

**IN THE MATTER OF A HEARING
BEFORE AN APPEAL BOARD
OF THE FOOTBALL ASSOCIATION**

BETWEEN:

ENFIELD TOWN FOOTBALL CLUB

and

ARYAN TAJBAKHSH

Appellants

and

THE FOOTBALL ASSOCIATION

Respondent

**STATEMENT OF REASONS ISSUED
PURSUANT TO REGULATION 3.7
OF THE REGULATIONS FOR
FOOTBALL ASSOCIATION
DISCIPLINARY APPEALS**

FA Appeal Board

Mr Paul Gilroy QC
Mr Frank Clark
Mr Gary Aplin

Venue and Date of Hearing

Wembley Stadium
8th May 2015

Appearances

For the Appellant: Mr James Mulholland QC
For the Respondent: Mr Christopher Foulkes (of Counsel)

The Charges

1. Each Appellant was charged with two breaches of FA Rule E10 in that it was alleged that Enfield Town FC (“the Club”) and Mr Aryan Tajbakhsh (“the Player”), failed to comply with an FA suspension in that the Player participated in the following first team fixtures on behalf of the Club between 3rd January 2015 and 17th January 2015:

Enfield Town FC v Hendon FC

Isthmian Premier League
10th January 2015

Tonbridge Angels FC v Enfield Town FC

Isthmian Premier League
17th January 2015

at a time when he should, by virtue of the accumulation of 10 cautions, have been suspended.

Decisions appealed against

2. The appeals were against decisions of a Regulatory Commission of The Football Association (“The FA”), or (“The Association”), comprising Major (Retd) W Thomson (Chairman), Mr S Turner and Mr D Rose, made at a hearing on Wednesday 22nd April 2015, with written reasons being provided on 24th April 2015 in the case of the Club and on 28th April 2015 in the case of the Player, that the Club and the Player were guilty as charged, and that the Club should be warned as to its future conduct, and that the Player should be the subject of an immediate two match suspension and fined £150.

The Appeal

3. The Appellants appealed against the above findings of the Regulatory Commission. Independently of the decisions made by the FA Regulatory Commission, a Commission of the Isthmian League determined that it was bound by the decisions of the FA Regulatory Commission in the case of the Club, and that (amongst other orders) the Club should be subject to a deduction of 3 league points. The principal purpose of the Club’s appeal to the FA Appeal Board was to challenge the basis upon which the Isthmian League Commission imposed the above points deduction (ie by challenging the findings of the FA Regulatory Commission), in that, but for the points deduction, the Club would have qualified for the play offs of the Ryman Premier League of the Isthmian Football League at the conclusion of the 2014/15 season.

Decision of the Appeal Board

4. The Appeal Board unanimously dismissed the appeals of both the Club and the Player.
5. The Club and the Player shall each forfeit their respective costs deposits of £100.
6. There shall be no further order in respect of the costs of the appeal.

Relevant Rules and Regulations

7. The following Rules and Regulations of The Association are relevant to these appeals:

Rules of the Association 2014-2015

E. CONDUCT

MISCONDUCT

1. The Association may act against a Participant in respect of any "Misconduct", which is defined as being a breach of the following:

(b) the Rules and Regulations of The Association and in particular rules E3 to 28.....

COMPLIANCE WITH DECISIONS, INCLUDING SUSPENSIONS

10. Each Participant shall comply with a decision made pursuant to the Rules and regulations of The Association.

Disciplinary Procedures 2014-2015

SECTION D

DISCIPLINARY PROCEDURES CONCERNING FIELD OFFENCES

For Players associated with teams competing in.....the Isthmian League.....

(a) CAUTIONS ADMINISTERED ON THE FIELD OF PLAY

(iv) If a player accumulates ten cautions in any Competition between the opening day of the Playing Season and the second Sunday of April in the same season, he will be suspended automatically for a period covering:- two First Team matches plus a fine of £20.

Regulations for Football Association Disciplinary Action

8 PENALTIES

8.1 The Regulatory Commission shall have the power to impose any one or more of the following penalties on the Participant Charged:

(a) a reprimand and/or warning as to future conduct;

(b) a fine;

(i) such further or other penalty or order as it considers appropriate".

