

**IN THE MATTER OF AN ARBITRATION UNDER RULE K OF THE FOOTBALL
ASSOCIATION RULES AND THE ARBITRATION ACT 1996**

Before:

His Honour Phillip Sycamore CBE (Single Arbitrator)

BETWEEN:

**(1) MR KENNY MCLEAN
(2) NORWICH CITY FOOTBALL CLUB**

Claimants

and

THE FOOTBALL ASSOCIATION

Respondent

DECISION

INTRODUCTION

1. I was appointed on 13 December 2024 as Single Arbitrator under Rule K 8.3.2 of the Football Association Rules 2024-25 (“the Rules”) to determine an application for interim relief made by the Claimants, Mr Kenny McLean (“KM”) and Norwich City Football Club (“the Club”), in arbitration proceedings commenced on 13 December 2024 by the Claimants against the Respondent, the Football Association (“the FA”). It was subsequently confirmed, on 15 December 2024, at the request of and with the agreement of both parties, that my appointment

THE INDEPENDENT EXPERTS

extended to that of Single Arbitrator to also determine the substantive application in accordance with Rule K2.4.

2. The arbitration proceedings are concerned with the Claimants' challenge to a decision of a Regulatory Commission of the Respondent on 10 December 2024, with written reasons subsequently provided on 11 December 2024, which found that (i) a charge of violent conduct was proven and (ii) there were not exceptional circumstances to justify deviation from the standard penalty of a three-match suspension plus an additional penalty of one further suspension. The charges arose from the EFL Championship fixture between Queens Park Rangers Football Club and Norwich City Football Club on 7 December 2024 ('the Fixture'). It was alleged that KM's behaviour in or about the 24th minute of the fixture constituted violent conduct.
3. In its written reasons of 11 December 2024, at paragraph 13, the Regulatory Commission found that KM had committed a clear deliberate act by striking an opposing player in the face with his left arm before the opposing team took a throw in. The Regulatory Commission rejected the suggestion that the action was simply an attempt to block the player, concluding that KM knew what he was doing and that the force used was excessive.
4. Although the Notice of Arbitration and Points of Claim did not specify the interim relief sought it was accepted that, essentially, the relief sought was a stay of KM's suspension until the conclusion of the Arbitration or further order, applying the provisions of Rules K7.4 and K8.3.4. KM had already served one of the suspensions prior to the receipt of the written reasons and the next suspension was due to take effect for the Club's match against Burnley Football Club at 3pm on Sunday 15 December 2024.
5. The application for interim relief was issued and served on the Respondent on 13 December 2024. The Respondent served its Response on 14 December 2024. The parties invited me to consider dealing with the application on the papers but having considered matters, as required by Rule K8.3.3, I determined that an oral hearing was necessary.

6. The application was therefore listed at very short notice for a remote hearing by video link during the early morning of 15 December 2024. This was necessary so that it would be known if KM would be available for the match that afternoon. The Claimants were represented by John Mehrzad KC of counsel. The Respondent was represented by Daniel Cashman of counsel. I express my gratitude to both counsel for their assistance and presentation.
7. My decision was to dismiss the application for interim relief. I announced my decision at the conclusion of the hearing and indicated that I would provide my reasons in writing, as required by Rule K8.3.5, and would invite written submissions in relation to costs from the parties, should they be unable to reach agreement.
8. The parties invited me to determine the substantive application on the papers as I had heard the submissions on the merits. This decision therefore deals with both the application for interim relief and the substantive application.

BACKGROUND

9. The First Claimant was charged by letter of 9 December 2024 with a breach of FA Rule E1.1 in relation to purported misconduct during the Fixture. The heading of the Charge Letter referred to:

**“INCIDENT ON THE FIELD OF PLAY WHICH FALLS WITHIN LAW
12, WHICH WAS NOT SEEN BY MATCH OFFICIALS, BUT WAS
CAUGHT ON VIDEO (see Fast Track 1 pages 242-246 of the FA
Handbook Season 2024-2025).”**

10. Fast Track 1 relates to “Not Seen Incidents” as defined at Table 10 in Part E - Fast Track Regulations.
11. The Regulatory Commission in its decision of 11 December 2024, at paragraphs 11 and 18, recorded that it had “...*carefully considered all of the written and video evidence...*”. That evidence is set out at paragraph 6 of the decision and included a written statement from the match referee, Mr A Backhouse, to the effect that he did not witness the incident. The full text of his statement is as follows:

“Hope you are keeping safe and well!”

I can confirm that this incident was not witnessed by myself or any of my colleagues on the day.

The communication from myself to the players following the incident was my assumption after reading the reaction of both players and looking to calm the situation.

Although I state I believe there was minimal contact over the comms, I can confirm that I did not witness the incident.”

