

**PRIVATE AND CONFIDENTIAL**

**IN THE MATTER OF AN APPEAL FROM  
THE DECISION OF A REGULATORY COMMISSION  
B E T W E E N:**

**THE FOOTBALL ASSOCIATION**

**Appellant**

**-and-**

**ARSENAL FOOTBALL CLUB**

**Respondent**

**-and-**

**ARSENAL FOOTBALL CLUB**

**Appellant**

**-and-**

**THE FOOTBALL ASSOCIATION**

**Respondent**

---

**APPEAL BOARD DECISION**

---

1. This is the Decision and Written Reasons for the Decision made by an Appeal Board which sat on 7 February 2023.
2. The Board Members were Mr. Paul Darling, OBE, KC (Chairman), (Legal Independent Specialist Panel Member) Mr. Alan Hardy and Mr. Matt Williams (both Independent Football Panel Members of the FA Judicial Panel). Mr Michael O'Connor acted as Secretary to the Board.

**The Decision Appealed From**

3. On 20 January 2023, a Regulatory Commission sat to consider a charge contained in a letter of 11 January 2023 that Arsenal Football Club ("Arsenal") had breached FA Rule E20.1 during the Oxford United FC ("Oxford") v Arsenal FA Cup Third Round Fixture on 9 January 2023 ('the Charge'). Specifically, it was alleged that in or around the 34<sup>th</sup> minute of the Fixture, Arsenal players surrounded the Match Official and that in breach of FA Rule E20.1, Arsenal had failed

to ensure that its players conducted themselves in an orderly manner. The Charge was designated Non -Standard.

4. The Regulatory Commission found the Charge proven and decided that Arsenal should be fined the sum of £40,000.

#### **This Appeal**

5. On 24 January 2023 the Football Association (“The FA”) served Notice of Appeal. The appeal relied upon Regulation 5 of Appeals Fast Track 7 which identified the grounds available to the FA as including that Regulatory Commission had *“imposed a penalty, award, order or sanction that was so unduly lenient as to be unreasonable”*.
6. By letter dated 24 January 2023, Arsenal also appealed. Their appeal was based on Fast Track 7, Rule 6. Arsenal contended that the Regulatory Commission came to a decision to which no reasonable such body could have come, and that it failed to give Arsenal a fair hearing. On a fair reading of the Arsenal Appeal, they also sought, if their appeal was unsuccessful, to appeal against the sentence on the grounds that it was excessive.
7. Arsenal’s response to the FA’s Appeal was late, but we nevertheless gave it full consideration.

#### **The Regulatory Commission’s Decision on breach.**

8. The Regulatory Commission’s Decision on breach is embodied in paragraphs 14 and 15 of its Decision.

*The Commission watched the video footage and noted that after the Referee had not given Arsenal a penalty after a shot had struck the arm of an Oxford player, four Arsenal players reacted and approached the Referee forcefully pleading for the decision to be reversed. The incident was relatively short in duration, with the Arsenal players following the Referee around for a short period of time before they dispersed. The Commission did not consider the Arsenal players to have acted violently, abusively, indecently or to have used insulting or provocative words or behaviour. It is possible that the Referee felt slightly threatened by the actions of the Arsenal players but did not say as much in his Report. Notwithstanding the above, the Commission felt that*

*the Arsenal players had acted improperly by approaching the Referee in the manner that they did, although the Commission considered the level of Misconduct to be low.*

9. Given the above, the Commission considered *“Arsenal to have failed to ensure that its players conducted themselves in an orderly fashion. As such the Commission found the charge proven.”*

