

THE FOOTBALL ASSOCIATION

APPEAL BOARD

PERSONAL HEARING

of

DAVID BYRNE (Appellant)

&

SURREY FOOTBALL ASSOCIATION (Respondent)

REASONS OF THE APPEAL BOARD

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 1st February 2024.

Introduction

1. On 16th January 2024 the Football Association (“The FA”) received an appeal against a decision of the Surrey Football Association (“Surrey FA”) finding a 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 4th November 2023 between Croygas U11s and Cheam Sports Tigers U11s (“the Match”).
3. The charge had been considered by an FA regional disciplinary panel on 10th January 2024 (“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 1st 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. In attendance were the Appellant himself, representing himself, and David Miller on behalf of the Respondent.

7. Having introduced all participants in the appeal hearing the Chair explained the procedure to be followed, the necessity to follow FA Non-Fast Track Appeal Regulations (which would be explained as and when necessary) and made careful point of explaining the private and confidential nature of the hearing.

New Evidence

8. The Appellant had sought to introduce new evidence to the appeal hearing in the form of Statements from Charles Valler, John Hartley, Laura Kier and Simon Tennant.

9. The Chair took the opportunity of explaining Appeal Regulation 10 and in particular the necessity for any party seeking to introduce new evidence to satisfy the Appeal Board as to the relevance of that evidence and to explain satisfactorily why that evidence could not be or was not produced at first instance.

FA Non-Fast Track Appeal Regulation states:

New Evidence

10 The Appeal Board shall hear new evidence only where it has given leave that it may be presented. An application for leave to present new evidence must be made in the Notice of Appeal or the Response. Any application must set out the nature and the relevance of the new evidence, and why it was not presented at the original hearing. Save in exceptional circumstances, the Appeal Board shall not grant leave to present new evidence unless satisfied (i) with the reason given as to why it was not, or could not have been, presented at the original hearing and (ii) that such evidence is relevant. The Appeal Board's decision shall be final. Where leave to present new evidence has been granted, in all cases the other party will be given an opportunity to respond.¹

¹ The FA Handbook 2023/2024 at P.190

10. The Appellant explained that after the Match he and his colleagues had decided they would report Croygas to the Surrey FA for the behaviour of their management and coaches at the Match. It was the Appellant who had submitted the complaint on 9th November 2023. Unfortunately, the first the Appellant heard of the Charge against him was early in January 2024. There had been email correspondence to the club secretary concerning a possible hearing but he himself was not alerted to the Hearing until after it had concluded and he was notified that he had been suspended. It was his club secretary who had told him. The Appellant explained, “It’s our fault as a club - we should have picked this up”, and that he wanted to “right this wrong”.

11. When asked whether he accepted there was nothing the Respondent could or should have done that they had not done the Appellant replied “Absolutely”. The Appellant accepted there was nothing wrong in the process but he was left with an unfair result through no fault of his own and he believed there had to be some culpability in the system but he was not blaming the Respondent.

12. The Respondent had very little to add. At the investigation stage they would have expected more evidence to have been submitted and the statements which were now being produced could and should have been produced at the appropriate time but there had been no explanation which would have satisfied the requirements of Regulation 10 as to why they were not.

13. The point of contact is always the club secretary and the charge had been sent in the usual way. The original investigating email was dated 8th November and requested evidence. When there was no response a reminder had been sent on the 17th November and an email with the Appellant’s own statement had been submitted later that day. The original charge letter had been sent to the club secretary on 12th December. So far as the Respondent was concerned, three opportunities had been given for production of the evidence which was only now being produced.

Deliberation and Decision on New Evidence

14. The Appeal Board retired to consider whether the proposed new evidence was admissible. The Appeal Board was unanimous in that procedurally nothing had been wrong in the charging process or the investigation process undertaken by the Respondent. Also, there was no persuasive argument as to why the evidence could not or was not submitted in time for the Hearing and therefore the new evidence did not satisfy the requirements of Regulation 10.

15. The decision not to admit the new evidence was communicated to the Appellant and Respondent.

The Appeal Proper:

Submissions by the Appellant:

16. The Appeal Board carefully considered the appeal notice and its covering correspondence as set out in the Bundle (but without the new evidence).

17. The Appellant explained the circumstances leading to the incident complained about in the referee's report. The weather had been poor on the day in question and the home team had warned him and his colleagues that it was a young referee and consequently they told their own boys to be respectful. There had been points of disagreement with the home side outlined in the Appellant's statement of 5th November 2023. In the course of his submissions the Appellant stated the referee "didn't know what he was doing", he was "a club referee", "had no presence or charisma". He explained one particular error he believed the referee had made in allowing the home team's goalkeeper to take goal kicks from the edge of the penalty area but the referee had taken no notice when this was pointed out to him.

