

# **THE FOOTBALL ASSOCIATION**

## **APPEAL BOARD**

### **NON-PERSONAL HEARING**

*of*

**DARRELL FRANCIOSY (Appellant)**

**&**

**DURHAM FOOTBALL ASSOCIATION (Respondent)**

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### **REASONS OF THE APPEAL BOARD**

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These are the written reasons of the decision of an appeal board (the “Appeal Board”), having considered the matter as a non-personal hearing held online via the video platform MS Teams on 1<sup>st</sup> February 2024.

#### **Introduction**

1. The Football Association (“The FA”) had received an appeal against a decision of the Durham Football Association (“Durham FA”) finding a charge (“the Charge”) proven against the Appellant.
2. The charge had concerned a breach of FA Rule E3.1 Improper Conduct against a Match Official including abusive language/behaviour in a match played on 9<sup>th</sup> October 2023 between Chester Le Street United Youth U16s and Hetton Juniors U16s Lazio (“the Match”).
3. The charge had been considered by an FA National Serious Cases panel as part of a consolidated hearing on 14<sup>th</sup> December 2023 (“the Hearing”) when the charge had been found proven (“the Decision”).
4. The Appellant was appealing against the Decision.

## **The Appeal Hearing**

5. The appeal hearing commenced on 1<sup>st</sup> February 2024. The Appeal Board comprised:

Paul Tompkins (Chair)

Keith Allen

Matthew O'Grady

The Appeal Board was assisted by Shane Comb of Wiltshire FA acting as secretary to the Appeal Board.

6. The Appellant having requested a non-personal hearing the appeal proceeded as a review of the case papers of first instance, the notice of appeal and the formal response to the appeal by the Respondent.

## **Submissions by the Appellant:**

7. The Appeal Board carefully considered the appeal notice and its covering correspondence as set out in the Bundle.

8. The Appellant was appealing the Decision on two grounds:

- The Respondent had imposed a penalty, award, order or sanction that was excessive
- The Respondent had misinterpreted or failed to comply with the Rules and/or regulations of the Association relevant to its decision

9. On the first ground, that the Respondent had imposed a penalty, award, order or sanction that was excessive the Appellant argued that the punishment he had received was harsh as there had been no evidence of him using foul and abusive language neither had he received any warning or caution from the Match official. This was something which he had been unable to present to the original commission. He also considered it harsh that he was being afforded no mitigation for showing remorse as he had not seen the Charge and didn't have the opportunity of expressing remorse.

10. On the second ground, that the Respondent had misinterpreted or failed to comply with the rules and or regulations of the association relevant to its decision, the Appellant referred to the hyperbole in the referee's report claiming that he had not in fact belittled every decision of the referee but also pointing out that belittlement is subjective and such a decision could only be taken on facts and actual examples rather than assumptions or interpretations.

11. Additionally, the Appellant appealed on the basis that he had not actually breached FA Rule E3 as he had not used any of the identified misconduct behaviours. He denied using foul and

abusive language and his argument was that the original commission had erred in misinterpreting the referee's report and finding foul and abusive language had been attributed to him, which he had not used but, importantly, had not been mentioned in the referee's report.

**Submissions by the Respondent:**

12. The Appeal Board considered the formal response to the notice of appeal as well as the written reasons of the commission when reaching the Decision.

13. It was noted that the Appellant had not responded to the Charge other than to plead guilty. The Charge had been accepted and the Respondent had proceeded accordingly and entirely in accordance with FA regulations.

14. On the question of the lack of an opportunity for the Appellant to have raised these arguments earlier, the Respondent addressed the question of service of documents and in particular the Charge in this matter. The Respondent quoted FA general disciplinary regulation 20:

*20 A document may be served by:*

*20.1 giving it to the person to whom it is addressed;*

*20.2 leaving it at, or sending it by first class post to, the last known address of the addressee or, in the case of an individual, the Club with which they are associated; or*

*20.3 sending it by e-mail or by fax to the last known email address or fax number of the addressee or, in the case of an individual, the Club with which they are associated.<sup>1</sup>*

The Charge against the Appellant had been sent to his club secretary on 23<sup>rd</sup> November 2023 and on 30<sup>th</sup> November 2023 the Respondent received a guilty plea through Whole Game System.

