

BEFORE AN APPEAL BOARD OF THE FOOTBALL ASSOCIATION

BEFORE:

His Honour Phillip Sycamore CBE (Chairperson)	Independent Specialist Panel Member
Daniel Mole	Independent Football Panel Member
Bradley Pritchard	Independent Football Panel Member
Paddy McCormack	Judicial Services Manager – Secretary

IN THE MATTER OF AN APPEAL FROM THE DECISION OF A REGULATORY COMMISSION

BETWEEN:

TOTTENHAM HOTSPUR FOOTBALL CLUB

Appellant

-and-

THE FOOTBALL ASSOCIATION

Respondent

APPEAL BOARD DECISION

INTRODUCTION

1. This is the Decision and Written Reasons for the Decision made by an Appeal Board which convened remotely by Teams on 15 May 2023 to consider the appeal in this matter. The appeal proceeded on the basis of written submissions only.

2. The appeal was in relation to sanction and arose from the decision of a Regulatory Commission (“the Commission”) on 19 April 2023 in relation to a single admitted charge of a breach of FA Rule E20.1 (“the Decision”) by the Appellant during its Premier League match against Brighton and Hove Albion FC (“BHFC”) on 8 April 2023 (“the Match”).
3. The allegation was contained in a charge letter dated 12 April 2023 and was to the effect that in or around the 58th minute of the Match the Appellant failed to ensure that its technical area occupants conducted themselves in an orderly fashion and/or did not behave in a way which was improper (“the Charge”).
4. The case was designated by the Respondent as a “Non- Standard Case” due to previous breaches by the Appellant of Rule E20.1 and/or the involvement of bench personnel. It was not suggested that there was any element of violent conduct in the Charge which was relevant to that designation.
5. The Commission dealt with the matter on the papers by video link and on the same occasion dealt with the consolidated identical charge against BHFC. The Commission imposed a fine of £100,000.00 on each of the Appellant and BHFC.

THE APPEAL

6. The Appellant brings the appeal on the following grounds, namely that the Commission:
 - (i) misinterpreted or failed to comply with the Rules and/or regulations of The Association relevant to its decision (Regulation 6.2 of the Regulations) (the “First Ground of Appeal”); and/or
 - (ii) came to a decision to which no reasonable such body could have come (Regulation 6.3 of the Regulations) (the “Second Ground of Appeal”); and/or
 - (iii) imposed a penalty, award, order or sanction that was excessive (Regulation 6.4 of the Regulations) (the “Third Ground of Appeal”).
7. We remind ourselves that this is an appeal by way of review on the documents only and does not involve a rehearing of the evidence. Both parties agreed that the proper approach to be adopted is that set out in the decision of the Appeal Board in *The FA v Jurgen Klopp* (11 November 2022). In particular, the fact that an Appeal Board may consider that a different sanction is appropriate does not entitle them to substitute their opinion for that of a Regulatory Commission unless they can show that the Commission’s decision fell outside the band of

reasonableness available to it or it had reached a decision which no reasonable body, properly directing itself to the facts, could have reached.

THE DECISION

8. The Commission had available to it, inter alia, accounts of the incident from the Match Referee and Fourth Official, both which are recited in the body of the Decision. The Commission members had read the documents in the bundle and had viewed the video footage in advance of the hearing. After making a number of findings of fact and acknowledging that both Clubs had admitted the offence at the earliest opportunity, the Commission directed itself that it was "...obliged to look at the FA's *'Factors to be considered when determining sanction'* and to assess the aggravating features as well as the mitigating factors advanced by both Clubs." (Paragraph 5 of the Decision)
9. The Commission (at paragraph 7) determined as follows: "...the behaviour of Brighton and Hove Albion FC was more disorderly than that of Tottenham Hotspur FC in that the Brighton and Hove Albion FC's Head Coach, Mr De Zerbi did leave his technical area on the side of the Tottenham Hotspur FC technical area and did appear to encroach on Mr Stellini and engage in seemingly provocative behaviour. If Mr De Zerbi had not left his technical area on that side then the mass confrontation may not have arisen. (emphasis added)."
10. The Commission went on to consider sanction and made reference to previous sanctions against both Clubs, noting that BHFC had received 2 sanctions for similar incidents in October 2021 and October 2022 and that this was the third incident of this nature in less than the last 3 years. In relation to the Appellant, the Commission noted that it had been sanctioned on 3 occasions namely December 2018, and on 2 separate occasions in October 2022 and that this was the fourth incident of this nature in the last 5 years and the third incident in the last year. The earlier fines imposed on the Appellant were significantly higher than those imposed on BHFC.
11. In determining sanction the Commission indicated that in relation to BHFC in setting a fine of £100,000.00 it had taken account of previous disciplinary records in reaching the decision on the level of applicable fine (paragraph 10) and that it

had considered the breach warranted a heavier fine but discounted that given the admission by the Club and its co-operation in the proceedings (paragraph 12).

12. In relation to the Appellant the Commission said this:

“ 15. The Regulatory Commission determined that the behaviour of Brighton and Hove Albion FC was more disorderly than that of Tottenham Hotspur FC in the Match in question but equally noted that Tottenham Hotspur FC’s disciplinary record for similar offences was comparatively worse.

16. The Regulatory Commission did not accept Tottenham Hotspur FC’s submission that their previous disciplinary incidents were distinguishable from the Charges arising from this fixture. Furthermore, the Regulatory Commission have adopted a consistent approach in analysing Brighton and Hove Albion FC’s disciplinary record which also included under 23 matches.

17. The Regulatory Commission, having carefully considered the Regulations and the mitigating factors, have imposed the following sanction: that Tottenham Hotspur FC be fined the sum of £100,000.