General Provisions relating to proceedings conducted by Inquiries, Commissions of Inquiry, Regulatory Commissions of The Association, other Disciplinary Commissions, Appeal Boards and Safeguarding Review Panel Hearings

1.1 It should be borne in mind that the bodies subject to these provisions are not courts of law and are disciplinary, rather than arbitral, bodies. In the interests of achieving a just and fair result, procedural and technical considerations must take second place to the paramount object of being just and fair to all parties.

Regulations for Football Association Appeals

1.4 The Notice of Appeal must:

(2) set out the ground(s) of appeal and the reasons why it would be substantially unfair not to alter the original decision;

1.6 *The grounds of appeal available to Participants shall be that the body whose decision is appealed against:*

(2) misinterpreted or failed to comply with the rules or regulations relevant to its decision; and/or

(3) came to a decision to which no reasonable such body could have come

3.3 *The Appeal Board shall have power to:*

(1) allow or dismiss the appeal;

(2) exercise any power which the body against whose decision the appeal was made could have exercised, whether the effect is to increase or decrease any penalty, award, order or sanction originally imposed;

(3) remit the matter for re-hearing;

(4) order that any deposit be forfeited or returned as it considers appropriate;

(5) make such further or other order as it considers appropriate, generally or for the purpose of giving effect to its decision;

(6) 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.

The Findings of the Regulatory Commission

8. These Reasons should be read in conjunction with the fully reasoned decisions produced by the Regulatory Commission on 24th and 28th April 2015.
9. The Club is a member of the Isthmian League, its first team currently playing in the Ryman Premier Division.
10. The Player registered with the Club on 6th January 2015. Prior to that date, he had, during the 2014/15 season, played for VCD Athletic and Cheshunt FC, both of which clubs are members of the Isthmian League (VCD Athletic playing in the Ryman Premier and Cheshunt in the Ryman North). Upon being questioned, when joining the Club, on the matter of the number of cautions he had received during the current season, the Player stated that he had received “*about 8 or 9 bookings*”.
11. The Club, via its Secretary, checked the FA’s Suspension Checker database on the County FA website. The Player did not appear on the list of suspended players. No checks were conducted against the Member Services database. The Player played for the Club against Hendon FC on Saturday 10th January 2015 and against Tonbridge Angels FC on Saturday 17th January 2015.
12. On Saturday 24th January 2015, the Player played for the Club in a match against Maidstone United FC. He was cautioned during the match. As a result of this caution, enquiries were conducted which resulted in the discovery that there were three records in respect of the Player, two under his correct name (one of which did not bear a date of birth), and a third with his name incorrectly spelt. It emerged that as of Monday 26th

January 2015, the Player had received 12 cautions, the 10th being administered on 20th December 2014, with the consequence that he should have been suspended from 3rd January 2015 and should not have played in the above-mentioned games played by the Club against Hendon FC and Tonbridge Angels FC.

13. As can be seen from the above chronology, none of the 10 cautions had been administered whilst the Player was registered with the Club.
14. Discussions ensued between the Club and The FA. The Club was advised not to field the Player for two games, which instruction it complied with.
15. At some point during the week commencing 26th January 2015, Mr Bradley Quinton (the Club's Manager) telephoned Mr Mark Ives (Head of Judicial Services at The FA) who indicated that no charges would be pursued against the Club.
16. Unusually, but on the joint application of the parties, the Appeal Board heard evidence from Mr Ives, and Mr Tarik Shamel (Head of Onfield Football Regulation and Security at The FA).
17. The Regulatory Commission indicated that they had sympathy with the Club in view of the administrative confusion concerning the number of cautions which had been administered to the Player during the course of the season. It also concluded, however, that had the Club Secretary checked the Member Services database upon the Player registering with the Club, alarm bells would or should have rung when that database revealed that the Player had no cautions, given that the Club had been told by the Player that he had received "8 or 9".
18. On the afternoon of Tuesday 17th February 2015, Mr Ben Marshall, FA Football Regulation Co-Ordinator, Football Governance and Regulation Division, sent an e-mail to Ms Kellie Discipline, League Secretary of the Isthmian League, stating:

"We are currently investigating the above named player for playing in 2 fixtures whilst under an automatic suspension for accumulating 10 fixtures (sic) in a season..... please note that we are only opening a case against the player in relation to this matter and the FA are not intending on taking any further action in relation to the club, Enfield Town FC".

