

**IN THE MATTER OF AN RULE K ARBITRATION**

**B E T W E E N:**

**FOREST GREEN ROVERS FOOTBALL CLUB**

**Claimant**

**and**

**THE FOOTBALL ASSOCIATION**

**Respondent**

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**AWARD AND REASONS**

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**Background**

1. On 15 January 2015 the Claimant, Forest Green Rovers Football Club ("the Club") served a Notice of Arbitration on The Football Association ("the FA") in accordance with Rule K2(a) of The FA Rules and Regulations by which the Club sought to challenge the decision of the FA Appeal Board of 12 December 2014. The Club proposed modifications to the Standard Directions set out under Rule K3 and K4(b), including that I would be appointed as sole arbitrator, to which The FA agreed in its Response to Notice of Arbitration dated 29 January 2014.
2. At the hearing before me on 5 March 2015 the Club was represented by John Merzhad, Counsel instructed by Lewis Silkin LLP, and The FA was represented by Tom Cleaver, Counsel instructed by The FA. I am very grateful to them both for their assistance including by way of detailed and helpful skeleton submissions.

3. The background to this challenge is that on 1 October 2014 the Football Conference Panel ('the Panel') found the Club guilty of fielding an ineligible (unregistered) player (Luke Oliver) on 9 August 2015 in its match against Southport FC ('the Match') which the Club had won 1 - 0.
4. The relevant rule concerning the consequences of fielding an ineligible players is found at Rule 6.9 of the FA Standardised Membership Rules 2014/2015 seasons for the Football Conference Limited, which provides as follows:

*"Any club found to have played an ineligible player in a match or matches shall have any points gained from that match or matches deducted from its record up to a maximum of 12 points and have levied upon it a fine. The Board may also order that such match or matches be replayed on such terms as are decided by the Board who may also levy penalty points against the Club in default."*

5. The Panel deducted the three points that the Club had gained in the Match from its League Table score, as it was required to by Rule 6.9, and levied a fine on it of it of £500 (the minimum contained in the fines tariff) but declined the Club's request that the Panel exercise its discretion to order that the Match be replayed pursuant to Rule 6.9, for the following reasons:

*"There were no extra-ordinary or extenuating circumstances that caused FGR to field an ineligible Player in the match at Southport on 9 August 2014. In accordance with Membership Rule 6.1.1 Clubs are responsible for ensuring their Players are correctly registered, including the allotment of a current registration number. The Club failed to meet its responsibilities in this respect and was entirely culpable for the breach. For this reason, and because of the adverse effect(s) on the integrity of the Competition, the Panel applied the mandatory sanctions but rejected the Club's invitation to exercise any discretion to order a replay of the match."*

6. On 14 October 2014 the Club appealed against the Panel's refusal to exercise its discretion to order that the Match be replayed on the grounds that the Panel had misinterpreted or failed to comply with the rules and regulations relevant to its decision and that it had come to a decision to which no reasonable body could have come. On the latter ground, the Club argued that the finding that there were no extraordinary or extenuating circumstances was unreasonable and not supported by the available evidence, and that the Panel had based its decision not to order a replay of the match on inaccurate or irrelevant findings of fact.
  
7. The Club's appeal was heard by the Appeal Board on 12 December 2014. In a decision issued on the same day the Appeal Board found that when considering the decision of the Panel in conjunction with the reasons provided that the reasons lack substance and were unreliable. As a result the Appeal Board upheld the appeal on the second limb alone in that it could not be convinced as to the reasons for the decision. The Appeal Board went on to exercise their right to consider what the appropriate decision would have been had they been in the position of the original Panel.

*"The key factors to their decision are outlined as follows:*

*"(i) The Board concentrated their decision on the facts of this case alone and not any other matter outlined by the appellants in respect to other similar cases as the full reasons and facts of those cases were not before the Board to consider.*

*(ii) The Appellant did not deliberately intend to play a player that was ineligible.*

*(iii) The onus is on the Club, if not under regulation, to ensure all players are eligible before taking to the field. By not doing so is a high risk strategy for the Club to which they must accept the consequences that flow from that decision.*

*(iv) There was no evidence to suggest, nor was it submitted, that the appellant was given inaccurate information that would*

*have led the Club to play a player that was ineligible. Had that been the case, not to order a replay would have been perverse.*

