

IN THE MATTER OF AN ARBITRATION UNDER THE ARTICLES OF ASSOCIATION OF THE
IRISH FOOTBALL ASSOCIATION

BETWEEN:

CLIFTONVILLE FOOTBALL CLUB

Claimant

-and-

IRISH FOOTBALL ASSOCIATION

Respondent

AWARD

Introduction

1. The issues that arise in this case concern the suspensions of two players in the context of the specific wording of the Code of Conduct of the Irish Football Association and the steps taken in relation to football in Northern Ireland during the COVID-19 pandemic. On the 20 July 2020 the Appeals Board of the Irish Football Association upheld a decision of the IFA Disciplinary Committee of 1 July 2020 (“the DC Ruling”) in respect of Cliftonville Football Club (“the Club”). The Club challenges the DC Ruling by way of this arbitration.
2. By written agreement dated 22 July 2020 and signed by both the Club and the IFA I am appointed as sole arbitrator. The arbitration is expressly agreed to be governed by the Sport Resolutions (UK) Rules for Arbitration, the Arbitration Act 1996 and in accordance with the IFA’s Articles of Association.
3. The parties are agreed that this award must be handed down in advance of the Irish Cup semi-final on Monday 27 July 2020 when the Club is drawn to play against Glentoran

Football Club. For that reason, the parties are also agreed that the matter be dealt with on the papers. In accordance with that urgency I gave directions for the expedited filing of submissions by both parties, which directions have been complied with.

4. This arbitration is by way of review. References herein to Articles are references to the Disciplinary Code of the Irish Football Association unless the contrary appears.

Background

5. The background facts are not in dispute. The appeal submission provided by the Club concerned the suspensions that two players had received. Jamie Harvey had a two-match suspension operative from 3 March 2020. The player was able to serve his first suspension on 7 March 2020. However, due to the pandemic that rendered football unable to be played in Northern Ireland, the player has a remaining suspension. Garry Breen, who has a two-match suspension from 7 March 2020, has been unable to serve out his suspension due to the stoppage of football in Northern Ireland.
6. On 23 June the Northern Ireland Football League (NIFL) decided that it would curtail the 2019/20 Danske Bank Premiership. The Club then sought clarification from the DC as to whether the suspensions its players were deemed served as a result of the Danske Bank fixtures being cancelled by NIFL .
7. The Club was informed by the IFA that the DC considered the suspensions still stood.

The DC Ruling

8. The initial challenge was made by both the Club and also Ballymena hence the references in the DC Ruling to “the Clubs”. Whilst Ballymena together with the Club appealed the DC Ruling to the Appeal Board there has been no further challenge by Ballymena by way of arbitration.

9. The DC confirmed that all active suspensions must be served as they had applied the overriding objective as per Art 1.6 of the IFA Disciplinary Code in reaching its decision. The DC Ruling stated that the overriding objective of the Code is to maintain and promote fair play, protect the health and welfare of Players (and others involved in the game, ensure that acts of indiscipline (on and off the field of play), or breaches of the Code are dealt with expeditiously and fairly and that the image and reputation of football and the Irish Football Association are not adversely affected and that the DC felt it would be unjust to allow infringements to take place without punishment. Furthermore, to allow infringements to go unpunished would also be unfair to players/officials who had successfully maintained clean disciplinary records.

10. In addition, the DC outlined that all active suspensions must be served in either the Irish Cup (if applicable) or at the commencement of the 2020/21 season as per the opening sentence of Art 15.13 *'Any period of suspension which remains outstanding at the end of the playing season must be served at the commencement of the next playing season.'* The DC also communicated their view that Art 15.3 was not written with a global pandemic in mind.

The Appeal Board Ruling

11. Before the Appeal Board the Club challenged the DC Ruling contending that Art 15.3 of the code was *"clear, decisive, incontestable and not open to interpretation."* The use of the wide wording in Art 1.6 was not permissible. It was also argued by the Club that Art 1.8 should be utilised by the Appeal Board:

'In the event that a particular incident takes place for which there is no provision in this Code including (but not limited to) procedure , jurisdiction or sanction then the Committee may take such action that it considers appropriate in the circumstances in accordance with the principles of natural justice and fairness.'

12. The Club also advanced the following arguments:

12.1 Art 13.13, which concerned a cautions amnesty appeared to be at odds with the DC Ruling that the suspensions must stand;

12.2 The IFA should follow the FIFA Disciplinary Code 19.4:

“If the suspension is to be served in terms of matches, only those matches actually played count towards execution of suspensions. If a match is abandoned, cancelled or forfeited (except for a violation of art 53), a suspension is only considered to have been served if the team to which the suspended player belongs is not responsible for the facts that led to the abandonment, cancellation, or forfeit of the match.”

