

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER SECTION 8 OF THE EFL REGULATIONS

Before:

His Honour Phillip Sycamore CEB (Chair)
Laura McCullum
Matt Williams

BETWEEN:

THE FOOTBALL LEAGUE LIMITED (EFL)

Claimant

and

(1) MORECAMBE FOOTBALL CLUB (Club)

(2) JASON WHITTINGHAM (UBO)

Respondents

DECISION

INTRODUCTION

1. The Disciplinary Commission was appointed to determine disciplinary proceedings brought by the Claimant (“the EFL”) against the First Respondent (“the Club”) and the Second Respondent (“the UBO”). There was one charge against the Club and two charges against the UBO. Both the Club and the UBO admitted all of the charges and the matter proceeded before us in respect of sanction and whether there had been a failure to comply with the terms of an Agreed Disciplinary Decision (“the Decision”) made

on 17 August 2023, which provided for the activation of the suspended 3-point deduction for the 2023/2024 Season.

2. We held a hearing remotely by video link on 6 March 2024 when we reserved our decision and directed the UBO to provide further material and submissions by 11 March 2024. This direction was complied with, and we subsequently reconvened to continue our deliberations.
3. The EFL was represented by Mr Robert Weekes KC of counsel. The Club and the UBO were represented by Mr David Lowe of counsel. We express our gratitude to both counsel for their assistance and presentation.
4. We did not hear any oral evidence, but the following statements of witnesses were admitted in evidence before us: Geoff Cunningham, Jason Whittingham and Ben Sadler. Mr Weekes made it clear that, absent the opportunity to cross examine, his client did not accept the relevance and accuracy of all of the evidence from the two Respondents.

THE FACTUAL BACKGROUND

5. On 28 March 2023 the Club failed to make payment of wages due to both players and non-playing staff. The payment was not made until 31 March 2023.
6. The Club self-reported and accepted that this constituted a breach of Regulation 64.7 of the EFL Regulations 2023/24 Season (“the Regulations”) amounting to misconduct within the meaning of the Regulations.
7. The EFL proposed an Agreed Decision to which both the Club and the UBO agreed. As a consequence, a Disciplinary Commission, by an Agreed Decision ratified on 17 August 2023 by Christopher Stoner KC, imposed sanctions, at paragraph 7a, as follows:

“7 [...] a. a suspended 3-point deduction for the 2023/2024 Season, to expire on 30 June 2024 if not activated, but to become active if:

*i. Payment is not made by the owners of the Club to the Club Deposit Account in accordance with paragraph 7(b) of the Agreed Decision;
or*

ii. There is any failure to pay Players on time from the date of the Agreed Decision until 30 June 2024.”

8. As provided for in paragraph 7b of the Decision, the rules for the operation of the Deposit Account were set out in an Appendix to the Decision described as Rules for the Deposit Account (Not for Publication) (“the Rules”). Paragraph 7 continues:

*“b. within two Normal Working Days of this Decision (as defined in the Regulations), the Club’s ultimate beneficial and controlling shareholder (Jason Whittingham) deposits an amount equal to 125% of the forecast monthly wage bill (gross/before tax deductions) in a designated Club bank account for calling upon by the Club in the event of any future delays in processing of overseas payments, with obligations around reporting on the operation of the account, an obligation to maintain it at appropriate levels and a time limit for its operation (until 30 June 2024, provided there has been no call on the amounts during that period) (the **Deposit Account**), the full terms of which have been set out in an agreement between the EFL and the Club. The Club’s ultimate beneficial shareholder, Jason Whittingham, signs this Agreed Decision, acknowledging and accepting personal liability for procuring the deposit account is funded with the requisite funds in compliance with the terms of this Agreed Decision, failure to do so will breach this Agreed Decision, trigger the suspended sanction above at paragraph 7(a) and may result in misconduct charges against Jason Whittingham.*

c. the Club agrees to bear the EFL’s costs in the sum of £750.00 plus VAT, plus the costs of ratification of the Agreed Decision in the sum of £700 plus VAT; and

d. the Agreed Decision is to be published in this format on EFL.com.”

