SR/Adhocsport/28/2019

IN THE MATTER OF AN APPEAL BEFORE THE OFF FIELD OPERATIONAL RULES APPEALS TRIBUNAL UNDER THE RFL OFF-FIELD OPERATIONAL RULES

Before:

Jeremy Summers (Chair)

Arthur Harverd

Brad Pomfret

BETWEEN:

Wigan Warriors

Appellant

and

The Rugby Football League (RFL)

Respondent

DECISION

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1. Background

1.1 By a decision of the Off Field Operational Rules Tribunal ('**ORT**') dated 24 January 2019 the following sanction was imposed upon Wigan Warriors (the '**Club**'):

a) *A deduction of 2 (two) Competition Points in the 2019 season.*

b) *A fine of £5000 of which £2500 shall be suspended for a period of 12 months.*

c) *An order for costs in the sum of £2000.*

1.2 The above sanction was imposed in relation to breaches of the 2017 RFL Salary Cap Regulations ('**SCR**') that were either admitted by the Club or found as proven by the ORT (HH R Grant, G Hallas and A Raleigh).

1.3 The Club appealed that decision by notice sent by email dated 8 February 2019.

1.4 An Off-Field Operational Rules Appeal Tribunal ('the **Tribunal**') was appointed by Sport Resolutions as provided for under the RFL Operational Rules ('**OR**') D1:60. As the alleged breaches took place in 2017, the parties were agreed that the 2017 version of the OR applied to the appeal, and all references to the OR herein are to the 2017 version.

2. Preliminary Issues

2.1 There was no objection to the composition of the Tribunal.

2.2 The parties were in compliance with pre-hearing directions issued on behalf of the Tribunal.

2.3 Pursuant to OR D1:67, and with the agreement of the parties, the hearing proceeded by way of a rehearing.

2.4 The Tribunal had before them an Appeal Bundle ('**AB**') and the Bundle before the first instance tribunal ('**FIB**').

2.5 OR D1:70 stipulates that new evidence will not usually be admitted unless shown to be material and not reasonably available at the time. Although not compliant with this provision, the parties agreed and the Tribunal ruled as a preliminary issue that the following additional documents should be considered by the Tribunal:

(a) A letter from Andrew Clarke, Outside Sport Limited to Ian Lenagan ('Mr Lenagan') dated 4 March 2019; and

(b) An email from Samantha Allen ('Ms Allen') of the RFL to Mr Lenagan dated 15 September 2017.

2.6 In addition to the Tribunal, present at the hearing were

For the Club

- Mr Martin Budworth, Counsel
- Mr Kris Radlinski, General Manager
- Mr David Moore, Finance Director
- Mr Ian Lenagan, Chairman/Owner

For the RFL

- Mr Alan Darfi, Head of Legal
- Ms Samantha Allen, Head of Delivery, Professional Games Competitions and Salary Cap

For Sport Resolutions

- Mr Matt Berry, Senior Case Manager

3. Issues before the Tribunal

3.1 The Club formally admitted breaches of SCR 3.1.3 and 3.1.4 SCR: in respect of the following matters:

(a) Agent's Fees for Frank Paul Nu'uausala (FPN) of £2,000.

(b) Flight allowance for FPN of £2,000.

(c) Agent's Fees for Liam Farrell (LF) of £3,250.

(d) Agent's Fees for Thomas Leuluai (TL) of £5,000.

(e) Agent's Fees for Morgan Escare (ME) of £2,000.

(f) Agent's Fees for Romaine Navarette (RN) of £2,000.

3.2 The Club however denied that it was further in breach of SCR 3.1.1 in respect of any of the matters set out at 3.1 (a) - (f) above.

3.3 In so doing, the Club asserted that [redacted] of the salary paid by the Club to one of its players, a [redacted] should not have been included as part of its Aggregate Liability as defined by the SCR for the 2017 season. This was on the basis that the RFL ultimately indemnified the Club for that part of [redacted]'s salary in 2017, pursuant to an agreement between the RFL and the Club whereby [redacted] of [redacted]'s salary would come from a payment made to him by the RFL for non-playing services (see section 6 below).

3.4 That argument was rejected by the ORT and the Club appealed on two limited grounds:

(a) The [redacted] payment; and

(b) Sanction.

3.5 In respect of sanction, the Club asserted that, even if the [redacted] payment was properly included, the sanction imposed by the ORT was disproportionate and should accordingly be reduced. Its primary submission, however, was that the [redacted] payment should have been excluded and that the sanction imposed by the ORT was therefore in any event wrong.