18. The Appellant described an incident where he had to go on to the pitch to attend to one of his players who had been hurt in a tackle. The referee was standing by him and he had taken the opportunity of telling the referee about the incorrect application of the law relating to goal kicks. The referee didn't agree with him. The Appellant had told the referee "I don't think you're fit to referee this game". He denied swearing at the referee. He also denied swearing at Croygas's management or at any one at all.

19. In response to questions from the Appeal Board the Appellant submitted:

- Of the evidence submitted by Croygas, the referee's statement is subjective, his father's statement was irrelevant as he was not at the Match at the appropriate time and the statement of Alan Nash was not objective.
- He was unfamiliar with the Regulations so was unable to assist in identifying any shortcomings on the part of the original commission at the Hearing.
- He was seeking rescission of the ban and would be happy with a fresh hearing.
- He didn't know who had appointed the referee, it may well have been Croygas
- He can't recall whether the referee called him on to treat his injured player or not. There were one or two of his own spectators complaining loudly and he was more concerned about the boy who was on the ground crying. He also wanted to tell his boys to leave the referee alone.
- He had told the referee he wasn't fit to referee this game but only once he had shooed his boys away.

- The referee didn't seem to know the rules and was clearly biased towards the home team.
- He was only told of the Charge by the club secretary in early January 2024 once it had been decided. This came as a total surprise to the Appellant.
- He had not collected statements from his witnesses earlier as he knew it would take several hours to take each statement and he wasn't able to devote time to doing so until he knew they were needed.

20. In closing, the Appellant stated that the atmosphere at the match was intimidating, his boys were all sad at the end of the game as they had been sworn at and wondered what they could do about it. He had reported it to club secretary, Lorraine, on the same day and had prepared his statement contemporaneously, which was submitted to the Respondent. It seems that Croygas had made their own complaint first. He denied saying anything to the Croygas linesman.

Submissions by the Respondent:

21. 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.

22. It was noted in paragraph six of the written reasons that the commission stated the Respondent had received a reply to the charge on 5th January 2024. It was accepted by the Respondent that in fact no reply was received. The Charge had fallen to be considered as a denial and a request for a correspondence hearing by default not by request.

23. The Appeal Board also considered the original case papers and was directed to the referee's report in particular.

24. The circumstances to be considered when considering the appeal on the grounds of not receiving a fair hearing had already been addressed in the preliminary application and the Respondent directed the Appeal Board to those earlier submissions.

Closing submissions

25. In closing the Appellant had little to add but:

- There had been a breakdown in communication which was unfortunate
- The Appellant accepted the Appeal Board had to follow the Regulations
- The referee was weak.

Deliberation

Legal test for all grounds of appeal

26. As is clear from Regulation 12 of the Non- Fast Track Regulations², 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.

27. 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’.”

28. 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;

² The FA Handbook 2023/2024 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

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

30. The Appeal Board considered whether the Respondent had come a decision to which no such reasonable body could have come.

31. The Appeal Board took note that:

- the referee had complained in his statement that the Appellant had commented to him, whilst treating a player, that he shouldn’t be refereeing at this level, something which the Appellant never denied and even admitted saying in the course of the appeal.
- Mr Nash also reported the Appellant had told him the referee didn’t know what he was doing.

- the Appellant admitted challenging the referee in front of young players.
- The Appellant couldn't recall whether he had been allowed on to the pitch by the referee, although this was not something about which the referee had complained or reported
- Despite being invited to supply statements on three occasions the only statement submitted on behalf of or in support of the Appellant was his own
- The referee's report provided details of abusive language from the Appellant to the referee. Whether the Appellant swore at the referee or not, challenging his authority and telling him he was not fit to referee the game was abuse.
- The referee was 15 years old and this was known to the Appellant
- This disrespect and criticism of the referee continued in the course of the appeal hearing

32. The Appeal Board considered whether the Appellant had received a fair hearing.

33. The Appeal Board noted:

- The Appellant accepted, "It's our fault as a club - we should have picked this up", when asked how it was that he had not learnt of the Charge until after it had been considered and the Decision taken.
- He had provided no evidence as to why neither the Appellant nor, particularly, his club had engaged in the investigation or replied to the charge letter
- There was nothing defective in the procedures of the Respondent and this was accepted by the Appellant.

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

- It was unsustainable to suggest that the Respondent had come to a decision to which no reasonable such body could have come. On the evidence in front of the commission, the Decision was within the reasonable range of decisions to which the commission could have come.
- Procedurally the Respondent had not erred at all. 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.

Conclusion

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

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

37. 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

5th February 2024