9. Paragraph 3 of the Rules is concerned with the maintenance of the Minimum Deposit Amount and provides as follows:

“a. The UBO shall within two Normal Working Days of this Agreed Decision being ratified, pay the Initial Deposit into the Club Deposit Account.

b. the Club shall procure that the UBO complies with the provisions of paragraph 3.a.

c. No amount shall be withdrawn from the Club Deposit Account other than in accordance with the terms of this Appendix – being the Rules of the Deposit Account

[...] e. the Club must ensure that the balance of the Club Deposit Account always meets the Minimum Deposit Amount. [...]

f. The Club is only permitted to withdraw from the Club Deposit Account in the following circumstances:

[...] iv. If the Club would, but for the proposed utilisation of funds from the Club Deposit Account be unable to meet its obligations to employees in any

Pay Reference Period, and then only to the extent necessary to meet those obligations (by way of example, if the Club can pay 95% of its liability in respect of any Pay Reference Period, it shall only be entitled to withdraw the remaining 5% from the Club Deposit Account)

*[...] i. If the amount standing to the credit of the Deposit Account does not meet the Minimum Deposit Requirement, the Club must procure that the UBO deposits sufficient funds to ensure that the balance of the Club Deposit Account equals (or exceeds) the Minimum Deposit Amount (the **Top Up Requirement**). The Top Up Requirement must be met within Five Normal Working Days of the balance falling below the Minimum Deposit Requirement”.*

10. Paragraph 4(b) of the Rules states:

“The Club acknowledges and agrees that the terms of this Appendix shall be deemed to be part of the Agreed Decision and any failure on the part of the Club to meet the terms hereof shall constitute misconduct (in accordance with paragraph (c) of the defined term of misconduct in the Regulations)”.

11. Paragraph 4(c) provides:

“Accordingly any breach of this Appendix will result in separate misconduct proceedings. Further, if the breach of the Appendix also results in a late payment of wages to players, the Club will be liable to the application of the suspended sanction as per the Agreed Decision, and further such sanction as the Disciplinary Commission may determine of that repeated breach.”

12. Paragraph 5 of the Rules is headed “Acknowledgment and Agreement of the UBO” and provides at 5(b):

“Jason Whittingham hereby acknowledges and agrees that he is now subject to this Agreed Decision and this Appendix, and that failure to procure that the Club comply with the same may result in separate charges for misconduct being issued against him.”

13. Neither the Club nor the UBO sought to appeal the Agreed Decision.

14. The Club made payments totalling [REDACTED] into the Deposit Account on 22 and 23 August 2023. The EFL confirmed in an email of 23 August 2023 that it considered that the Club had “met its obligation to procure the funds into the deposit account” and reminded the Club that “the suspended points deduction will still be applied should payment of wages not be made in time” (see paragraph 17 infra for the full contents of

the email). On 24 August 2023, the Club withdrew [REDACTED] from the Deposit Account to enable it to pay players' wages, which were paid the next day.

15. As provided for in paragraph 11.2(b) of the Rules the five Normal Working Day deadline for replenishing the Deposit Account expired on 4 September 2023. The Club did not make any payment into the account then nor has it made any subsequent payment into the account.

16. A further withdrawal in the sum of [REDACTED] from the Deposit Account was made by the Club on 27 September 2023 for payment of players' wages which were paid the next day. As of 14 February 2024, the Deposit Account balance was [REDACTED].

17. On 23 August 2023, Mr Geoff Cunningham ('GC'), who was at that time the Head of Legal (Regulatory) at the EFL, sent an email to the Club in the following terms:

"Dear Graham,

Thank you for confirming the sum of [REDACTED] is now in the Club's deposit account. The EFL considers the Club to have met its obligation to procure the funds into the deposit account within 2 Normal Working Days of the Agreed Decision.

Please let me remind you that the suspended points deduction will still be applied should payment of wages not be made in time, so please keep me updated on that front.

If you have any further queries, please do let me know.

Kind regards,

Geoff"

18. There followed an exchange of emails between the Club and GC. This was against a background of efforts, according to the UBO, to raise funds from potential buyers of the Club. Those efforts proved to be unsuccessful. In particular, on 5 September 2023, GC emailed the UBO and the Club in the following terms:

"Dear Jason,

As you are aware, the Club used the funds in the deposit account on or around 25 August 2023.

