Licence may be issued as stated in the Licence Criteria.”

35. “*Licence Criteria*” are indeed dealt with in Annex 1 of Appendix Q. We will not quote each and every provision, but we will note simply the headings which are: (1) Legal; (2) Ownership and Control; (3) Integrity; (4) Finance; (5) Grounds and Security of Tenure; (6) Reporting of Changes.
36. Annex 1, conspicuously (according to the Club’s submissions) does not deal specifically with the kind of condition and sanction imposed by the letter of 23 July 2023 and implemented on 23 August 2023. The National League’s answer to that is that this Annex 1 focuses on what would be required for the grant of an Unconditional Licence and that the power to impose (at least reasonable) conditions arising under paragraph 1.4 of Appendix Q is unfettered.
37. Another provision to note is paragraph 7 – Appeals – to which we have referred already. This provides:

“7 APPEALS

7.1 All decisions of the Competition in relation to a Licence shall be subject to appeal only by the Club which submitted an application form for that Licence. The appeal shall be determined in accordance with The FA’s Appeal Regulations save that any such appeal must be lodged in writing within 5 working days of the date of notification of the date to be appealed against and any appeal hearing must be held within 14 days of the appeal being lodged with The Association.

7.2 All decisions of The Association where it applies the delegated powers in accordance with Section 2 shall be subject to appeal only by the Competition and the Club which submitted an application form for a Licence. The appeal shall be determined in accordance with The FA’s Appeal Regulations save that it must be lodged in writing within 5 working days of the date of notification of the final decision of The Association to apply delegated powers and any appeal hearing must be held within 14 days of the appeal being lodged with The Association.”

38. Two other provisions may be considered relevant. The first is paragraph 8 “*Rules and FA Rules*”, which provides:

“8.1 The application of the Licence Criteria and processes shall not restrict the application of the Rules and FA Rules in any way. Any information provided under the licensing processes may be used by the Competition and or The Association in the application of the Rules and FA Rules respectively.”

39. The second is paragraph 9 – “*Misconduct*”. That provides, at paragraph 9.1:

“9.1 Any Club and or Club Official that knowingly provides information to the Competition in relation to the Club’s Licence that is found to be false in any particular then that Club and or Club Official may be charged with Misconduct under the Rules or FA Rules.”

40. We comment on that last provision at this stage because it is relevant to the Club’s submission about what powers might arise and how they should be exercised if the National League were entitled to impose a condition tied to payment of debts to HMRC. Mr De Marco KC submits that if it were permissible to impose such a condition, non-compliance would not engage some pre-determined sanction but could be characterised (and charged) as misconduct. That would then, by definition, result in a hearing at which the Club would have the opportunity to challenge any charge which it denied or to offer mitigation in respect of the sanction that might be sought to be imposed against it: in other words, it is submitted, would provide for a fair process.

Discussion

41. As we have already said, one of the points made by Mr De Marco KC in his submissions is that Appendix Q, Article 1.4 should not be interpreted so as to entitle the National League to pre-determine a points deduction. He observes that the National League Rules in other places make express provision for the circumstances in which such a deduction can be imposed, and he cites ten examples⁵ arising under rules 2.9.2, 6.9, 8.38, 8.43, 11, 13.A.1, 13.B.6, Appendix D paragraph 3.1 and Appendix H paragraph 13, and Appendix Q paragraph 6.3.

42. He draws particular attention to the last example, which specifically recognises that the penalty applicable (to changes to the Licence Criteria) would be one “*including and not*

⁵ Recited at paragraph 8 of the Club’s Reply to the Response of the National League.

limited to suspension or withdrawal of the Club's Licence, Embargo or financial penalty or a points deduction".