Notwithstanding the content of Mr Marshall's e-mail to Ms Discipline, on 24th March 2015, both Club and Player were charged with misconduct in the form of alleged breaches of Rule E10.

19. Before the Regulatory Commission The FA submitted that only the Chief Regulatory Officer or his nominee(s) could make a decision on charging.
20. Before the Regulatory Commission, the Club maintained that it had made all the necessary enquiries to ensure that the Player was eligible to play for the Club.
21. In summary, the Regulatory Commission decided that Rule E10 was an offence of strict liability and that any assurances given by The FA not to take action against the Club did not have the effect of nullifying the charges.

22. Some indication of the degree of sympathy the Regulatory Commission had for the Club is given by the fact that the sanction imposed on the Club was restricted to a warning as to the Club's future conduct. The Appeal Board was nonetheless aware, as stated at paragraph 3 above, that the real sanction against the Club was the consequential penalty imposed by the Isthmian League in the form of a points deduction of 3 points.
23. The Regulatory Commission found that the Player had a greater level of culpability than the Club. Clearly he was in the best position to know how many cautions he had received before joining the Club. Had he been uncertain as to his true caution tally he could have made the check directly with The FA but he did not do so. In his case the offence was deemed to be serious, requiring a 2 match suspension with immediate effect, together with a fine of £150.

The Appeal

24. The grounds of appeal were articulated and extensively developed in the Notice of Appeal dated 4th May 2015. Reference can be made to the Notice of Appeal for the full detail of the case advanced on behalf of the Appellants. Those submissions were substantially developed over the course of the appeal hearing which lasted over 6 hours. What follows is a short summary of the Appellants' position under each of the three grounds of appeal.
25. As the legal foundation for their grounds of appeal, the Appellants submitted that the Regulatory Commission:
 - (i) misinterpreted or failed to comply with the rules or regulations relevant to its decision, and
 - (ii) came to a decision to which no reasonable such body could have come.

It was further contended that it would be "*substantially unfair*" (within the meaning of Regulation 1.4 of the Regulations for Football Association Appeals) not to alter the Regulatory Commission's original decisions.

26. Under the umbrella of the above submissions, the Appellants advanced three grounds of appeal as follows:
 - (i) The Regulatory Commission erred in interpreting Rule E10 as an offence of strict liability.
 - (ii) Finding strict liability in relation to Rule E10 represented a failure to comply with the paramount object of The FA's disciplinary process.
 - (iii) A decision was made not to take further action against the Club. In making an adverse finding against it in such circumstances, the Commission failed to comply with the paramount object of The FA's disciplinary process.

Ground 1

“The Regulatory Commission erred in interpreting Rule E10 as an offence of strict liability”

27. The Appellant contended that Rule E10 required the Participant to comply with a “*decision*” made pursuant to the Rules and regulations of The Association, and no such “*decision*” had been made on the given facts.
28. The Appellant argued that even if such words as are to be found in Rule E10 were found not to denote a specific mental element, the Regulatory Commission had failed to apply basic common law rules of statutory interpretation to Rule E10. Mr Mulholland QC submitted that there was substantial authority in support of the proposition that whenever a section in a criminal statute is silent as to *mens rea* (the mental element of an offence) there is a presumption that words must be read into the provision to require *mens rea*.
29. It was submitted that the intention of the draftsman of The FA Rules and Regulations 2014/15 could not have been to make Rule E10 an offence of strict liability.
30. Mr Mulholland contrasted Rule E10 with Regulation 5 of The FA Anti-Doping Regulations 2014/2015, which expressly provides that certain offences will be dealt with as strict liability violations, whereas there is no such express statement in Rule E10.
31. It was submitted that the Regulatory Commission misinterpreted Regulation D3 of the Memoranda of Disciplinary Procedures. It was submitted that Regulation D3 did not support the assertion that Rule E10 created a regulatory offence of strict liability because (i) Regulation D3 does not address the issue of the culpability of the Club or the Player; (ii) it is inconsistent with Rule E10 (which requires a decision to have been made), and (iii) the proper rationale of Regulation D3 can only be understood correctly by applying the “*mischief rule*” of statutory interpretation, namely that it is helpful, when construing the provision, to consider what it is seeking to achieve. The activation of the suspension was not dependent upon the technicality of direct notification of the Player and the Club.