As you know, you and the Club now have an obligation to procure funds are made available to replenish those funds taken from the deposit account. Failure to do so in accordance with the deposit account rules will result in an immediate 3-point deduction and such further disciplinary action as may be necessary.

Can I please have your observations as to when the funds left the deposit account and what the delay has been in making those funds available.

I understand that you and the Club are now in breach of the deposit account rules unless you are able to explain, with good reason, otherwise.

I await hearing from you by 4pm tomorrow.

Best wishes,

Geoff."

19. On 6 September 2023 the UBO emailed GC as follows:

"Dear Geoff,

Thank you for the email and the support thus far and in particular the creative approach to us making the initial deposit.

As discussed at that time whilst I was expecting funds, from my other sources, to arrive in good time to top up the deposit account they did not. I am currently still waiting for those funds to come into my account and as soon as they do they will be sent on to the Morecambe FC deposit account.

It is not easy for me to move funds around so quickly, particularly having already deposited around [REDACTED] so far this year to ensure the Club continues to operate.

[REDACTED] Another frustration and challenge, as an aside, is the seeming 'wage inflation' since we were last in L2 coupled with the squeeze on match day and sponsorship incomes due to the economic climate in which we find ourselves.

I am committed to topping up the Deposit Account but, in all honesty, need just a few more days or a week at most. I am doing all that I possibly can to meet obligations but the timelines are just working against me and, ultimately, the Club.

Obviously the impact for the Club of this points deduction is devastating and will no doubt hit the Club income through a further loss of 'trust in Ownership'. All I can do is make every effort to appeal to sensibilities whilst also understanding your regulatory obligations.

I will obviously keep you apprised, daily, of the timing to make to (sic) top-up payment.

Best regards”

20. There was a telephone conversation on the afternoon of 6 September 2023 between GC and Mr Ben Sadler (“BS”), the Chief Executive Officer of the Club, during which GC expressed the view that the three-point deduction would not apply. According to BS there were two further telephone conversations between GC and BS during the morning of 7 September 2023 and that in the second conversation GC informed BS, that contrary to what GC had said the previous afternoon, the points deduction did in fact apply and that the EFL had no alternative but to apply the points deduction. There is no reference in GC’s witness statement to any telephone conversations having taken place on 7 September 2023. GC said the below in his witness statement about the conversation on 6 September 2023 and his email of 7 September 2023:

“22. [...] I did express my view that the automatic three point deduction would not apply. However, in making that comment I was not in any way varying the terms of the Agreed Decision or waiving any of the EFL’s rights under the Regulations. Following the call I considered the matter further, and took instructions from colleagues in the EFL, and having done so I reached a different conclusion having regard to the language of the Agreed Decision.

23. To confirm the EFL’s position, I emailed the Club on 7 September at 13.01 explaining:

‘After further consideration of the Agreed Decision, it note (sic) that the three point deduction is subject to: (1) payment by the owners of the Club to the Club Deposit Account in accordance with paragraph 7(b); or there is a failure to Players on time between 17 August 2023 and 30 June 2024 [...].’

GC explains that he then reminded the Club of the terms of paragraph 7(b) and continues:

“23. [...] Although the Deposit Account was initially funded with the requisite funds, to our knowledge the Club and Jason Whittingham have failed to replenish those funds within five Normal Working Days in breach of the Deposit Account Rules. Given paragraph 7(b) also extends to the obligation around reporting and maintaining it at appropriate levels the League’s view is that paragraph 7(b) of the Agreed Decision has not been complied with in full and the suspended sanction should be activated without prejudice to any further charges for misconduct against the Club and/or Jason Whittingham.

It is regrettable to have to deliver this news to the Club and I accept this differs from my initial observations yesterday but with time for a more detailed review of

the Agreed Decision I do feel the League have no option but to apply the 3-point deduction. I would like to give the Club an opportunity to provide its observations on the points deduction before the League apply the same. Can I please have your observations by noon tomorrow, 8 September 2023."

21. BS said this in his witness statement:

"23. At Approximately 3:35pm on 6 September 2023, I called Mr Cunningham and explained our position [...] Mr Cunningham unreservedly agreed with my understanding and confirmed that the Club had not triggered the suspended sanction in the Agreed Decision and that the three-point deduction would not be applied as a result [...]"

24. Following this phone call, at 3:41pm I sent a message to the Board WhatsApp group saying "Wow - spoke to Geoff – he agreed!" [...]"