*For the avoidance of doubt and to assist all parties, the occasions for which an order for replay would reasonably be ordered would be where the failure to do so would result in a sporting disadvantage to a team other than that of the offending Club or where the offending Club had acted on advice given to them by either the League, County FA or The FA. Naturally all cases are determined on the merits of their individual facts.*

*In concluding the Appeal Board in exercising the discretion that the League had at their disposal, for the reasons given above, find on balance that a replay in this case should not be ordered.*

*The Appeal Board find that the intention of the rule is not to allow a replay where the benefit to do so would be mainly for the offending Club or where the fault lay with the offending Club." (emphasis added)*

8. In its Notice of Arbitration the Club challenges the Appeal Board decision on the basis that it applied its decision irrationally by concluding that:
  - a. There would be no sporting disadvantage to a team other than the Club by not ordering a replay. There obviously would be a sporting disadvantage to Southport FC of not so ordering. That sporting disadvantage is all the more obvious in this case where Southport FC lost the original match but would gain the opportunity to obtain points (and improve goal difference) from a replayed match; and
  - b. A replay in these circumstances would "mainly" be for the benefit of the Club. On the contrary, there would be at least an equal benefit for Southport FC, who would have an opportunity to win (and gain points from) a replay.
9. In its Response to Notice of Arbitration The FA set out its position as being that the main reasons for the Appeal Board's decision were those

at subparagraphs (i) to (iv), of which there is no criticism, and that the Appeal Board's comment that it would be appropriate to order a replay "*where the failure to do so would result in a sporting disadvantage to a team other than that of the offending Club*" cannot be constructed as meaning that a replay should be ordered in cases where a non-offending Club has an opportunity to earn points from or improve its goal difference in the replay. The FA also argues that, even if this was what was meant by that comment it was in principle incorrect, but that this does not render the decision irrational because the Appeal Board placed no reliance on that statement of principle in reaching its conclusion that a replay should not be ordered.

10. In the alternative, The FA argues that the appropriate order would be for me to exercise the discretion afresh and order that there should be no replay, or, if any replay were to be ordered, direct that it be on terms that any points earned or goals scored by the Club be disregarded and/or deducted as "*penalty points*".
11. In this context I note that whilst my role under Rule K is limited to considering whether the Appeal Board's decision is vitiated by reason of it being ultra vires (including an error of law), irrational or procedurally unfair (Rule K1(d)), the Club and The FA agreed that in the event that I were to find that the Appeal Board's decision was so vitiated that I should go on to exercise the discretion under Rule 6.9 afresh.

## **Analysis**

12. As I have indicated above, mine is a supervisory jurisdiction. Unless I am satisfied that the Appeal Board's decision was vitiated on the grounds that it was made ultra vires, was irrational or procedurally unfair, then I must dismiss the Club's challenge, irrespective of whether I might have taken a different view as to whether a replay should have been ordered in this case.

13. No challenge is brought in these proceedings to the Appeal Board's view that it would be appropriate to order a replay where the offending club essentially bore no fault, or to the Appeal Board's conclusion that the degree of fault on the part of the Club was such that a replay was not justified on that basis. The critical question is therefore whether it was irrational for the Appeal Board to decline to order a replay of the Match in circumstances where it had directed itself as a matter of principle that an order for a replay could reasonably be made where *"the failure to do so would result in a sporting disadvantage to a team other than that of the offending Club"*.
14. The Club's position is straightforward. It argues that there will always be a sporting disadvantage to a team other than that of the offending Club where the offending Club won the Match, and accordingly it was irrational for the Appeal Board not to order a replay on the facts of this case.
15. The FA's position is that the reason why the Appeal Board declined to order a replay of the Match was because the Club could not be said to be without (or sufficiently without) fault, which was the basis upon which the Club had brought the appeal. In its Response to the Notice of Arbitration The FA initially suggested that the Appeal Board had included the paragraphs in its decision which are emboldened above *"for information purposes only"*, although in submissions before me The FA suggested that the Appeal Board had reached the implied conclusion that no case had been made out that there would be a sporting disadvantage to another club if no order for a replay was made, but that that conclusion did not form the basis for the Appeal Board's decision.
16. In my view The FA was clearly correct to accept that the Appeal Board had, by implication, found that the failure to order a replay in this case would not result in a sporting disadvantage to a team other than that of the Club. That being so, I find it difficult to see how it can properly be said that the Appeal Board's decision was not based on a finding as to sporting disadvantage such that if that finding was irrational the decision would not be vitiated in any event.

