

# **THE FOOTBALL ASSOCIATION**

## **APPEAL BOARD**

### **NON-PERSONAL HEARING**

*of*

**DYLAN BARRY (Appellant - 18 y/o)**

**&**

**BERKS & BUCKS FA (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 personal hearing held online via the video platform MS Teams on 6<sup>th</sup> March 2024.

#### **Introduction**

1. The Football Association (“The FA”) had received an appeal against a decision of the Berks & Bucks Football Association (“Berks & Bucks FA”) finding a charge proven against the Appellant.
2. The charge had concerned an alleged breach of FA Rule 3.1, Improper Conduct (including foul and abusive language) and of FA Rule 3.2, Improper Conduct – aggravated by a person’s Ethnic Origin, Colour, Race, Nationality, Faith, Gender, Gender Reassignment, Sexual Orientation or Disability. The alleged misconduct had occurred in a match played on 11<sup>th</sup> November 2023 between Windsor & Eton FC U17 Merlins and Spencers Wood U17 Red Kites.

3. The charge had been dealt with as a serious case through the FA's National Series Case Panel and had been heard by a chair Sitting alone on 5<sup>th</sup> February 2024 ("the Decision").
4. The Appellant was appealing against the Decision.

### **The Appeal Hearing**

5. The Appeal Board convened on 6<sup>th</sup> March 2024 to consider the appeal. The Appeal Board comprised:

Paul Tompkins (Chair)

Alan Darfi (Panel Member)

Emma Vase (Panel Member)

The Appeal Board was assisted by Conrad Gibbons of FA Judicial Services acting as secretary to the Appeal Board.

6. No parties were in attendance as the Appellant had opted for a non-personal hearing; in other words the appeal was to proceed on consideration of the papers alone.

### **The Appeal Documentation:**

7. The Appeal Board had before it the full appeal bundle comprising:

- The Appellant's Notice of Appeal
- The Respondent's Response to Notice of Appeal
- Papers of First Instance
- Appellant's Offence History
- Results Letter & Written Reasons
- Supplementary Observations

8. The Appeal Board had before it the full appeal bundle, including all papers of first instance and a video clip, with which all members of the Appeal Board were fully conversant. Absence of specific reference to any part of the appeal bundle in these written reasons does not mean they were not considered; they were considered in full.

### **Submissions by the Appellant:**

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

10. The Appellant was appealing against the decision on the grounds that the Respondent:

- Came to a decision to which no reasonable such party could have come,
- Failed to give the appellant a fair hearing,
- Imposed the penalty, award, order or sanction that was excessive,

11. The Appellant claimed that no reasonable body would have come to the decision of the Respondent. The Appellant submitted that there was no independent evidence in support of the allegation of discriminatory language and the Appellant, through his club, had pleaded not guilty to the charge of aggravated misconduct.

12. It was further claimed that the Appellant had not had a fair hearing. The Appellant submitted that he had denied the E3.2 charge of aggravated misconduct but the case papers submitted to the FA's National Serious Cases Panel state that the charge had been accepted. This was not correct. The Whole Game System indicated that a not guilty charge had been pleaded. In addition, statements from the Appellant's club supported the denial. The Appellant submitted that he was not given an opportunity to present a defence nor was he given any kind of hearing either written or personal in respect of the E3.2 charge.

13. The Appellant claimed that the sanction of a six match ban and a compulsory education programme was excessive bearing in mind the absence of any charge, plea, hearing or mitigation for the aggravated misconduct charge. The E3.1 charge of foul and abusive language had been dealt with on the day by the referee who had cautioned the Appellant for his language.

#### **Submissions by the Respondent:**

14. The Appeal Board considered the formal response to the notice of appeal as well the written explanation as to how it had reached the Decision.

15. The Respondent explained in full its disciplinary process.

16. In its written submissions the Respondent admitted:

- *“The Club provided a response on 21/01/2024, as follows:  
FA RULE E3 – Accept – Correspondence  
FA RULE E3.2 – Not Guilty”*
- *“The County FA would like to note as per the Appellant's Appeal, The Case Papers sent to the Commission did not detail the 'Non Guilty' Plea of the secondary E3.2 Charge and only the 'Guilty' Plea of E3.1. The County would like to state this was*

*not done in a way to effect the Case and only a administrative mistake. Plans have been put in place since to prevent a repeat in the future.”.*