18. The Regulatory Commission had considered the breach warranted a heavier fine but discounted that given the admission by the Club and the co-operation in the proceedings.”

13. The Commission did not indicate in the Decision what the starting point was for the fine nor did the Commission specify the discount which it had applied in recognising the admission at the earliest opportunity. We also observe that the Decision did not contain any reference to comparable FA Rule E20.1 “*mass confrontation*” decisions which might have provided assistance to the Commission in their deliberations in determining the appropriate level of fine.

DISCUSSION

FIRST GROUND OF APPEAL

14. There is agreement between the parties that the Commission misdirected itself in determining that it was obliged to look at the FA’s “*Factors to be considered when determining sanction*” (page 178 of the FA Handbook) which are only applicable to aggravated breach cases involving aggravation by reference to

certain protected characteristics such as, for example, ethnic origin, colour, race or nationality. In such circumstances a Regulatory Commission is permitted to depart from the sanction range in aggravated breach cases. They have no relevance in the context of the present case. The Appellant maintains that having misdirected itself the Commission must have taken those matters into account and as such contaminated the decision making. For its part the Respondent maintains that the misinterpretation by the Commission cannot be said to have been material and did not make any difference to the decision. The Respondent relies on the findings of fact in the Decision and the absence of any reference to the factors identified above in the body of the decision.

15. Whilst we accept that no further specific reference is made, we conclude that having recorded the misdirection in the Decision we consider that the Commission did take the factors at page 178 of the Handbook into account and that they played a part in the decision making process and thus made a material difference to the decision. We allow the appeal in relation to the First Ground.

SECOND AND THIRD GROUNDS OF APPEAL

16. We consider first the lack of reference to the consideration of comparable decisions. In the absence of any indication that the Commission had considered any such cases we cannot assume that it did. We agree with the submission by the Appellant that the proper approach is that set out in *the FA v Everton FC* (22 September 2022):

"Parties appearing before Regulatory Commissions frequently submit that the doctrine of precedent does not apply. Each case turns on its own facts and must be approached from the basis of those facts. We agree. Nevertheless, it is plainly sensible that whilst every case is determined on its own facts there should be a degree of consistency and uniformity of approach. That does not require a Regulatory Commission slavishly to follow the approach of an earlier Commission, but it does require that it should take into account the reasoning of an earlier decision and to apply the wisdom to be gained from it.

We endorse that observation. Absent good reason to the contrary, parties charged with a breach of the FA Rules are entitled to expect a broad consistency of approach by Regulatory Commissions tasked with sanctioning them if that

breach is admitted or found proven. Achieving that requires any Regulatory Commission a) To have regard to any guidelines in place as to sanction for breaches of particular Rules or Regulations – in this case, the Standard Penalty Guidelines – and ask itself how, if at all, those guidelines might apply or be relevant to the facts of the case before it as the Regulatory Commission finds them to be.”

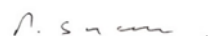
We also recognise that a Commission or Appeal Board should not slavishly seek to follow previous cases and recognise that each case ultimately turns on its own facts. (See the *FA v Marco Da Silva and Aleksandar Mitrovic* 25 April 2023)

17. We have considered the various decisions referred to in the Notice of Appeal (*the FA v Nottingham Forrest FC and Wolverhampton Wanderers; the FA v Arsenal FC and Manchester City FC and the FA v Everton FC and Leeds United FC*) and the representations in reply by the Respondent, particularly in relation to *the FA v Arsenal and Manchester City*. We consider that had the Commission had regard to those decisions and the need for consistency they may have reached a different conclusion in relation to the appropriate level of financial penalty.
18. We next consider the approach adopted by the Commission in determining that the same outcome was appropriate for both the Appellant and BHFC. We consider that the explanation as to parity of treatment is lacking in clarity as to the process adopted by the Commission in reaching that conclusion. In particular, the parity in sanction is inconsistent with the findings of fact as to greater culpability on the part of BHFC and notably the finding that if “... *Mr De Zerbi had not left his technical area, on that side, then the mass confrontation may not have arisen...*” In our judgment the brief reference in the Decision to the distinction between the Clubs’ disciplinary records does not sufficiently demonstrate that the Commission grappled with the need to reflect the significantly greater level of culpability on the part of BHFC in the sanctions imposed.
19. In those circumstances, we conclude that the Second Ground of Appeal is made out and is therefore allowed.

20. We have reminded ourselves (see paragraph 7 supra) that it is not for us to substitute our own opinion on sanction unless we find that the Commission's decision was unreasonable or one that it was not open to the Commission to have reached and that there is a significant margin of appreciation. We have also taken account of the observations of the Appeal Board in *the FA v Marco Da Silva and Aleksandar Mitrovic* as to the need to avoid subjecting the language of a Commission decision to excessive scrutiny, to read it as a whole and to have regard to the time constraints under which a decision may have been produced. In the light of our consideration of the background as described above taken with the Appellant's lower level of culpability and our regard to the decisions referred to at paragraph 17 supra, we conclude that the sanction was excessive, and we allow the Third Ground of Appeal.
21. We concluded, having taken into account all of the factors already referred and the assistance taken from the "confrontation" decisions already referred to together with the need for consistency that the starting point for a financial penalty is £60,000.00. We consider that the financial penalty should be discounted by one third to reflect the admission at the earliest stage and the level of co-operation by the Appellant. A fine of £40,000 will therefore be imposed.

CONCLUSION AND SANCTION

22. We therefore allow the appeal and replace the Order made by the Commission with the following order.
- a) Tottenham Hotspur is fined the sum of £40,000.00
 - b) The costs of the Appeal Board shall be paid by the Football Association



His Honour Phillip Sycamore CBE

Chairperson

17 May 2023