12. The Club had submitted a detailed written statement with two video clips and a witness statement from KM, which the Regulatory Commission recorded as having considered at paragraph 9.
13. In addition, The Regulatory Commission was provided with the observations of three Referee Advisory Panel members who each, independently of each other, had reviewed the incident and each opined that, had the referee witnessed the incident, he would have dismissed the player from the field of play for violent conduct.
14. The Claimants had maintained that the Respondent should not have brought the charge at all, as the incident could not be charged as a “Not Seen Incident” given that the referee had made a comment to the players at the time, on the basis of his incorrect assumption about the incident. The Claimants are critical of the Regulatory Commission as they say that the Regulatory Commission did not grapple with their submission and that the Regulatory Commission acted in error of law and/or in a procedurally unfair manner by failing to consider and/or determine and/or give reasons in relation to the Claimants’ contractual estoppel submission. They were also critical of the omission of the words “*and dealt with*” in the heading to the Charge.
15. At paragraph 8 of the decision the Regulatory Commission referred to the Claimants’ submission in relation to estoppel and to the account given by the Match Referee in his statement.

THE RELEVANT REGULATIONS AND RULES

16. FAST TRACK 1: NOT SEEN INCIDENTS AND SUCCESSFUL DECEPTION
paragraph 4 provides:

“Matters falling within this Fast Track 1 will be determined on video and written evidence only, and parties shall not be present or represented in person.”

17. Paragraph 5 provides:

“In relation to Not Seen Incidents only:

5.1 A written statement by Match Officials that they did not witness a particular incident shall be conclusive evidence of that fact.

5.2 Where one or more of the Match Officials sees only part of an incident, an act of Misconduct that occurs during or immediately after that incident may be regarded as not seen by the Match Officials where, without limitation:

5.2.1 an act of violence occurs secondarily to a challenge for the ball, and so is not seen as the Match Officials are concentrating on the challenge for the ball; or

5.2.2 the Match Officials' view of the incident was such that none of them had an opportunity to make a decision on any act of Misconduct that took place within it.”

18. Paragraph 30 provides:

“Subject to paragraph 31 below, there shall be no right of appeal from decisions made by Regulatory Commissions under this Fast Track 1.”

(Paragraph 31 does not apply on the facts of this case)

19. As to the purpose of Rule K, Rule K1.4 provides:

“Rule K1.1 shall not operate to provide an appeal against the decision of a Regulatory Commission or an Appeal Board under the Rules and shall operate only as the forum and procedure for a challenge to the validity of such decision under English law on the grounds of ultra vires

(including error of law) irrationality or procedural unfairness, with the Tribunal exercising a supervisory jurisdiction.”

DISCUSSION

THE APPLICATION FOR INTERIM RELIEF

20. The Claimants submitted that there was a serious issue to be tried and that the balance of convenience was in favour of granting interim relief as the relative prejudice was greater to the Club than to any other non-party. Damages would not be an adequate remedy.
21. On behalf of the Respondents, it was essentially submitted that the approach to be adopted was that set out in *American Cyanamid* and that the Claimants had not made out that any of the threshold requirements, namely (i) a serious issue to be tried (ii) damages an inadequate remedy and (iii) that balance of convenience favours injunctive relief, applied.
22. I was not satisfied the Claimants had satisfied the test that they had a serious prospect of establishing that the decision of the Regulatory Commission was wrong, as I will explain below. As to the balance of convenience, I concluded that this lay in favour of preserving the status quo. It was important to have in mind the potential impact on a third-party, namely Burnley Football Club, who were the next opponents of the Second Claimant, who would be adversely affected if interim relief was granted, and it was subsequently shown that the relief should not have been granted.
23. The Club maintained that it was important to them for KM to be able to play that afternoon. The Respondent submitted that it is important for the integrity of the sport that its fast-track procedures are not undermined and that this is consistent with its legitimate aims. I accepted that this was a legitimate point.
24. I refused to grant the stay of the 4-match suspension and dismissed the application for interim relief.