#### **Ground 1 – Unreasonable Decision**

10. The first ground of appeal focusses on the Commission’s finding that Arsenal’s players had *“forcefully pleaded for the decision to be reversed”*. Arsenal complains that this is a highly subjective assessment in the absence of any such description in the Referee’s Report or other objective evidence to substantiate it. Arsenal complained that the Regulatory Commission should not have made its finding without objective evidence to that effect.
11. We do not agree. These proceedings by their very nature rely very heavily upon the video evidence. We have reviewed that evidence ourselves carefully. It seems to us clear that the Regulatory Commission was entitled, having reviewed that evidence, to come to the conclusion that it did. It seemed to us that it was an entirely legitimate inference for the Regulatory Commission to draw, that the Arsenal players were protesting rather than simply enquiring of the Referee.
12. However, we think that this point does not, in any event, go anywhere. Whether the Arsenal players were merely asking the Referee about his decision or were pleading for the decision to be reviewed matters not. As the reasons make clear, four Arsenal players reacted and approached the Referee. Their conduct was *“forceful”*. The Arsenal players followed the Referee around for a short period before they dispersed.
13. Arsenal also complained about the reference to it being possible that the Referee felt slightly threatened. They pointed out that this was not in his Report. In fact, the Regulatory Commission recognised this and its finding at the end of paragraph 14 is expressed to be *“notwithstanding the above”*. Accordingly, without deciding whether the comment on the Referee feeling threatened was appropriate or not, it is clear that the Regulatory Commission did not take it into account when making its finding.

14. Arsenal also complained that The Regulatory Commission's decision did not delineate "*disorderly conduct*" from "*orderly conduct*" and that no reasoned standard was set out.
15. We do not consider that to have been a fair criticism of the Regulatory Commission. It did not seem to us in any event to be fatal to the Regulatory Commission's Decision, even if it was a justified criticism. The question for us was whether the Regulatory Commission's finding that there had been disorderly conduct was reasonable or unreasonable, and not whether they had given sufficient reasons for their finding.
16. Nevertheless, out of deference to Arsenal's position, we identify from the Regulatory Commission's Decision the factors that caused them to conclude that it was disorderly.
- (i) The Regulatory Commission refer to the involvement of four players. That was a factor which in our judgment the Regulatory Commission was entitled to consider. It may be that the Regulatory Commission has in mind the reference in the Essential Information for Clubs 22-23 ('the Essential Information') at page 53, where there was a reference to incidents where two or more players surround a Match Official.
  - (ii) The conduct was "*forceful*". Again, that was a view that, in our view, they were entitled to take. It may be that they had in mind the prohibition in the Essential Information on the incident to which we refer above taking place in "*confrontational manner*".
  - (iii) The Regulatory Commission then drew attention to the following of the Referee around, albeit for a short time. It seems to us that that is a view that they were entitled to take and was a matter that they could legitimately take into account when deciding that the behaviour was "*improper*".
17. It seems to us that those factors, particularly when taken in the context of the guidance in the Essential Information provide more than enough delineation of the border between improper and proper. In any event, the Regulatory Commission was satisfied of the impropriety of the Arsenal players' conduct.
18. We should make it clear that whilst our review function is limited to deciding whether or not the Regulatory Commission Decision was reasonable, we agreed with it. Had we been sitting on the Regulatory Commission, we would ourselves each have been supportive of a decision to find the charge proven.

## **Ground 2 – Fair Hearing**

19. Arsenal complains that they did not have a fair hearing from the Regulatory Commission. On investigation of the grounds, Arsenal's complaint can be distilled to be that the Rule is applied inconsistently and that Arsenal are charged where other Clubs are not.
20. We are clear that is not a factor that goes to the question of whether Arsenal had a "*fair hearing*". On the contrary, it is a factor that goes to the decision by the FA to charge. Once that decision is made, it is for the Regulatory Commission to consider whether the charge in the case placed before it is or is not made out. If it be the case that other similar offences could have been charged and were not, that is nothing to do with the Regulatory Commission and their failure to take that into account does not in any sense make the trial unfair. In any event, the Regulatory Commission would not have available to it, even were it to be a relevant factor, the material upon which to decide whether that criticism was or was not made out on the facts. However, that is not in our view a valid ground of appeal.

