

APPEAL BOARD OF THE FOOTBALL ASSOCIATION

BETWEEN:

DOVER ATHLETIC FOOTBALL CLUB

Appellant

-and-

THE NATIONAL LEAGUE

Respondent

DECISION OF THE APPEAL BOARD

Hearing: 8 June 2021

Appeal Board:

David Casement QC (Chairperson) Independent Specialist Panel Member

Matt Wild Independent Football Panel Member

Alison Royston Independent Football Panel Member

Paddy McCormack Judicial Services Manager – Secretary

Club:

Christopher Saad Barrister

Jim Parmenter Chairman

Simon Tovey Outset Legal LLP

Sean Gorman Outset Legal LLP

The National League:

Nick DeMarco QC Barrister

Mark Ives General Manager

Stephen Joelson Clintons Solicitors

Background

1. The general background to this appeal is that as a result of the global pandemic football clubs have been severely affected by the inability to admit fans to matches and have thereby lost substantial parts of their revenue. Government support was provided to clubs in the National League, National League North and National League South in the form of Government grants for the period up to December 2020 however despite the hopes or expectations of many the Government decided that financial support thereafter would generally be in the form of loans. That change in the type of financial assistance was met with great disappointment by clubs. There was also a well-publicised and substantial increase in the rate of infection in December 2020 and January 2021, leading to a further national lockdown being announced by the Government on 4 January 2021.
2. On 22 January 2021 the National League (“the League”) temporarily suspended the Step 2 Competition with immediate effect for two weeks until 6 February 2021. The Step 1 Competition was not suspended. On 1 February the League circulated to clubs in both steps written resolutions the outcome of which would determine whether Step 1 and/or Step 2 clubs would continue the season or whether the season would be declared null and void with no promotion and relegation, subject to the approval of the Football Association.
3. On 17 February 2021 the required number of votes were lodged with the League. Step 1 voted against ending the season whereas Step 2 voted to end the season. The result of the vote was declared on 18 February 2021.
4. Dover Athletic Football Club (“the Club”) was charged with four breaches of Rule 8.39 of the National League Rules (“the Rules”) for failing to fulfil four fixtures namely, on 16, 20, 23 and 27 February 2021.
5. By a decision dated 25 March 2021 (“the Decision”) an independent panel found the Club to be in breach and imposed a fine of £40,000, expressly reducing what it

considered an appropriate fine namely £50,000 by 20% to reflect a discount it had applied in other cases. A further points deduction was ordered, 3 points per fixture (total 12), for the following season. Further, the Club's record was also expunged from the competition as it would play no further part in the season 2020/21.

6. By Notice of Appeal dated 9 April 2021 the Club has appealed the Decision on the grounds that:
 - 6.1 the Panel misinterpreted or failed to comply with the Rules and/or regulations of The Association relevant to its decision (Rule 2.2);
 - 6.2 the Panel came to a decision to which no reasonable body could have come (Rule 2.3);
 - 6.3 the sanction was excessive (Rule 2.4).
7. The parties have confirmed they have no objection to the appointment or the composition of the Appeal Board.

Rules

8. Rule 8.39 provides:

Where a match has been postponed for any reason, the two Clubs concerned must agree within the seven (7) days of the postponement a new date (which shall, save in exceptional circumstances, be within 42 days of the original date) and in default the Board is empowered to order Clubs to play on a date it considers suitable. The Competition Secretary shall determine the new date.

Any Club without just cause failing to fulfil an engagement to play a Competition match on the appointed date shall for each offence be liable to expulsion from the Competition and/or such other disciplinary action the Board may determine, including the deduction of up to a maximum of three points from the offending Club's record, any expenses incurred by the opponents, and a fine.

In the event of a Club being in breach of the previous paragraph of this Rule then the Board may award points to the Club not at fault as if the match had been played and

the League table shall reflect the position as if the match had been played with the result awarded by the Board. (underlining added)

9. Appendix A to the Rules sets out the Disciplinary Procedures- Appeals 2020/21.

10. Regulation 2 of Appendix A provides:

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

2.1 failed to give the Participant a fair hearing; and/or

2.2 misinterpreted or failed to comply with the Rules and/or regulations of The Association relevant to its decision; and/or

2.3 came to a decision to which no reasonable such body could have come; and/or

2.4 imposed a penalty, award, order or sanction that was excessive.