THE CLAIM

25. Ordinarily, having dismissed the application for interim relief, that would have been the end of my involvement. In this case, as I have already indicated, my appointment extends to the determination of the substantive arbitration as Single Arbitrator.
26. The issue is whether the decision of the Regulatory Commission amounts to an error of law and/ or is irrational and/or is procedurally unfair.
27. The essential complaint raised by the Claimants is that the Regulatory Commission failed to deal with KM's contention that the match referee dealt with the incident and that there was therefore a contractual estoppel. The Claimants say that even if the Regulatory Commission did consider that contention, it has either failed to determine it and/or if it has determined that contention it has failed to set out any reasons for its determination.
28. The Claimants seek declarations that both the decision and written reasons amount to an error of law and/or are irrational and/or are procedurally unfair and that the decision should be annulled.
29. I heard oral submissions from counsel and have considered all of the documentation submitted by the parties.
30. I consider first the question of whether a matter has been "seen and dealt with." In my judgment nothing turns on the omission of the words "and dealt with" from the heading to the charge. The language is consistent with that used in the Regulations which describe the 'Case Type' at Table 10 in Part E - Fast Track Regulations as "Not Seen Incidents". The Regulatory Commission reasons of 11 December 2024 make it clear (paragraph 8) that they had taken account of the Claimants' submission that the referee had both seen and dealt with the incident.
31. This was a single factual enquiry for the Regulatory Commission which had before it the statement from the Match Referee (see paragraph 11 supra). As I observed at paragraph 17 a written statement by Match Officials that they did not witness a particular incident, as in this case, is conclusive evidence of that fact (paragraph 5.1); and an incident may be regarded as not seen by Match Officials

even where one or more of the Match Officials sees only part of an incident at the time, such that, without limitation, they did not have an opportunity to make a decision on an act of misconduct that took place within any given incident (paragraph 5.2). I accept the Respondent's submission that the Claimants' assertion that any comment by a Match Official following no sight, or even partial sight, of an incident is necessarily "dealing with" the incident, such as to mean that it is not a "Not Seen Incident," is irreconcilable with those provisions.

32. The Claimants maintain that the Regulatory Commission failed to grapple with the meaning and effect of a "Not Seen Incident." A careful reading of the written reasons makes it clear that the Regulatory Commission did address this and found that the incident was not "seen and dealt with" by the Match Officials. At paragraph 8:

"With regard to the incident, the Match Referee, Mr Anthony Backhouse confirmed by email that neither he nor his colleagues had witnessed it in real time...Mr Backhouse stated that this communication to the players [during the Match] was an assumption and reading of the reaction of the players looking to avoid any escalation".

At paragraph 14:

"On this basis it was determined by the Commission that the Charge was found proven. It was agreed, as with all three RAPs [Referee Advisory Panel] who independently reviewed the incident, that if seen, it would have warranted a sending off".

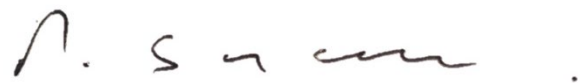
33. The Claimants say that the Regulatory Commission failed to consider KM's contention that the Match Referee dealt with the incident and that there was therefore a contractual estoppel. Again, a careful reading of the written reasons shows that the Regulatory Commission made specific reference at paragraph 8 and dismissed it at paragraph 14. At paragraph 11, the Regulatory Commission noted that *"the absence of a point, or submission, in these reasons should not imply that the Commission did not take such point, or submission into consideration"*. It is well established that it is not necessary, in giving reasons, for every argument raised by the parties to be dealt with. The decision of a

Regulatory Commission should be read fairly as a whole and is not to be construed forensically like a statute.

CONCLUSION

34. The challenge focuses on the construction of the definition of “Not Seen Incident”. To succeed, the Claimants would have to establish that the Regulatory Commission fundamentally failed to deal with an argument such that its decision is to be treated as a nullity or procedurally unfair. In essence the Claimants maintain that the Regulatory Commission failed to determine whether the matter had been “dealt with” by the Match Referee at the time, notwithstanding that he had not seen the incident.
35. I conclude that the Regulatory Commission properly and expressly considered that matter, as is apparent from a reading of paragraph 8 of the written reasons, finding that the incident had not been seen and dealt with by Match Officials at the time. The Regulatory Commission relied on and accurately summarised the Match Referee’s statement which, by virtue of paragraph 5 (see paragraph 17 *supra*), is conclusive evidence of that fact.
36. I have reminded myself that there is no right of appeal from a decision under Fast Track 1 and that Rule K is not to operate as an appeal against a decision of a Regulatory Commission and is only to operate as a challenge on the grounds of *ultra vires* (including an error of law), irrationality or procedural unfairness.
37. I conclude that the explanation provided by the Regulatory Commission as to why the argument that the matter had already been dealt with was rejected is clear and properly based on the evidence of the Match Referee that the matter had not been seen and dealt with, and the independent evidence of the three members of the Referee Advisory Panel that if the matter had been seen and dealt with then KM would have been sent off.

38. The argument advanced on behalf of the Claimants to the effect that the unseen incident of violent conduct was fully dealt with by the Match Referee by his *"communication to the players ... looking to avoid any escalation"* is unsustainable.
39. I refuse the Claimants' request for relief and accordingly dismiss the arbitration.
40. I reserve costs, to enable the parties to endeavour to agree to a position. In the event that costs are not agreed, I direct that the parties shall make submissions in writing by 4pm on 9 January 2025, to be accompanied by their costs schedules.



His Honour Phillip Sycamore CBE

Single Arbitrator

19 December 2024

London, UK