25. On 7 September 2023, at around 9:15am, I spoke on the phone to Mr Cunningham who again confirmed that this was a case for a misconduct charge, rather than an automatic points deduction under the Agreed Decision, but that the EFL would still be pushing for a points deduction [...]"

26. I was first informed that the EFL had changed its mind and was going to argue that the suspended points deduction had been triggered on 7 September 2023 in a phone call from Mr Cunningham at around 11:00 am [...] This was followed up by an email from Mr Cunningham [...]. I didn't understand him just to be making "initial observations". At no point during the call did Mr Cunningham state that he was expressing his personal opinion, and as such, given that he was the Head of Legal at the EFL, I understood that he was expressing the EFL's position during this call when he said that the three-point deduction had not been triggered."

22. The Club provided its written observations by email of 8 September 2023 and maintained that they did not feel the Agreed Decision had been breached, whilst accepting that the Rules had been breached by way of misconduct within the meaning of the Regulations.

23. Subsequently, at the suggestion of the EFL, it was agreed by the parties that the issue as to whether the three points deduction had been activated should be determined by a Disciplinary Commission.

THE CHARGES

24. The charges are set out in the Notification of Charges dated 18 December 2023 as follows:

"3.1 The charge hereby lodged against the Club is:

3.1.1 *On or around 4 September 2023, in breach of Regulation 86.9, the Club failed to comply with the Deposit Account Rules annexed to the Agreed Decision by replenishing the required funds back into the Deposit Account (**'the First Breach'**)*

3.2 *The charges hereby lodged against the UBO are:*

3.2.1 *On or around 4 September 2023, in breach of Regulation 86.9, the UBO failed to comply with and procure that the Club complied with the Deposit Account Rules annexed to the Agreed Decision by replenishing the required funds back into the Deposit Account (**'the Second Breach'**); and*

3.2.2 *On or around 4 September 2023, the UBO breached Regulation 21.2.2 by causing the Club to commit the First Breach through his actions and/or omissions, contrary to his implied undertakings to the League in his capacity as an Official and generally by his signing and agreement to the Agreed Decision and in particular the Deposit Account Rules (**'the Third Breach'**)."*

THE REGULATIONS

25. The Relevant Regulations provide as follows:

- (a) Regulation 93.7: *"Subject to Regulation 95, the decision of the Disciplinary Commission shall be binding upon all the Clubs, Officials and Players."* Regulation 95 provides for an appeal against a final order of the Disciplinary Commission. There has been no appeal against the Decision.
- (b) Regulation 86 is concerned with 'Agreed Decisions'. *"Agreed Decisions may be deemed appropriate in circumstances which justify the conclusion of an effective and equitable resolution without referring the matter to a Disciplinary Commission."* (86.1). An Agreed Decision may include *"any sanction that could be imposed by a Disciplinary Commission"*. (86.2).
- (c) Regulation 86.9 deals with failure to comply with the terms of an Agreed Decision: *"If a Club, Official, Player or other individual (in each case current or former) fails to comply with the terms of an Agreed Decision, they shall be guilty of misconduct."*
- (d) Regulation 21 deals with undertakings by Club Officials, and in particular: *"[...] an undertaking on the part of the Official or Player not to do anything or omit to do*

anything which will cause a Club to be in breach of the Laws of the Game, the Football Association Rules, the rules of the Premier League, these Regulations or the Articles of Association [...]" (21.2.2).

- (e) Regulation 1.1 deals with the definition of an "Official" (it was accepted that the UBO is an Official).
- (f) Regulation 85 is concerned with the disciplinary powers of the EFL and provides that it has power to bring disciplinary proceedings against Clubs or Officials by referring a matter to a Disciplinary Commission appointed under Regulation 90. (85.1.2).
- (g) Regulation 93 empowers a Disciplinary Commission to make decisions which can include deduction of points (93.2.7), the imposition of a financial penalty payable to the League (93.2.8) or the ordering of any other sanction the Commission thinks fit (93.2.12). The Disciplinary Commission may impose sanctions immediately or they *"[...] may be deferred or suspended for such period and on such terms as the Disciplinary Commission shall decide."* (93.3).