11. Regulation 10 of Appendix A provides:

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. Such 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 with the reason given as to why it was not, or could not have been, presented at the original hearing and 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.

12. Regulation 21 of Appendix A sets out the powers of the Appeal Board including the power to allow or dismiss the appeal. It further provides at Regulation 21.6 that the Appeal Board has the 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.

Summary of the Club's Grounds of Appeal and Submissions

13. In summary, the Club contends in its Notice of Appeal and subsequent written and oral submissions, that the Decision failed to adequately set out any or any proper reasons such that it is not possible to know how the Panel reached its conclusion in particular in relation to the finding of breach. However, the Club further contends, the Decision is so extraordinary that, absent proper express reasons, the Panel must have failed to properly apply the Rules and in particular to consider properly or at all the concept of "just cause" under Rule 8.39. Had it done so it would, on the information before it, have concluded that the Club had just cause in not fulfilling its fixtures. In fact as a matter of law the board of the Club had no choice but to cease fulfilling fixtures because to do so would be to trade whilst insolvent alternatively be in breach of directors statutory duties, as now codified in Companies Act 2006 in particular section 172.
14. The materials before the Panel included:
 - 14.1 Written response to charge written by Mr Parmenter;
 - 14.2 Report from Scott Rutherford
 - 14.3 Report from Adrian Dante of OPUS
 - 14.4 Financial statements of the Club;
 - 14.5 Oral submissions of Mr Parmenter and Mr Ives.
15. These show that notwithstanding Mr Parmenter's substantial equity investments over the years the Club is balance sheet insolvent and trades at a loss. The removal of match day revenue by reason of the exclusion of fans removed a substantial part of the Club's revenue. The Club's board could not, consistently with their statutory duties, take out a loan namely a Sport Winter Survival Package to continue to play the remainder of the season. Mr Parmenter also was not able to make a further equity investment.

16. Given that information it is clear that the Panel either misinterpreted or failed to apply the just cause defence within Rule 8.39 or reached a decision thereon that no reasonable body could have arrived at.
17. Further, it is contended, in all the circumstances the sanctions imposed were excessive.

Summary of the National League's Response and Submissions

18. In summary the position of the League as set out in its written and oral submissions is as follows:
 - 18.1 the Panel's reasoning was sufficiently clear. It was well aware of the submissions made by the Club in respect of just cause. Just cause is a factual issue and it is for the Panel to determine. The Panel states in terms that it considered all of the submissions advanced by the Club and it came to the conclusion that the Club was in breach. There is therefore no basis for saying that the Panel misinterpreted or failed to apply the Rules.
 - 18.2 the Decision was not unreasonable such that no such body could have reached that decision and it did not take into account matters it should not have or fail to take into account matters that it should have. The Panel took into account all of the matters placed before it by the Club. The matters referred to in the Decision including the fact that other clubs continued to fulfil their fixtures were relevant considerations to take into account.
 - 18.3 The Club's information placed before the Panel raised a number of questions including why equity support was not continued by the owner and why the Club did not take advantage of the loans that were available in place of grants, as some other clubs had done. The Panel was entitled not to be satisfied with the

information provided by the Club. The League contends that impecuniosity is insufficient on its own to amount to just cause.

18.4 It is accepted that just cause means valid reason as submitted by the Club but that remains a question of fact for the Panel to decide.

19. The League reminds the Appeal Board that it is not rehearing these charges but rather is reviewing the decision of the Panel to determine if the grounds of appeal are made out.

Decision of the Appeal Board

20. The Appeal Board only reviews the Decision of the Panel, it does not carry out a rehearing. It follows that it does not matter that the Appeal Board might have arrived at a different conclusion on breach or on penalty.