13. However the principle position of the Club was that Art 15.3 speaks for itself. The requisite number of games were cancelled through no fault of the Club and the Appeal Board was requested to deem the suspensions served.

14. The DC submission to the Appeal Board was that it had applied Art 1.6 along with Art 15.13 and that it was unjust to allow infringements to take place without punishment and it would be unfair to players who had successfully maintained clean records. Art 15.3 was not written with a global pandemic in mind. It was further submitted that the league officially concluded on 7 March at round 31 of the Danske Bank Premiership and that any fixtures after that date should not be considered as relevant in terms of serving a suspension. The DC also submitted that reference to other scenarios under Art 15.3 were distinguishable and it also had to be borne in mind as stated in Art 1.11 that the DC was not bound by its prior decisions.

15. In respect of the amnesty for cautions under Art 13.13 this was fair and served the purpose of maintaining the status quo as those had received penalties before 1 April must serve them.

16. The Appeal Board ruled that *“It appears ‘the Clubs’ argument that the suspensions could be deemed served by virtue of Art 15.3 due to the stoppage of football has been outweighed by the ‘DC’ applying the fairness principle across the game of football. In the circumstances that sport and society is enduring, balancing the interests of the football community as a whole is difficult. During the course of this appeal process, the DC properly provided the full details of which aspects of the IFA Disciplinary Code was in their thinking when they arrived at their decision. In particular, it stated that Art 1.6 was the strongest consideration in their decision making. This was in conjunction with Art 1.8 which allows the Disciplinary Committee to take steps not provided for within the Code which they consider appropriate in relation to a particular incident that takes place but this must be within the principles of fairness and natural justice. In the appeal before us, we do not accept the ‘DC’ decision to invoke the overriding principle was inappropriate. They explained that the exceptional situation of the global pandemic had been an event that required them to look at fairness to other players who had maintained clean disciplinary records. We consider this approach maintains and promotes fair play.”*

The Club’s Submissions in this Arbitration

17. The main submissions made by the Club can be summarised as follows:

17.1 Art 15.3 is clear in its meaning and is not subject to the discretion of the Association nor is its meaning altered or diluted in the context of the facts of the present case by application of the broader principles set out in Art 1.6 or 1.8;

17.2 it is clear that League matches have been cancelled through no fault of the Club. The cancellation of the remaining League matches was notified in correspondence from the managing director of the Northern Ireland Football League on 30 June 2020: *“The NIFL Board confirmed the curtailment of the 2019/20 Danske Bank Premiership on 23 June 2020. The remaining fixtures for Season 2019/20 have therefore been cancelled and will not take place”*;

- 17.3 in those circumstances the matches that have been cancelled should be deemed under Art 15.3 to count towards the suspensions.
18. The Club has identified a number of cases where matches have been cancelled as a result of flooding or the failure of the lighting system and yet were deemed to count towards the suspensions of players. The fact that matches in the present case were cancelled as a result of the pandemic does not affect the impact of Art 15.3. I am not persuaded that the results of other cases provide any assistance in this matter. There is no system of precedent as is clear from Art 1.11.
19. The fact that the IFA has extended the season to enable certain Cup matches to be played does not impact upon the fact that certain matches which were scheduled to be played have been cancelled.

The Association's Submissions in this Arbitration

20. The submissions on behalf of the Association adopt the reasoning of Appeal Board but proposed a "more fulsome rationale". The points relied upon by the Association can be summarised as follows:
- 20.1 the decision to suspend football in Northern Ireland is not under challenge;
- 20.2 the match suspensions imposed upon the two players in this case are not under challenge and the Club accepts its responsibility to ensure that players fulfil suspensions;
- 20.3 the situation facing football in every country is truly exceptional and has led to exceptional steps being taken: *New Saints v Football Association of Wales* (13/7/2020) and *South Shields FC v The FA* (5/6/2020);
- 20.4 the Disciplinary Code was not drafted with a pandemic in mind and could not envisage every scenario;

- 20.5 it is vital to the Association's submissions that the period of suspension of football meant there were not League or Cup matches to play and therefore nothing for the League or Cup committee to "cancel;"
- 20.6 ordinarily unspent player suspensions fall to be served at the next available game. The Club is seeking to distinguish between League and Cup matches when it comes to serving disciplinary suspensions;
- 20.7 the 2019-2020 season is not over. There are Cup matches that remain to be played rather than League matches. The player suspensions must be served during the Cup matches as much as for the League matches;
- 20.8 unlike other parts of the United Kingdom the season in Northern Ireland was not terminated but merely suspended and, as a result of the extension is still not concluded;
- 20.9 there was no cancellation of matches. Art 15.3 involves a process. The cause of a match being "abandoned, cancelled or forfeited" must (1) be "determined" by an unidentified arbiter, most likely the Disciplinary Committee, (2) at a time before the player's "next game" and (3) the Committee finds on the evidence that the sanctioned player's team was not responsible. There were no such determinations or findings in this case;
- 20.10 it was not for the NIFL but rather the IFA to determine if a match was cancelled for the purposes of Art 15.3. League matches were not rearranged but that does not amount to a cancellation.