4. Relevant Regulations

4.1 The SCR 2017 state:

3.1.1 - A Club must ensure that, at any time during the Salary Cap Year, its Aggregate Liability does not exceed:

(a) for British based clubs, £1,825,000 (One Million Eight Hundred and Twenty Five Thousand Pounds) (or such amount as determined prior to the Salary Cap Year in question by a majority vote of the British clubs or […]);

[…]

A Club's ***''Aggregate Liability''*** *is calculated by adding together the respective Salary Cap Values of the Club's Player's at the given time in question and then deducting any allowances or dispensations permitted pursuant to these Regulations[…]*

(c) - Failure to comply with Clause 3.1.1 is a Strict Liability Offence.

[…]

3.1.3 - Any information provided to the HSCR or any member of the Compliance Team pursuant to the Regulations must be accurate and complete.

(a) It is a breach of Clause 3.1.3 to provide information to the HSCR or any member of the Compliance Team pursuant to the Regulations, whether orally or in writing, which is inaccurate or incomplete.

(b) Failure to comply with Clause 3.1.3 is a Strict Liability Offence.

3.1.4 - A Club must obtain the express written approval of the HSCR prior to committing itself to any transaction, or conducting itself (by act or omission) in a manner which varies the Club's Aggregate Liability in the relevant Salary Cap Year.

(a) The 'live' and ongoing monitoring of compliance is only possible if the requirement of pre-approval of such transactions/conduct is respected. Accordingly, it is the failure to obtain such pre-approval that is a Salary Cap Offence, irrespective of the consequences of such failure. Accordingly, it is not necessary to demonstrate that the transaction or conduct in question increased the Club's Aggregate Liability in the relevant Salary Cap Year in order to establish a breach of Clause 3.1.4; nor, would proof that the transaction or

conduct actually lowered the Club's Aggregate Liability in the relevant Salary Cap Year constitute a valid defence to a charge of breach of Clause 3.1.4.

(b) For the avoidance of any doubt, where a Club fails to obtain pre-approval for a transaction or conduct which increased the Club's Aggregate Liability in the relevant Salary Cap Year in a manner that caused a breach of Clause 3.1.1, then such failure to obtain pre-approval will be treated as a separate and additional Salary Cap Offence for which the Club may be separately sanctioned.

(c) Failure to comply with Clause 3.1.4 is a Strict Liability Offence.

4.2 The 2017 RFL OR provide:

Operational Rule C1:1:7

Such Contracts (whether full or part time) shall record all financial benefits or benefits in kind that the Player may receive including but not limited to image rights agreements which relate to the Player whether or not the Player is a beneficiary of such image rights agreements. No Club or Club Official(s) (nor any Associate of a Club or Club Official and such Club and Club Official shall be responsible for any breach of this Operational Rule by any such Associate) *shall make any payment or provide any benefit in kind to a Player unless they are recorded in the Player's contract.*

5. Relevant Chronology

5.1 Pursuant to the SCR, clubs competing in the RFL Super League are required to submit to a post season audit. In this respect, the SCR season runs from 1 December in any given year to the following 30 November.

5.2 During the audit of the Club following the 2017 season, the RFL wished to query certain payments that it had appeared might have been erroneously excluded from the Club's Aggregate Liability (see above) statement ('**ALS**').

5.3 If those payments were included, so it was asserted, the Club risked being in breach of the Finite Salary Cap contrary to SCR 3.1.1.

5.4 By letter dated 25 October 2018, the RFL notified the Club that it was conducting an investigation into the matters specified in that letter.

5.5 Pursuant to that investigation, an interview was held with Club officials on 9 November 2018. Attending on behalf of the Club were Mr Kris Radlinski, General Manager, and Mr David Moore, Financial Director. The interview was conducted by Mr Bryan Dent from the RFL Compliance Team.

5.6 During the course of that interview, Mr Radlinski and Mr Moore challenged most of the assertions made by the RFL to the effect that a number of payments had been erroneously excluded from the ALS.

5.7 By letter dated 18 December 2018, the Club was informed that it had been charged with a breach of the SCR in respect of the six matters set out at paragraph 3.1 above.

5.8 The Club had accepted it was in breach in respect of two payments, those at b) and c) of 3.1 above but, until the day of the hearing, continued to deny the other matters subject to the charge.

5.9 At, or shortly before, the hearing the Club further admitted liability in respect of the issues set out at d), e) and f) of 3.1.