17. Further, the Respondent challenged the appeal by submitting:

- *“The County FA would like to note as above, that the Appellant pleaded Guilty to the primary charge with their response, finding the charge proven but failed to clarify the ‘Non Guilty Plea’ of the secondary E3.2 Charge*
- *The County FA would like to note that as the Chair read both charges as ‘Guilty’ no decision was made whether the Alleged Offence had taken place and imposed a sanction based on a Proven ‘Aggravated Breach’*
- *The Chair had stated as following the Mitigation for the sanction – ‘The Chair considered that DB’s early acceptance of the Charges and DB’s age and inexperience should be credited in mitigation. The Chair did not consider that there were any particular aggravating features present in this case.’*
- *The County FA has no further observations regarding the outcome of the case and are satisfied the Commission came to reasonable decision..”*

## **Deliberation**

### **Legal test for all grounds of appeal**

18. As is clear from Regulation 12 of the Non- Fast Track Regulations, 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 was 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;
- 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 the 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 grounds 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 Appellant had received a fair hearing.

23. The Appeal Board noted:

The ground for appeal in Regulation 2 of the FA’s Non-Fast Track Appeal Regulations<sup>1</sup> is that “The body whose decision is appealed against failed to give that Participant a fair hearing.” In other words, that the Respondent had failed to give the Appellant a fair hearing.

- The Respondent’s accepted that the Appellant had pleaded not guilty to the E3.2 charge but had accepted the E3.1 charge.
- The Respondent accepted that the case papers sent to the Commission did not detail the ‘Non Guilty’ plea of the secondary E3.2 Charge and only the ‘Guilty’ plea of the E3.1 charge.
- This was referred to as an “administrative mistake”, which description was accepted but not excused by the Appeal Board.
- It was not clear to the Appeal Board why the Respondent regarded the E3.2 charge as secondary, as if this was in some way subservient to the E3.1 charge.

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<sup>1</sup> The FA Handbook 2023/2024 at P.189

- The Respondent had afforded the Appellant no opportunity to have the denial of the E3.2 aggravated charge considered by the original commission.
- The Respondent specifically stated in its letter of response to the appeal, “*The Case Papers sent to the Commission did not detail the ‘Non Guilty’ Plea of the secondary E3.2 Charge.*”.
- The original commission chair was unaware that the E3.2 charge had not been accepted but proceeded as if it had been.

24. Having considered the question of whether the Respondent had given the Appellant a fair hearing the Appeal Board concluded that by its own admission the Respondent had not given the Appellant any opportunity for the Not Guilty plea to be heard before reaching the Decision and the appeal succeeds on this ground.

25. Having determined that the Respondent had not given the Appellant a fair hearing, the Appeal Board did not need to consider whether the Decision was one to which any reasonable such body could have come.

26. The question of sanction became irrelevant as the charge was no longer proven.

### **Conclusion**

27. In summary, the Appeal Board unanimously dismissed the Appeal on the single ground mentioned above. The Appeal Board did not need to consider the outstanding two grounds for appeal.

28. In order to give effect to this decision, the Appeal Board, in accordance with Regulation 21 of the Non-Fast Track Appeal Regulations<sup>2</sup>, orders that:

- i. The sanction imposed is quashed.
- ii. Both charges, the E3.1 charge and the E3.2 charge, be remitted to the Berks & Bucks FA to complete the hearing bundle correctly and have both charges reheard by a new commission.
- iii. The matters do not need to be recharged but simply reheard.

### **Costs**

29. Pursuant to its powers under Non Fast Track Appeal Regulation 21.6<sup>3</sup>, the Appeal Board

<sup>2 & 3</sup> The FA Handbook 2023/2024 at P.191

considered the question of costs: *“The Appeal Board shall have power to order that any costs, or part thereof, incurred by the Appeal Board be paid by either party or be shared by both parties in a manner determined by the Appeal Board.”*

30. The Appeal Board took grateful note of the admissions by the Respondent on the constitution of the original hearing bundle and in the light of those admissions there was no prospect of the Respondent successfully defending the appeal. The Respondent could have short-circuited the appeal procedure by an early admission and cooperating with FA Judicial Services. The Respondent could also have acted sooner, admitted its error and rectified the procedural errors. It had chosen not to do so but had put all parties, including the FA, to the trouble of an appeal hearing. Therefore, the Appeal Board made a costs order against the Respondent.

31. While the Appeal Board could have chosen not to award costs at all, this would have sent the wrong message. Leagues, competitions and County Associations cannot view the appeal process as being risk free. This was an “administrative mistake” which was accepted to have been an innocent error but the consequences to the Appellant were significant and therefore the error must carry some possible consequences for the Respondent. The Appeal Board was also conscious that any financial penalty would have an impact upon the members and clubs whom the Respondent serves and for that reason costs were awarded against the Respondent but limited to one hundred pounds (£100).

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

Paul Tompkins

Alan Darfi

Emma Vase

12<sup>th</sup> March 2024