17. The Club argued that the Appeal Board erred in not giving it an opportunity to address the issue of sporting disadvantage before reaching this (implied) conclusion. However, it cannot be said that the Club did not have the opportunity to raise the issue of the effects of a replay on the integrity of the competition, which included sporting disadvantage, before the Appeal Board as it could have appealed against the Panel's findings in that regard, and in any event it could have made the arguments that it did before me to the Appeal Board as to how it should have exercised the discretion under Rule 6.9 afresh. I do not consider that the Appeal Panel's decision was vitiated as a result of this issue not being the subject of argument at the hearing.
18. Accordingly, the real issue is what the Appeal Board meant by "sporting disadvantage".
19. As set out above, the Club's position is that there will always be a sporting disadvantage to the non-offending team where the offending team won, such that a replay should be ordered in every such case. In these circumstances there would be no unfairness to other clubs in the league in terms of a distortion of the normal three points available for a win principle since the offending club would have had the three points initially awarded deducted.
20. Conversely, if the offending club lost the match then no replay should be ordered. The non-offending club has already obtained three points and a positive goal difference. If a replay were to be ordered there *would* be unfairness to other clubs due to the distortion of points available as a result (six rather than three).
21. As for the position where the outcome of the match was a draw, the Club's position is that whilst there would be some sporting disadvantage to the non-offending club (because it would only have obtained one point rather than the three potentially available), it would be unfair on other teams in the league to order a replay as it would result in a distortion of the total points available (four rather than three).

22. On the Club's approach, the issue of the extent to which a club had been at fault in fielding an ineligible player would only be relevant to whether, in addition to having deducted any points from the original match, further penalty points should also be awarded as the Board has the power to do under Rule 6.9. Thus, whilst the Club's primary position was that the types of "terms" which may be decided by the Board are limited to practicalities such as when and where the match should be replayed, it accepted that the Board had the power to create a situation whereby the offending club could not obtain any points from the replay. However, it submitted that this should only be the case where the club had been egregiously at fault by, for example, deliberately fielding an ineligible player.
  
23. In my view the difficulty with the Club's approach is highlighted by its position where the match was a draw. As The FA pointed out, given that the Club accepts that the interests of the other teams in the league effectively 'trump' that of the non-offending club in that case, it is difficult to see why there should equally not be a balancing exercise between those sets of interests where the result was a win by the offending club. In my view there is also a further difficulty with the distinction drawn by the Club between matches which were won and drawn by the offending club. The simple answer to the suggestion that there would be four points available in such circumstances rather than three is that any replay should only be ordered on terms that in the event of a win by the non-offending club its points would be "topped up" to three, rather than three points being added to the single point it earned previously.
  
24. Accordingly, in my view The FA is right that the effect of the Club's approach is that what is characterised in Rule 6.9 as being a discretion to order a replay in fact becomes an obligation to do so in every case where points have been deducted (i.e. whether the offending club won or drew), because in every case the non-offending club would have lost the opportunity to earn more points than it did. That of itself suggests that the Club's approach cannot be right.



25. Moreover, taken to its logical extreme, the Club's position must be that a replay should in fact be ordered in *every* case, irrespective of the result of the match, because in every case the non-offending club has the opportunity to improve its goal difference, even if it could not earn a greater number of points. To deprive a club of that opportunity might of itself be described as a "sporting disadvantage", albeit generally a lesser one than the opportunity not to earn points.
26. The fundamental difficulty with the Club's approach is that it deprives Rule 6.9 of all real meaning. The sanction for fielding a non-eligible player would become, in effect, simply a financial one, as the Club would have another opportunity at the replayed match to earn the same points as it did in the previous match, or indeed even *more* points than it did previously were the result to have been a draw. That cannot be right.
27. Moreover, the Club's approach, which focuses on the absence of any distortion of the points available for a particular match, fails to take into account the wider sporting context. This context was in fact helpfully set out by the Panel in the original decision, where it identified a number of potential eventualities were a replay to have been ordered:
- *FGR, the offending Club, would be given the opportunity to improve its position i.e. by winning the replay by a greater margin, and would thereby gain an advantage over the whole Competition*
  - *The non-offending Club, and all other Clubs in the Division, would be disadvantaged by the above eventuality.*
  - *The result of a replayed match, even if different from the score of the first match, would have a positive or negative effect on every Club in the Division.*
  - *As only points, not goals, are deducted in the application of Rule 6.9 even if the result of the first game was repeated (0-1 to FGR) the offending Club will benefit by improving its goal difference.*
  - *The opposite effect will directly apply to the non-offending Club – and thereby positively or negatively affect every other team in the Division.*
  - *The integrity of the Competition would be adversely affected by all/any of the above eventualities.*