Findings

21. The starting point for any arbitrator dealing with these issues is to remind himself that he is not taking the decision *de novo*. This is not a rehearing of the substantive merits. It is an arbitration to review the decision that has been made. The position was set out clearly in Bradley v Jockey Club [2004] EWHC 2164:

“That brings me to the nature of the court’s supervisory jurisdiction over such a decision. The most important point, as it seems to me, is that it is *supervisory*. The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review...In each case the essential concern should be with the lawfulness of the decision of a public body: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, as so forth.”

The present case proceeds by way of arbitration rather than court. However, the supervisory jurisdiction remains substantially the same. In the present case I am specifically empowered by clause 2 of the Arbitration Agreement signed by the parties to decide whether the suspensions of the players should be deemed as have been served. That enables me to go beyond merely deciding on the lawfulness of the decision that is subject to the supervisory jurisdiction which would have restricted me, at most, to setting aside the decision and leaving the DC to make its decision again. Given the urgent nature of this arbitration I consider the parties have taken a sensible approach.

22. I have carefully considered all of the arguments that have been raised. I have not felt it necessary to deal with all of them in the course of this Award, only those that are necessary to resolve the real issues between the parties.

23. The starting point is to identify and consider the relevant provisions of the Disciplinary Code.

Art 1.6

The overriding objective of the Code is to maintain and promote fair play, protect the health and welfare of Players (and others involved in the Game), ensure that acts of indiscipline (on and off the field of play) or breaches of this code are dealt with expeditiously and fairly and that the image and reputation of association football and the Irish Football Association are not adversely affected.

Art 1.8

In the event that a particular incident takes place for which there is no provision in this Code including (but not limited to) procedure, jurisdiction or sanction then the Committee may take such action that it considers appropriate in the circumstances in accordance with general principles of natural justice and fairness.

Art 15.3

Suspensions shall cover all domestic league and cup matches until such time as the team at which the player or official received the suspension has completed the required number of matches to enable the suspension to be served. A suspension (or part thereof) which has been imposed on a player or official will not be considered to have been served by a match that is abandoned, cancelled or forfeited. Unless, the cause of the abandonment, cancellation or forfeiture of the aforementioned match has been determined prior to the player or official's next game and it is found that the team to which the player or official belongs is not responsible for the facts that led to abandonment, cancellation or forfeit of the match. A suspension from playing in a domestic league or cup match shall preclude the person so suspended from being present in or at the field of play and the areas immediately surrounding the same. The Committee shall have the power to determine where those areas are.

24. The interpretation of the Disciplinary Code, as with any document, is an objective one to understand the meaning it would convey to the ordinary reasonable person construing the document as a whole, giving its words their plain and ordinary meaning and also taking into account the background factual matrix. The latter is the context that must include all matters that were reasonably available to the parties at the time they agreed to be bound by the Code.

25. Art 1.6 is concerned with the overriding objective of the Code. Where there is discretion or there is ambiguity or a gap in the rules this provision informs the approach to be adopted by the regulator and the parties who are bound by the Code. Likewise Art 1.8 is concerned specifically where there is a gap in the rules and informs how the Committee should proceed.

26. Art 1.6 and 1.8 are general rules that form the foundation of the Code hence they appear at the outset of the Code. If, however, there is a specific rule within the Code that deals with the situation in point it is that specific rule that normally should be given effect. The principle is set out in Lewison on The Interpretation of Contracts paragraph 7.05 at pp.378-379 of the 6th edition (2015):

"General Provisions and Special Provisions

Where a contract contains general provisions and specific provisions, the specific provisions will be given greater weight than the general provisions where the facts to which the contract is to be applied fall within the scope of the specific provisions.

The above proposition is a loose rendering of the maxim 'Generalia non specialibus derogant.' It has been described as 'a principle of common sense'".

27. The same principle applies in respect of the interpretation of statutes. As set out in Bennion on Statutory Interpretation (7th edition, 2017) at section 21.4 (pp.517-518):

"Section 21.4: General and specific provisions

21.4 It is a principle of construction that, in the absence of any contrary intention, the general gives way to the specific."