THE ISSUES FOR DETERMINATION

26. The parties agreed that there are four issues which arise for determination, namely:

- (a) Whether the three-point deduction has been automatically triggered by reason of the Club's failure to maintain the balance in the Deposit Account.
- (b) The significance and relevance of the indication given by GC in the telephone conversation on 6 September 2023.
- (c) The sanction to be imposed on the Club in the event that the automatic three-point deduction does not apply.
- (d) The sanction to be imposed on the UBO.

DISCUSSION

Issue (a)

27. This essentially is a matter of interpretation of the Decision. The EFL say that the question is one of construction and not about the Club's interpretation of the document. An objective analysis is required. The EFL maintain that the terms for the operation of the Deposit Account are clearly set out in the Rules, which are acknowledged to be part of the Decision, and that only one interpretation is possible, there being no ambiguity. As a consequence, there is first an obligation to pay an initial sum ("the Initial Deposit") within two days of the ratification of the Decision. This requirement was fulfilled by the payment of [REDACTED] into the account. Second, say the EFL, there is an obligation to maintain a minimum balance throughout the term of the Decision as the purpose of having the Deposit Account is to ensure that there is an emergency facility to ensure the payment of wages for the entire 2023/24 Season. Any other interpretation would defeat the purpose entering into the Decision. The Club and the UBO have effectively failed to comply with their obligations other than for a period of less than 2 days.
28. The Club and the UBO, say the EFL, acknowledged and agreed that the Rules were part of the Decision and that the sanction of a suspended points deduction involved an obligation to pay funds into the Deposit Account and maintain it for the whole season.
29. The approach adopted by the Club and the UBO is to say that first the obligation is limited to the initial funding only and that there was therefore compliance by virtue of the payment of the Initial Deposit. Second, they say that by virtue of paragraph 4.b. and 4.c. of the Rules the automatic deduction of points is only triggered in the event of there being a late payment of wages, notwithstanding the terms of paragraph 7(a)(i) of the Decision which provides for activation if payment is not made by the owners of the Club to the Club Deposit Account.
30. Counsel for the Club and the UBO referred us to a number of EFL Commission decisions which, it was suggested were consistent with the approach they were each contending for. We did not find that to be helpful. Every case is fact specific and, in any event, we are concerned with what was agreed by the parties in this case, which included an acceptance by the Club and the UBO that the suspended sanction would be activated in the event of a failure to comply with the requirements of paragraph 7(b) of the Decision. The fact that in other cases the EFL did not seek automatic points deductions or that there was no separate appendix in other cases does not advance matters further.

31. In considering this issue we remind ourselves that the Club and the UBO on their own reading understood that their conduct did trigger the activation of the suspended points deduction (see email from the UBO 6 September 2023 at paragraph 19 supra). The clear purpose in providing for an Appendix which, unlike the Decision, was not for publication was to maintain confidentiality of commercially sensitive material for the UBO and the Club.

32. We consider that a purposeful interpretation is necessary, and that the interpretation urged upon us on behalf of the Club and the UBO would defeat the purpose of a mechanism which was clearly intended by all parties to avoid repetition of the failure to pay wages on time by providing the certainty of emergency funding for the whole season, not an account to be used to meet salaries in the normal way. We conclude that the question relates to paragraph 7(a)(i) of the Decision, namely the activation of the suspended points deduction in the event of a failure to comply with the requirements of paragraph 7(b) of the Decision, not a further failure to pay wages on time. We are satisfied that there is no ambiguity. Any other interpretation would result in an outcome which would permit paying in on one day and withdrawing the following day and then not replenishing for the remainder of the season and receiving no sanction. We are satisfied that the failure to maintain the required balance in the Deposit Account results in the automatic activation of the three-point deduction.

Issue (b)

33. The Club contends that in the event that we find as we have done in relation to Issue (a) we should, nevertheless, not allow the EFL to rely on the triggering of the sanction, given the history of the indications given by GC between 6 and 8 September 2023 and in an earlier email of 23 August 2023, all of which are set out above. The Club and the UBO say that they had a legitimate expectation that, as the Initial Deposit had been paid, the sanction would only be activated by a failure to pay wages, and that any failure to replenish would be a matter for separate misconduct proceedings. They maintain that they relied on the representations made by GC to their detriment.