28. I would only add that, in the light of the clarity with which the Panel put these points, it is both inconceivable that the Appeal Board when considering the appeal from the Panel's decision took the view that sporting disadvantage arose whenever the non-offending club was deprived of the opportunity to earn points, and understandable that the Club did not seek to appeal against this part of the Panel's decision
29. The Panel did not, of course, consider whether a replay should be ordered on terms whereby the offending club did *not* have the opportunity to earn points. However, as the Panel pointed out, the disadvantage to other clubs was not limited to points but to goals in any event.
30. As for the suggestion that a replay should be ordered on such terms, the Club argued that to deprive it of any points earned on a replay would be doubly punitive, as it would already have been deprived of the points earned at the original match. I do not accept this. In my view the logic of the Club's position, which focuses entirely on the sporting disadvantage to the non-offending club in the absence of a replay, leads inexorably to the conclusion that it could only be the non-offending club which should be able to gain any advantage from a replay, and not the offending club, in such circumstances.
31. However, as the Club observed, were a rematch to be ordered from which one club could not derive any benefit, that club would be unlikely to take the risk of fielding its supposed starting eleven given the risk of injury, cards or suspensions. Whilst there are no doubt many occasions on which clubs choose their squads tactically, it does seem to me that the integrity of the game may well be undermined by creating a situation in which one club effectively has nothing to play for and everything to lose.
32. That being the case, just as I cannot accept that Rule 6.9 intended that the offending club should be able to gain an advantage from any replay, I equally cannot accept that it intended to required matches to be replayed on such an artificial basis. In any event, such a solution

would not address the other issues arising out of goal difference identified by the Panel.

33. Accordingly, I agree with The FA that the concept of “sporting disadvantage” cannot have been intended by the Appeal Board to cover any case in which the non-offending club lost (or indeed drew).
34. What, then, is meant by “sporting disadvantage” in this context? It would clearly neither be appropriate nor possible for me to attempt to list all the circumstances in which such a disadvantage might arise such as to justify an order for a replay, but I would agree with The FA that there would need to be circumstances specific to the actual teams involved such as to give rise to a sporting disadvantage to the non-offending teams or other teams were no replay to be ordered. Whilst recognising that it may well not be easy to identify the impact that a particular player had on the game, in principle I would accept that this may be a relevant factor. Equally, it was common ground between the parties that the position of the respective teams in the may be relevant, although of course some care would need to be taken where the teams are in or close to the relegation of play-off zones as the impact on other teams in those circumstances is likely to be all the more acute.
35. Although the Club criticises the Appeal Board for reaching the conclusion that there was no “sporting disadvantage” on the facts of this case without hearing from it, or from Southend, on the point, it is quite clear that, even without having heard from them, the Appeal Board’s implied conclusion that there was none was not irrational.
36. At no time has the Club ever suggested that there was any relevant circumstance specific to it (such as Mr Oliver having scored the winning goal in the Match) that could give rise to a sporting disadvantage were a replay not to be ordered.
37. The only circumstance identified as being relevant to Southport is that, as at 5 March 2015 and with less than two months to the end of the season, they are only two places away from the relegation zone. However, the issue for me is whether the Appeal Board erred when it

reached its decision on 12 December 2014, which was approximately half way through the season. Even were Southport to have been close to the relegation zone at that point, given the number of matches still to play there would have been no reason to order a replay at that time on that basis.

38. Accordingly, no basis has been made out by the Club for impugning the Appeal Board's decision within the scope of Rule K1(d) and the claim brought by way of arbitration is therefore dismissed.
  
39. I would invite the parties to make submissions in writing on the issue of costs. If it is necessary for me to make any directions for the timing and service of such submissions the parties should notify me and I will do so.



**Kate Gallafent QC**  
**6 March 2015**