## **Decision**

21. Accordingly, we dismiss Arsenal's appeal against the finding that it was in breach of Rule E20.1.

## **Sentence – The FA's Appeal and Arsenal's Appeal**

22. The Regulatory Commission fined Arsenal £40,000.
23. We set out the background
- (i) Where a Club denies a standard E20.1 charge that is subsequently found proven at Premier League Level, the Club is fined £30,000.
- (ii) Arsenal had five fines imposed for previous and analogous breaches. In reverse order they were:
- |     |                                      |               |
|-----|--------------------------------------|---------------|
| (a) | 3 January 2023 v Newcastle United:   | fined £40,000 |
| (b) | 16 October 2022 v Leeds United:      | fined £20,000 |
| (c) | 1 January 2022 v Manchester City FC: | fined £20,000 |
| (d) | 2 December 2018 v Tottenham Hotspur: | fined £45,000 |

(e) 9 May 2018 v Leicester City: fined £20,000.

24. The Regulatory Commission, having set that material out, made its decision on the sentence as follows:

*“In coming to its decision on the level of fine to be imposed in a particular case, the Commission took into consideration the relatively low levels of misconduct, the denial of the charge, the standard case fine structure and the Club’s previous disciplinary record.”*

25. As such the Regulatory Commission decided that Arsenal should be fined the sum of £40,000.

26. The FA’s Notice of Appeal in particular at paragraphs 22 and 23 did a forensic analysis of the Commission’s reasons.

27. In summary, the FA contend:

- (i) The Commission gave disproportionate weight to the standard penalty and ought to have increased the fine more from the standard penalty than they did.
- (ii) In the circumstances, the penalty ought to have been materially increased from that levied by the Regulatory Commission in the Arsenal case and that it was not legitimate for the only factor identified by the Regulatory Commission as mitigating, namely the relatively low level of misconduct to trigger a reduction to £40,000.

28. Arsenal’s response seeks to differentiate between the incident at Oxford and the incident with Newcastle. It argues strongly for the weight to be properly given to the relatively low levels of misconduct found by the Regulatory Commission. It also said that the 2018 findings should be given less weight because of their age.

29. It says that the argument about deterrent is misconceived as *“it relies on the outcome of the charge being instructive as to future behaviour”*. It says that *“the applicable standard is unclear and inconsistently applied and therefore any sanction in this case cannot act as an effective deterrent by definition”*.

30. We accept that, when assessing the relative seriousness of breaches across a spectrum, the events at Oxford are towards the lower end of the spectrum. They are, however, still completely unacceptable. We are sure that Arsenal did not intend to make any contrary submission. We consider that the Regulatory Commission did give and was right to give weight to the fact that this incident was at the lower end of the spectrum. It was, still a breach of Rule E20.1.
31. On the issue of previous findings, we have some sympathy with Arsenal's point that the two offences from 2018 are old. We would give them little weight. However we give great weight to the fact that there were four contraventions in just over 12 months and three contraventions in under 3 months. That does seem to us to be a highly significant factor and the penalty should have reflected that.
32. As set out above, the Appeal Board did not accept Arsenal's submissions, either that there had to be a delineation between proper and improper conduct, or that it had failed to establish that this behaviour was improper. Clubs and players need to be clear that where two or more Players, Managers or other Participants of one Club surround a Match Official in a confrontational manner, they risk being held in breach of Rule E20.1.
33. We have no difficulty in saying that the Arsenal players ought not to have approached the Referee and behaved towards him in the way that they did. We consider that it is important that participants are deterred from behaving in that manner. We agree that a proper penalty which was not unduly lenient ought to have included an element of deterrence.
34. It therefore seems to us that a proper penalty and one that was not unduly lenient, needed to reflect Arsenal's record since the beginning of 2022 and provide an element of deterrence.
35. We accept that it is appropriate to make comparisons with the fine imposed by the Regulatory Commission in the Newcastle case. There is the additional distinguishing feature that in the Newcastle case, Arsenal pleaded guilty and, in this case, they did not.
36. Whether one uses the starting point of the standard fine of £30,000 (although this charge was designated, correctly, as Non-Standard) or the Newcastle fine of £40,000, we agree that the fine of £40,000 was unduly lenient. If one adopts the Newcastle fine as the starting point, it seems to us that it cannot have been right for the fine in this case to be the same as that case.