Ground 2

“Finding strict liability in relation to Rule E10 represents a failure to comply with the paramount object of The FA’s disciplinary process”

32. Mr Mulholland cited Regulation 1.1 of the General Provisions relating to proceedings conducted by Inquiries, Commissions of Inquiry, Regulatory Commissions of The Association, other Disciplinary Commissions, Appeal Boards and Safeguarding Review Panel Hearings, (see paragraph 7 above).
33. The following contentions were advanced:
 - (1) The decisions of the Regulatory Commission had created a generic offence of strict liability in relation to the entire system of FA Rules and Regulations. The

effect of the determination would be to provide The FA with a mandate to obtain an adverse finding against a club or individual under its jurisdiction for any inadvertent breach of any of The FA Rules and Regulations, regardless of the circumstances.

- (2) The conduct which led to the charges under Rule E10 was primarily brought about by systemic failures of The FA. The Club had relied on The FA's own published database as to the status of the Player. The criticism of the Regulatory Commission that it would have expected a Club to have conducted better research into the Player's caution total once he had confirmed he was unsure whether his total was 8 or 9 for the season was, it was submitted, a criticism which was both unreasonable and borne solely out of hindsight.
- (3) The FA had failed to implement a competent system which would ensure accurate records for its own players. It had been made aware of defects in the system no later than early 2013 as a result of the case of *Thurrock FC v Isthmian Football League* (which resulted in an FA Rule K Arbitration) on 29th July 2013. It had failed to notify the Club or Player of the number of his cautions and any consequences of those cautions in a reasonable period or at all after 20th December 2014. It had failed to record correctly the number of cautions against the Player between 20th December 2014 and 26th January 2015. There were other administrative errors on the part of The FA.
- (4) Reliance was placed upon the decision of the Supreme Court in *R v Maxwell [2010] UKSC 48*, which dealt with prosecutorial misconduct in criminal proceedings. It was submitted that it was well established that the court had the power to stay proceedings, for example "*where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case*". Mr Mulholland submitted that that test was made out.

Ground 3

"A decision was made not to take further action against the Club in making an adverse finding against it in such circumstances the Commission failed to comply with the paramount object of The FA's disciplinary process"

34. Mr Mulholland cited from, amongst other cases, *R v UK Central Council for Nursing, Midwifery and Health Visiting Ex Parte Brabazon-Drenning [2001] HRLR 6*, and *R v General Medical Council Ex Parte Gwynn [2007] EWHC 3145*. It was submitted that once a decision had been taken that there should be no charge, then unless there was some misrepresentation, or unless The FA had been acting under some fundamental misconception as to the true position, it was not open to The FA to resuscitate the charge.

Response to the Appeal

35. The Respondent resisted all grounds of appeal. Again, the Response to the Notice of Appeal is not set out in full in these Reasons.