5.10 In so doing, however, and for the first time, the Club advanced the [redacted] payment seeking to establish that, if that payment was excluded, there would not in fact be a breach of SCR 3.1.1.

5.11 At the hearing before the Tribunal, the Club also admitted the final issue included within the charge (point a) to 3.1), but retained its position that the [redacted] payment should have been excluded.

5.12 Of some note perhaps, at the hearing before the Tribunal, Mr Lenagan stated that he had not been made aware of the position until receipt of the charging letter of 18 December 2018, by which time he was shortly to go on holiday. He further asserted that, albeit unintentionally due to a lack of understanding of the SCR, Mr Radlinski and Mr Moore had incorrectly answered questions put to them during

the interview held on 9 November 2018. [redacted]

6. Evidence before the Tribunal

6.1 In addition to considering the documentation contained in the AB and FIB, the Tribunal heard live evidence from Mr Lenagan and Ms Allen.

6.2 In summary the salient aspects of their evidence was as follows.

6.3 Mr Lenagan referred to a scheme suggested in 2014 by the RFL whereby it would make a payment to certain top-level players for non-playing ambassadorial services in an attempt to keep them within the RFL rather than having such players persuaded to seek higher remuneration in the Australian National Rugby League ('**NRL**').

6.4 Although the scheme had been proposed by the then Chief Executive, Mr Nigel Wood, it was confidential and, perhaps surprisingly, had only been offered to certain clubs.

6.5 Mr Lenagan stated that initially the RFL had offered to make four [redacted] payments in respect of [redacted] covering the years 2014-2018, although no evidence of that specific agreement was before the Tribunal.

6.6 At the request of the RFL, the payments supposedly agreed in respect of [redacted] were then reassigned to [redacted]

6.7 The fact of the payments was specifically referred to in [redacted]'s contract with the club dated [redacted], which purported to make it clear that the payments from the RFL were part of, and not in addition to, the overall sum to be paid to [redacted].

6.8 Although on the face of [redacted]'s [redacted] contract, the four payments covered the years 2018-2021, Mr Lenagan stated that, in fact, the payments were to cover the years 2017-2020, as per the agreement referred to at paragraph 6.5 above, although, as stated, there was no evidence before the Tribunal expressly to that effect.

6.9 Mr Lenagan stated that he was happy to receive an advance payment in 2017 because, as he candidly put it, it helped with cash flow. He accepted that [redacted]'s [redacted] contract committed the Club to pay him [redacted] in [redacted], without the benefit of the final RFL [redacted] payment. The Club was willing to take that risk, as Mr Lenagan indicated that the nature of the game was such that he expected [redacted] to have moved from the Club by the [redacted] season. Mr Lenagan stated that if the RFL did not honour its agreement, the Club would nevertheless have to pay [redacted] the salary set out in his [redacted] contract.

6.10 [redacted]'s [redacted] contract was subsequently referred to the RFL for the purposes of completing the Club's 2018 ALS. Having seen the contract, Ms Allen had recommended that the reference to the [redacted] payments from the RFL should not be included in the contract as, being for non-playing services, they were not relevant for the purposes of calculating the ALS.

6.11 Mr Lenagan considered that, as the payments had been excluded for the years 2018-2021, it was wholly inconsistent for the RFL to refuse to exclude the payment made in respect of 2017.

6.12 That payment had not in fact been made until mid-2018. Mr Lenagan confirmed that it had been retained by the Club to reimburse the money paid to [redacted] pursuant to his contract. [redacted] had not received the sum and had only been paid [redacted] in 2017, as per his contract. There was no reference to the RFL payment in [redacted]'s [redacted] contract as this had been entered into before the RFL ambassador scheme had been suggested in relation to [redacted]

6.13 The Club had been subject to acute injury problems in 2017, which had created great administrative stress at the Club, not least in having to repeatedly liaise with RFL in respect of replacement players to be covered by the SCR. He noted that the system had now changed to avoid that necessity arising.

6.14 Neither Mr Radlinski nor Mr Moore had sufficient experience of dealing with SCR, and the problem should have been escalated to Mr Lenagan earlier. He had conveyed his annoyance in that regard, and stated that a similar situation would not arise again.

6.15 Mr Lenagan expressed great frustration that the RFL was not honouring the arrangement he believed had been made.

6.16 In her evidence, Ms Allen advised that she had been with the RFL for some 11 years and in her current post with responsibility for the SCR for the past 4 years.