34. The EFL contend that the communication of 23 August 2023 contains no representation from GC in respect of either the obligation to maintain the balance in the Deposit Account

or that the suspended points deduction did not apply to that obligation, both of which were provided for in the Decision to which both the Club and the UBO had agreed.

35. The EFL observe that the Club failed to meet its obligation to replenish the account on 4 September 2023 and that, as at that time no representation had been made by GC, it cannot be said that the Club relied on such representation. On 5 September 2023, GC reminded the Club of its obligation to replenish the account and that failure to do so would result in the immediate 3-point deduction and such further disciplinary action as may be necessary (see paragraph 18 supra).

36. By the time on 6 September 2023 that GC expressed the view that the automatic 3-point deduction would not apply, which he corrected the following day, the Club had already failed in its obligations to replenish the Deposit Account.

37. We have considered carefully the various authorities on which the parties relied in making their submissions in relation to Issue (b). We can deal with the Issue briefly. We conclude that the argument advanced on behalf of the Club is without merit. The chronology of events makes it clear beyond doubt that there was not and could not be any detrimental reliance by the Club on what was said by GC on 6 September 2023. It is noteworthy that when the correct position had been explained to the Club it still did not replenish the account and has continued to fail to do so. We agree with the submission by the EFL in relation to the email of 23 August 2023 and conclude that there was no representation from GC in respect of either the obligation to maintain the balance in the Deposit Account or that the suspended points deduction did not apply to that obligation. We reject the Club's argument in respect of Issue (b). There was no detrimental reliance or unfairness.

Issue (c)

38. As we have concluded that the automatic points deduction is triggered, we do not need to consider this issue as the EFL does not contend for any further sanction.

Issue (d)

39. The EFL contended that the UBO should be subject to an immediate fine of £10,000.00 and a further suspended fine of £20,000.00 to be activated if he fails to comply with his

obligation to replenish the Deposit Account within 28 days of the Commission's decision. On behalf of the UBO it was suggested that there should be a fine of £10,000.00 to be suspended for 6 months during which period he hopes to sell the Club. It was pointed out that this is a first offence by the UBO and that he has been let down by others in his attempts to sell the Club. We were provided with financial information both at the hearing and in the further material submitted on 11 March 2023. It was contended on his behalf that an immediate fine would be unfair and that if there is to be a second suspended fine a period for payment of 28 days is unrealistic.

40. We have carefully considered all of the submissions and the material before us and have concluded that the appropriate sanctions are (i) an immediate fine of £10,000.00 and (ii) a further fine of £20,000.00 to be paid by 31 May 2024 unless he complies in full with his obligation to replenish the Deposit Account.

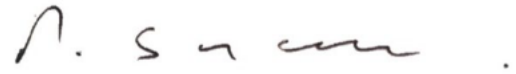
41. Finally, the UBO proposes that the fines should be paid to an appropriate charity. The suggestion is without merit and in any event the Regulations make it clear that any financial penalty is payable to the EFL (see paragraph 25(g) supra).

CONCLUSION

42. We summarise our conclusions as follows:

- (1) We declare that the three-point deduction for the 2023/24 Season imposed on Morecambe Football Club in the Agreed Decision dated 17 August 2023 has been automatically activated.
- (2) Mr Jason Whittingham is to be fined £10,000.00, payable immediately.
- (3) A suspended fine of £20,000.00 is imposed on Mr Whittingham to be activated on 31 May 2024 unless he complies in full with his obligation to replenish the Deposit Account under the terms of the Agreed Decision dated 17 August 2023.

43. We reserve costs to enable the parties to endeavour to agree to a position. In the event that costs are not agreed, the parties shall make submissions in writing to the Disciplinary Commission by 4pm on 18 April 2024, to be accompanied by their costs schedules.



A handwritten signature in black ink, appearing to read 'P. Sycamore', is written over a white rectangular area.

His Honour Phillip Sycamore CBE

For and on behalf of the Disciplinary Commission

London, UK

4 April 2024

1 Paternoster Lane, St Paul's London EC4M 7BQ resolve@sportresolutions.com 020 7036 1966

Company no: 03351039 Limited by guarantee in England and Wales
Sport Resolutions is the trading name of Sports Dispute Resolution Panel Limited

www.sportresolutions.com



ENABLING FAIR PLAY