28. Therefore, the focus turns to the specific provision in issue in the present case, Art 15.3, to determine if it applies or whether, as the DC and Appeal Board have found, it did not contemplate and does not apply to the present situation of a pandemic. Art 15.3, notwithstanding the grammatical/typographical error in introducing a full stop between what is now the second and third sentence ("...abandoned, cancelled or forfeited. Unless,

the cause...”), is tolerably clear. The reasons for the abandonment, cancellation or forfeiture of a match are not relevant provided the sanctioned player’s team was not responsible for the facts that led to that abandonment, cancellation or forfeiture. Put another way, as long as the team of the sanctioned player is not at fault in bringing about eg the cancelation of a match the third sentence is engaged. A distinction between “sporting reasons” and “non-sporting reasons” is unsustainable on the wording of Art 15.3. The article is not concerned with the nature of the cause, it is concerned with (1) whether there was “abandonment, cancellation or forfeiture of a match” and (2) whether the sanctioned player’s team was at fault in bringing that about.

29. It cannot be at the discretion of the regulator to decide what amounts to an effective cause of a cancelation in order to engage Art 15.3 when that provision does not bestow, expressly or impliedly, a discretion upon a regulator. There is no gap to be filled. The provision does not refer to “sporting reasons” which would in any event fall to be interpreted. It is difficult to see why there would be a distinction, for these purposes, between say flooding or poor lighting which can prevent a single game from being played or indeed result in the cancellation of many games affecting many teams on the one hand, and on the other hand a pandemic which is of uncertain duration but which equally causes many matches to be cancelled. No persuasive basis for the distinction has been advanced in this arbitration.

30. I therefore proceed to consider whether there was a cancelation of matches and whether the sanctioned player’s team was at fault in bringing about the cancelations. I also note that in this arbitration the Association has advanced a new argument in respect of process and the need for there to be a finding by the DC of cancelation and lack of fault before Art 15.3 is operative. I will turn to the process point in due course.

Cancelation

31. Were League matches cancelled? It is contended by the Association that there was no cancelation of matches within the meaning of Art 15.3 or at all but there was a suspension

of the League matches and those matches have not been played. The DC had previously submitted:

31.1 that there were examples of cancellations in the past but those matches had at least commenced and were then stopped whereas the present alleged cancelled matches never took place;

31.2 in fact the allegedly cancelled matches in the present case were scheduled to take place after the League had concluded. Those matches cannot be described as cancelled.

32. The Club accepts that whilst the League was suspended the matches could not be said to be cancelled. Just as in other jurisdictions it was hoped that football would restart with a new schedule for the matches to be played. It is clear that the League games were suspended. However that position changed on 23 June or 30 June 2020.

33. In my judgment the League matches are correctly said by the Club to have been cancelled. There are a number of reasons why that is the case:

33.1 on 30 June 2020 the Club received formal notification from the Northern Ireland Football League that the remaining matches under its auspices were cancelled. That confirmation from the body responsible for organising the League matches ought to be dispositive of the point;

33.2 there is no suggestion by the Association that those matches that were scheduled to take place will ever take place. Therefore there is nothing to counter the official confirmation from the NIFL that the matches were cancelled;

33.3 the distinction drawn by the DC in respect of partially played matches is not persuasive. Whether a match is cancelled before it is played or it is partly played is not a valid distinction. In fact the latter would be more aptly

described as an abandonment of the game which is a separate basis under Art 15.3;

33.4 whether or not the games were rescheduled, the undisputed fact is that by 30 June 2020 they were cancelled.

New Point: Process

34. The Association has advanced a point in respect of process which was not part of the argument before the DC or the Appeal Board nor was it part of their findings. The new point which is advanced is that on a proper construction of Art 15.3 the cause of the “abandonment, cancellation or forfeiture” must be “determined” by an unspecified arbiter, although it is suggested it should be the DC, and that it must also be “found” that the sanctioned player’s team was not at fault in bringing about those facts. In the absence of such a process it is suggested there can be no cancellation within the meaning of Art 15.3.
35. Neither the DC or the Appeal Board suggested, nor was it suggested to them, that there was any need for a determination as to the reason for cancellation or whether or not the Club was at fault. The parties have all proceeded on the basis that such is obvious. Hence it is not part of the decision under review. The reason for the cancellation was the pandemic and it is obvious that the Club was not responsible for that. One can imagine other facts and scenarios where the reasons for abandonment, cancellation or forfeiture may not be so obvious and an inquiry and determination would be required but those would be far removed from the present case.
36. It is not open to the Association to raise this point for the first time on a review of the decision when the parties have proceeded to date on the basis that such was obvious. In any event, on the undisputed facts, the point is without merit.

Conclusion

37. I find in favour of Cliftonville Football Club. The decision of the Disciplinary Committee and that of the Appeal Board were contrary to Art 15.3 and are hereby set aside. In my judgment the League matches were cancelled by no later than the formal notification to the Club on 30 June 2020. The cancelled matches came within Art 15.3 and the cancelations were not due to the fault of the Club. The suspensions are deemed to have been served.
38. In accordance with Rule 15.1 of Sport Resolutions (UK) Arbitration Rules the seat of this arbitration is Belfast.



DAVID CASEMENT QC

SOLE ARBITRATOR

26 July 2020