43. As Mr De Marco KC observes, those are the only provisions within the Rules in which the National League specifically identifies and provides itself with the express power either to impose a points deduction or to instigate a procedure which might end in the imposition of such a points deduction.
44. As we have said now more than once, we consider the Club's appeal on that basis is certainly well arguable. Nevertheless, our conclusion is that it is not necessary or appropriate to read Appendix Q, paragraph 1.4 in the restrictive way that Mr De Marco KC says we should. The language of that provision, which we have cited above, gives a broad discretion to the National League so that a licence may be "*withdrawn, suspended or have conditions imposed or have financial penalties imposed upon it*" (our emphasis).
45. True it is that the provision would have greater clarity if the language included words such as "*or what other penalty might be appropriate*", or if it actually said "*including a points deduction*", but we do not think that the absence of such clear language, although perhaps regrettable, should deprive the provision of the meaning that the National League attaches to it.
46. We note that the language of the provision does not seek to restrict what conditions might be imposed (subject, obviously, to the reasonableness of those conditions) and it is, we consider, significant that no issue was in fact taken either with the condition imposed as regards HMRC or as to the potential consequences of non-compliance in the period before and at the time when the National League imposed that condition on 23 July 2023.
47. We stress, additionally, that the imposition of that condition⁶ did not come out of the blue but has to be seen in the context of the regrettable financial history and non-compliance of previous conditions, as apparent from the history above.

⁶ Even though it was, as Mr de Marco KC submitted and as was stated at paragraph 12 *ff* of the Notice of Appeal, a "New Condition". Although Appendix Q, Rule 3.3, requires the National League to advise member Clubs of their licensing decision "on or before the 5 May", we do not read that as precluding the Licensing Authority from imposing the later condition on 3 July, especially since the factual context for the imposition of any such conditions was the troubled financial history of the Club.

48. Perhaps the most important consideration of all, however, is the fact that it would have been open to the National League on 23 July 2023 to tell the Club that it was recommending the revocation of the Club's licence, a far more serious sanction than the condition in fact imposed. In those circumstances, we prefer the National League's interpretation of its own rules and, looking at the four grounds of appeal, we dismiss the appeal on the second ground.
49. We need add very little about the additional grounds of appeal. The first is that the Club was not given a fair (or indeed any) hearing. We do not think the National League was required to do so. Either it had the power to impose this condition and implement the consequences in the event that the condition was not met, or it did not – and we have found that it did have such power. There was, therefore, no need to offer any kind of a hearing and, in standing back from and deciding upon the reasonable interpretation of these rules, it is a material factor that the Club has had many opportunities in the past, as recorded in the factual history, to negotiate with and put its point across to the National League.
50. On this same first ground, therefore, whilst we accept that it would have been possible to characterise non-compliance with a condition as misconduct, leading to a charge in respect of which there would have been a hearing, we think that the answer is to be found in the earlier answer we have given to the second ground.
51. The third ground of appeal amounts to an assertion that the imposition of such a condition, and the implementation of the sanction prescribed, was one that no reasonable body could have come to. We unreservedly accept that the sanction imposed was a harsh one and we take the point that it was the equivalent of the sanction applicable where the Club has suffered an "*insolvency event*". On the other hand, it was not so serious as to amount to a revocation of the licence absolutely, which would have much more adverse consequences.
52. In all the circumstances, although we think that the 10 point sanction was at the upper end of the range of that which we would accept as reasonable, we would not go so far as to say that no reasonable body in the position of the National League, with the powers

within the rules that we have found it had, and in the light of the relevant factual history, could not properly have reached that same decision.

53. The fourth ground is the assertion that the penalty, award, order or sanction was excessive. As we have said, we do not think, for the reasons we have explained, that this really can be seen as a separate point. If the imposition of the condition and of the sanction identified within it was within the range of that which a reasonable regulatory body might impose, we are not going to say that acting upon that condition and imposing the 10 points deduction was excessive and inappropriate in all the circumstances.

Conclusion

54. For all those reasons, we dismiss the appeal on all four grounds, but our recognition of the fact that the Club's challenge was well arguable (as well as being well argued) is reflected in the Order for Costs that is included in the Notification Letter.

WILLIAM NORRIS KC
(Chair & Specialist Panel Member)

KEN BROWN
(Football Panel Member)

LAURA McCALLUM
(Legal Panel Member)

2 October 2023