Ground 1

36. There is no requirement within Rule E10 for a “Decision” to be taken in order for the automatic suspension under paragraph 11 (a)(iv) of Section D to be Disciplinary Procedures Concerning Field Offences to take effect.
37. Mr Foulkes submitted that there was a wealth of authority to support the proposition that absolute offences represent a well-established category of quasi-criminal offences. The offences which were the subject of these appeals were neither criminal nor quasi-criminal. They were disciplinary matters with corresponding penalties and it is against that background that the “offences” must be considered. The fact that examples exist of strict liability disciplinary offences whose character is explicit on the face of the relevant regulations does not mean that such explicit description is necessary in order for an offence to be one of strict liability

Ground 2

38. Fairness to the parties required recognition that fielding a player who is subject to suspension creates unfairness for other participants in the game. The very fact that the offence is one of strict liability is to encourage a greater degree of vigilance to prevent breaches.
39. The Respondent maintained that there are many examples of strict liability offences in the criminal as well as disciplinary field. There was a need for certainty and an understanding on the part of participants in the game as to the rigour with which Rule E10 would be applied. Minor matters would not necessarily be prosecuted and any mitigation could be taken into account and reflected in the sanction applied.
40. The Club had sought to lay blame on The FA for the administrative confusion concerning the number of cautions the Player had accumulated, yet the individual best placed to know how many cautions the Player had received was the Player himself. It was not open to the Player to simply argue that he had to wait until notification before realising after accumulating 10 cautions that he was automatically suspended. The Regulatory Commission had been right to criticise the Club for not checking the website that listed a Player’s individual cautions. It was also the responsibility of the Club to keep accurate records.
41. In terms of abuse of process, the Respondent accepted that the principles applicable to the stay of criminal proceedings were applicable to the present appeal. However, those principles are only to be applied in exceptional circumstances. In the case of *Maxwell*, the police had misled the Court, the CPS and Counsel and lied to the Court of Appeal. In *Council for the Regulation of Health Care Professionals v GMC and Saluja [2007] IWLR 3094*, it was stressed that the principle behind a stay is the Court’s repugnance in permitting its process to be used in the face of the executive’s misuse of state power by its agent. Such conduct was wholly different in character to the type of conduct with which these appeals were concerned.

Ground 3

42. The Respondent urged caution in relation to the Appellants' reliance upon the cases of ***Brabazon-Drenning*** and ***Gwynn***. First, the GMC's rules and powers are defined by statute. One of the GMC's principal aims is to protect the public with the result that where impairment of a doctor's fitness to practice is found, the GMC is limited in the way that it can moderate its sanction against the doctor to take into account matters relating to the proceedings themselves.
43. In both of the cases relied upon by the Appellants under this ground of appeal, the correct individual or committee made a decision in accordance with the procedures laid down and the powers given to them. In each case the matter was formally closed and the resurrection of the charges in both cases occurred years later in the light of further matters being considered against the doctors.
44. In ***Brabazon-Drenning***, the Court found that if there was a power to resuscitate the case it would be unfair to do so given the unambiguous and unequivocal way in which the decision not to pursue it had been notified to the doctor. In ***Gwynn***, the doctor had not been informed of the original decision but the delay of over 4 years was unreasonable.
45. The Respondent sought to distinguish the instant case with both ***Gwynn*** and ***Brabazon-Drenning***. In the present case, the power to make a decision on charge rested solely with the Chief Regulatory Officer or his nominees. Any case requiring potential formal disciplinary action must be referred to Regulatory Legal. The views expressed by Mr Marshall to Ms Discipline in the 17th February 2015 e-mail were made (i) on a preliminary basis during the evidence collation stage of the investigation, and (ii) without authority (Mr Marshall is not a member of the Regulatory Legal Team). The situation was fundamentally different to the circumstances in ***Gwynn***. Mr Marshall had purported to express a preliminary view to the Isthmian League. The process of dialogue between The FA and the leagues would be severely hampered if it could be claimed that during the course of such discussions a final decision had been taken.
46. In terms of the Appellants having been given the legitimate expectation that there would be no charge, the leading authority is ***R v Abu Hamza [2007] 1 Cr App Rep 27, CA***, which is authority for the proposition that where a defendant has been induced to believe that he will not be prosecuted this can be relied upon as grounds for a stay on the basis of abuse of process but this is not likely to arise unless there has been unequivocal representation by those who have conduct of the investigation or prosecution of the case that the defendant will not be prosecuted and the defendant has acted on that representation to his detriment. The doctrine of legitimate expectation was not made out in the present case. In particular the "Marshall representation" was not made to the Club, the Club did not act to its detriment in reliance on any representation, and there was no delay of any substance between the Marshall representation and the decision to charge.
47. In both of the cases relied upon by the Appellants, the correct individual or committee made a decision in accordance with the procedures laid down and the powers given to them. In each case the matter was formally closed and the resurrection of the charges in both cases occurred years later in the light of further matters being considered against the doctors (this is a good ground of distinction in terms of the present case).