21. The Panel was clearly focused on the wording of Rule 8.39 and in particular the concept of just cause. It set out the wording of Rule 8.39 in full. It was the basis of the written submissions and documents placed before the Panel. The Panel confirmed in the final paragraph of the first page of the Decision that it had considered all of the evidence and materials provided to it. The issue of whether there was just cause, an undefined term, is a question of fact. It is common ground between the parties that it really means valid reason. However that merely restates the concept and does not define it: it remains a question of fact for the judgment of the Panel.

22. Whilst the reasoning of the Panel is only given in short terms when taken together with the submissions and materials placed before it the reasoning of the Panel is clear: it was not satisfied that the explanations and information provided amounted to just cause. There is no reason to conclude that the Panel misinterpreted the Rules or misapplied them.

23. Further it is not sustainable for the Club to assert that the Decision was so unreasonable that no reasonable body could have reached that decision. The Panel was entitled to reach the decision that there was no just cause and therefore the Club was in breach of Rule 8.39:

23.1 the financial statements and information showed that the Club was loss-making and, as was conceded by Mr Saad on behalf of the Club, showed that over the years it was only possible for it to pay its debts as they fell due by reason of substantial injections of equity each year by its owner Chairman Mr Parmenter;

23.2 no projections or forecasts were placed before the Panel to show what the Panel's financial future would look like beyond the instant season. For that reason it is impossible to see whether or not the Club could afford to service the loan that was the Winter Survival Package. Apparently that was a loan with a term of 20 years at a rate of 2% p.a. No proper analysis was before the Panel, nor this Board, as to why that was not affordable;

23.3 no breakdown of personal wealth was provided in respect of Mr Parmenter to show why he could not provide equity contributions as in previous years. It was bare assertion by Mr Parmenter that he was unable to make equity contributions in the 2020/21 season to enable the Club to fulfil its fixture obligations;

23.4 no analysis was provided of costings to show whether savings were made or could have been made going forward so as to finish the season with its fixtures fulfilled and/or to service a loan;

23.5 the burden was on the Club to provide all of this analysis and information. It was the only party with access to such information.

24. Assertions on behalf of the Club that it would have been in breach of company directors' statutory duties and/or involve wrongful trading to continue to fulfil fixture obligations are merely that, assertions. The reports of Mr Dante and Mr Rutherford are general and without detailed financial information to support them.
25. The Appeal Board is not surprised that the Panel was unpersuaded and found the Club to be in breach.
26. The League submitted that if, which it does not accept, the Club had truly run out of options eg had been genuinely unable to raise funding by way of loan or equity injections, or was unable to cut its costs or to field young players to ensure it met its fixtures, it was for the Club to withdraw from the competition. What it could not do was remain in the competition, receive pool funds and refuse to turn up for matches for the rest of the season. That would undermine the integrity of the competition and would be unfair to other clubs. It is not necessary for this Appeal Board to finally decide upon that submission in this case: the Club did not prove to the Panel or to the Board that it was financially unable to meet its fixtures. However, the League's submission brings into focus the point that an assertion of just cause arising from impecuniosity raises difficult questions. It might, in a suitable case, be met with the response that if a club cannot, due to financial reasons, operate so as to meet its obligations to fulfil fixtures it may have to withdraw from the competition altogether as envisaged in Rule 12.9.
27. The sanction cannot be said to be excessive. The difference between fines imposed upon Step 2 clubs and the Club in Step 1 is obvious. Substantially more funding is provided in Step 1 and in the present case the Club made it clear that it would not be fulfilling any of the remaining fixtures for that season. Whereas an apology from a respondent to a charge coupled with determination to rectify the position counts as mitigation, so a determination to continue to act in breach of the Rules is an aggravating factor. The fine at the highest end of the guideline range was appropriate as was the points deduction.

28. It is the unanimous decision of the Appeal Board that the appeal is dismissed.

Costs

29. In our judgment it is appropriate for the losing party to pay the costs incurred by the Appeal Board. The Club is therefore ordered to pay the sum of £1600 within 30 days of receipt of this decision.

A handwritten signature in black ink, appearing to read 'David Casement', with a long horizontal stroke extending to the right.

David Casement QC (Chairperson)
Signed on behalf of the Appeal Board
Dated 14 June 2021