There are three distinctions that militate in favour of a larger fine – the not guilty plea or, as we prefer to put it, the failure to plead guilty, the fact that this was the third offence in three months and fourth in thirteen months and the need for deterrence and only one, the so-called low level of misconduct that could reduce it.

37. The correct fine, in our view, was one of £60,000. The calculation of that amount was not mathematical. However, one way of building that fine up was to start with £40,000 fixed in the Newcastle match and then balance the failure to plead guilty with the so-called minor nature of the offence. One could then add £20,000 to reflect the record and specifically the need in the light of that record for deterrence

38. We then consider whether it would be appropriate to suspend part of that fine.

39. The disciplinary regulations of the FA Rules provide at paragraph 43:

*“43. Save where any rule or regulation expressly required an immediate penalty to be imposed, and subject to paragraphs 43 to 46 below, the Regulatory Commission may order that a penalty imposed is suspended for a specified period or until an specified event and on such terms and conditions as it considers appropriate.*

*44. When considering imposing a suspended penalty, a Regulatory Commission must (a) determine the appropriate penalty for the breach, irrespective of any consideration of it being suspended, and (b) consider whether there is clear and compelling reasons for suspending that penalty; if so, (i) sets out what the clear and compelling reasons are and (ii) decide upon the period of the suspension, or event, until which the penalty will be suspended, and (iii) upon what other terms or conditions, if any, the penalty will be suspended.”*

40. We are satisfied that that Rule gives us power, as an Appeal Board, to exercise the function of a Regulatory Commission to suspend the fine and also to suspend part of it.

41. We have already decided that the appropriate fine would be £60,000. However, the overall reason that we are setting that level of fine is to deter Arsenal from breaching Rule E20.1 again and to make clear that any future breaches of Rule E20.1 will be severely punished. We consider that Arsenal having part of the fine ‘hanging over them’ is likely to act as an effective deterrent.

42. That seems to us to be a sufficiently clear and compelling reason to suspend £20,000 of the £60,000 fine and require immediate payment only of the first £40,000 of that fine. If before



1 June 2023, Arsenal is again convicted, either on a guilty or not guilty plea, of breach of Rule E20.1, then the suspension will be automatically lifted and Arsenal will be liable to pay the final £20,000 of the fine that we have imposed.

### **Costs**

43. Arsenal was unsuccessful in their Appeal. The FA was successful in its Appeal. We consider that Arsenal should pay the costs of the Appeal Board, which we invite FA Judicial Services to quantify.

44. Accordingly, the Decision of this Appeal Board is:

- (i) To allow the FA's appeal on the basis that the sentence of the Regulatory Commission was unduly lenient and substitute an Order that Arsenal pay a fine of £60,000, with £20,000 of that £60,000 fine suspended until 1 June 2023. In the event that Arsenal commit any further breach of Rule E20.1 between now and 1<sup>st</sup> June 2023, the suspension is lifted and the fine becomes payable.
- (ii) To dismiss Arsenal's appeal against the Regulatory Commission's finding that the Charge was proven.
- (iii) To dismiss Arsenal's appeal that the sentence imposed by the Regulatory Commission was excessive.
- (iv) To order Arsenal to pay the Costs of the Appeal Board, in the sum quantified by FA Judicial Services.

**Mr. Paul Darling, OBE, KC (Chairman)**

.....

**Mr. Alan Hardy**

.....

**Mr. Matt Williams**

.....

7 February 2023