15. Addressing the question of the level of penalty imposed against the Appellant, the Respondent confirmed that the penalty is in line with FA sanction guidelines and that an appropriate mitigation of one third had been applied, giving credit to the Appellant for his guilty plea.

16. In closing, the Respondent emphasised that the failure of the Appellant to have had the opportunity of presenting his case was the fault of his club and this was a matter he needed to take up internally.

17. The Appeal Board also considered the original case papers in full.

<sup>1</sup>*The FA Handbook season 2023/24 p174*

## Deliberation

### Legal test for all grounds of appeal

18. As is clear from Regulation 12 of the Non- Fast Track Regulations<sup>2</sup>, the task of the Appeal Board is to conduct a review of the first instance decision, and not a new hearing. In other words, the Appeal Board is not considering the matter afresh but, instead, reviewing the first instance decision.

19. Guidance on how this review should be carried out is to be found in:

(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 of 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’.”*

20. 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 Respondent. It is not a rehearing of the evidence and arguments at first instance;

<sup>2</sup> The FA Handbook season 2023/24 at P.191

- It is not open to the Appeal Board to substitute its own decision for that of the Respondent simply because the Appeal Board might themselves have reached a different decision at first instance;
- If the Respondent has reached findings of fact which it was reasonably open to the Respondent 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 Respondent. Evidential assessments of the Respondent 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 Respondent 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 Respondent acted irrationally and/or perversely and/or “Wednesbury” unreasonably, or came to a 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.

### **Discussions on the ground submitted**

21. In accordance with the principles set out immediately above, the Appeal Board considered all the parties’ submissions.

22. The Appeal Board considered whether the Respondent had misinterpreted or failed to comply with the Rules and/or regulations of The Association relevant to its decision.

23. The Appeal Board took note that:

- The Charge against the Appellant was abundantly clear in the charge letter.
- The Appellant, through his club, had pleaded guilty to the Charge.
- No argument had been taken with the allegations until after the Decision had been made.

- The Appellant believed the Respondent and the original commission had misinterpreted the referee's report
- The Appellant did not believe he was guilty of any of the behaviours specifically set out in FA Rule E3.
- The Appellant did not deny using insulting language to the referee but was at pains to distance himself from the foul language quoted.

24. The Appeal Board considered whether the Respondent had imposed a penalty, award, order or sanction that was excessive.

25. The Appeal Board noted:

- The penalty imposed was drawn from the FA's sanction guidelines for such cases
- The original commission had a discretion when imposing such sanctions and it was clear from the written reasons that this discretion had been exercised
- Due mitigation had been applied when imposing the sanction by reducing it by one third
- The Appellant believed the sanction had been imposed for him shouting at the referee and using foul language which, in the referee's report, had been attributed to the players
- The Appellant considered he had not had the opportunity of showing remorse because he was unaware of the Charge until the Decision had been taken
- Even now, the Appellant is not accepting responsibility for any insulting language nor for the encouragement such insults would have given his players on the day.

26. Having given due consideration to the Appellant's submissions on both grounds:

- The Appeal Board could not agree that the Respondent had misinterpreted or failed to comply with the Rules and/or regulations of The Association relevant to its decision. On the evidence in front of the commission, the charge had been clear, the allegations precise and the acceptance unequivocal. The Respondent could not have acted any differently.
- Procedurally the Respondent had not erred at all. The Charge had been properly dealt with, the Hearing had been properly conducted and the absence of evidence or representation on behalf of the Appellant was down to the Appellant and his club.
- On the question of sanction, it was not for the Appeal Board to impose its own sanction unless the original sanction was manifestly wrong. The sanction imposed was within

FA sanction guidelines and was properly addressed and the Appeal Board saw no reason to interfere.

**Conclusion**

27. In summary, the Appeal Board unanimously dismissed the Appeal on the grounds raised

28. The Appeal Board made no order as to costs and the appeal fee is to be forfeited.

29. This decision of the Appeal Board shall be final and binding and there shall be no right of further challenge.

Paul Tompkins

Keith Allen

Matthew O'Grady

14<sup>th</sup> February 2024