Conclusions

48. In reaching its conclusions, the Regulatory Commission did not misinterpret or fail to comply with any rules or regulations of the FA. Further, the Regulatory Commission, in reaching its decisions, did not come to conclusions to which no reasonable such body could have come (the “perversity” test).
49. The Appeal Board concluded that it would not be “substantially unfair” (within the meaning of Regulation 1.4 of the Regulations for Football Association Appeals) not to alter the Regulatory Commission’s decisions.
50. It cannot have been the intention of the draftsman of Rule E10 that in order for the automatic suspension under Section D of the Disciplinary procedures concerning field offences rule (a)(iv) to take effect, an officer or body of the FA would have to make a “decision” pursuant to the rules and regulations of the FA. If the construction of Rule E10 urged upon the Appeal Board was correct, a club finding itself in the position of the Club in the present appeals could effectively avoid the consequences of a recently acquired player accumulating 10 cautions in the relevant period by claiming lack of knowledge of the relevant “decision” as a complete defence to the charge.
51. The Appeal Board accepted the submission of the Respondent that the correct approach to interpretation of the rules was that the relevant “offence” is not criminal, nor is it quasi-criminal. It is a disciplinary matter with corresponding penalties.
52. The Appeal Board further accepted the Respondent’s submission that it was appropriate to consider the background against which the “offence” must be considered, essentially fairness to all and the maintenance of the objective of encouraging all Participants to show vigilance in their observance of the rules so as to prevent disciplinary breaches.
53. The Appeal Board rejected the contention that the paramount object of the FA’s disciplinary process would be defeated by a determination that the relevant offence is one of strict liability.
54. It is certainly the case that there was administrative confusion in relation to the “logging” of the player’s cautions. However, the Player bore the greatest responsibility for knowing how many cautions he had received and it was, in the judgment of the Appeal Board, entirely legitimate for the Regulatory Commission to criticise the Club for not checking the website that listed a player’s individual cautions given how close he himself believed he was to a further suspension.
55. There was, in the judgment of the Appeal Board, no abuse of process in this case.
56. The FA did not reach a decision that the Club would not be charged, only to resile from that position. In *Gwynn* the case had been closed in circumstances whereby the subject of the original complaint, a doctor, had not been made aware of its existence. The Court refused to give the GMC permission to pursue the charge after a decision had been made that no action would be taken. In the present case, on the findings of the Regulatory Commission, which findings the Appeal Board saw no basis of interfering with, there had been no “decision”. The view expressed by Mr Marshall to Ms

Discipline of the Isthmian League in the email of 17th February 2015 was made on a preliminary basis during the evidence collection phase of the investigation, and that view was expressed without authority, to the extent that it was suggested that it purported to represent a concluded decision.

57. Applying the principles in *Abu Hamza*, there was, on the present facts, no unequivocal representation by those with conduct of the investigation or prosecution of the case that the Club would not be prosecuted, and no evidence that the Club had acted to its detriment on the basis of any such representation.
58. The representation made by Mr Ives was not determinative. The representation made by Mr Marshall was not made to the Club. The club did not act to its detriment in reliance on any such representation and there was no delay of any substance between the representations (if there were any) and the decision to charge.
59. The Appeal Board unanimously found as follows:
 - (a) The reasoning of the Regulatory Commission was comprehensive and could not be faulted.
 - (b) In particular, the Regulatory Commission identified and plainly took account of all of the mitigation available to the Appellants when considering the issue of sanctions.

Costs

60. The Club and the Player shall each forfeit their respective costs deposits of £100.
61. There shall be no further order in respect of the costs of the appeals.

Signed



Paul Gilroy QC
(Chairman of the Appeal Board)

this 28th day of May 2015