6.17 In the run up to any season, Super League clubs will liaise with her to agree their respective ALS. This is an interactive process with messages and positions being exchanged.

6.18 Although the decision as to what is included in an ALS is ultimately in her sole discretion, there is a process under the SCR by which such a decision can be reviewed if a club is unhappy with it. An ALS will be in place for each club every season.

6.19 Ms Allen confirmed that no request had been made by the Club to exclude the [redacted] payment in issue from the ALS for the 2017 season. Similarly no request for a review of her ALS decision for the 2017 season had been made by the Club.

6.20 Whilst she had received no request from the Club to retrospectively exclude the [redacted] payment, Ms Allen was clear that, had she received such a request, she would not have entertained it. No similar request (for retrospective amendment to the ALS) had been received from any club whilst she had been in post and she was not aware of any having been made previously. Her understanding was that SCR did not permit a retrospective variation.

6.21 She did not think the injury problems faced by the Club in 2017 were particularly exceptional looking at the league as a whole.

6.22 She had not been aware of the RFL ambassador scheme until referred to it by the Club in the context of [redacted]'s 2017 contract.

6.23 The Club had, initially at least, not been as co-operative in responding to the RFL inquiries as would have been hoped for.

7. Submissions

7.1 Detailed and helpful submissions were received from both advocates, to whom the Tribunal records its gratitude. No discourtesy is meant in not setting out the submissions in full.

7.2 On behalf of the RFL, Mr Darfi submitted that the principal question was whether the [redacted] payment should be applied retrospectively to the 2017 ALS. In his view that should be answered in the negative.

7.3 As to sanction, Mr Darfi submitted that there was no previous decision of direct relevance, not least because of a change in the applicable regulation. The Salford case in 2016 was closest to being on point, although that case had involved a larger and deliberate breach of the SCR.

7.4 The Club had not been offered an Agreed Decision pursuant to OR D1:15, as it was understood that the Club did not agree with the RFL's position. The RFL did not consider that any previous Agreed Decision was relevant to the Tribunal's determination of the appropriate sanction.

7.5 Mr Darfi took the Tribunal to matters set out at SCR 7.9 to 7.12, which set out the factors the Tribunal should consider when determining sanction.

7.6 For the Club, Mr Budworth submitted that the [redacted] ambassadorial payment should be excluded. In that event, there would have been no breach of SCR 3.1.1 and the appropriate sanction for a breach of SCR 3.1.3 and/or 3.1.4 in all the circumstances was a warning or reprimand.

7.7 In the event that the [redacted] payment was not excluded, in his submission a points deduction was wholly disproportionate and the appropriate sanction was a low level fine.

7.8 He referred to what he thought was informed press comment and the view of other Super League clubs, suggesting that the points deduction had been unwarranted. He noted the (contrasting) approach taken by the Rugby Union Premiership to a salary cap breach involving Harlequins, which he thought might be informative, although accepted that processes from one sport should not be

carried over into another. As a matter of general principle points deductions were to be reserved for the most egregious offences that could not be adequately sanctioned by other means.

7.9 Notwithstanding they were not in evidence, he suggested that the Tribunal consider previous Agreed Decisions.

8. Findings

8.1 The Tribunal carefully considered the evidence and submissions before it. It reminded itself that the appeal was by way of re-hearing and that, pursuant to OR D1:12, the burden was on the RFL to establish, to the reasonable satisfaction of the Tribunal, that the alleged breaches had occurred.

8.2 The Tribunal noted that the Club accepted breaches of SCR 3.1.3 and 3.1.4 in respect of each of the six matters set out at paragraph 3.1 above and accordingly found those breaches established.

8.3 The Tribunal rejected the Club's argument that the [redacted] payment made (in 2018) by the RFL as part of [redacted]'s 2017 salary should be excluded from the Club's 2017 ALS. In so doing it made the following findings:

(a) No request had been made to have the payment excluded as part of the process by which the 2017 ALS was agreed with the RFL.

(b) No request had been made by the Club to retrospectively remove that payment from the 2017 ALS.

(c) Had such a request been received it would not have been granted.

(d) The argument as to the [redacted] payment had only been advanced at the eleventh hour, in response to the RFL charges.

(e) On Mr Lenagan's own evidence, the payment made in respect of 2017 was likely to have been an accounting exercise that was convenient to the Club, and did not represent a payment for any non-playing services undertaken

that year. Had the contrary position been correct, [redacted]'s playing salary for 2017 would have been [redacted]. That sum would have been significantly below his playing salary in the previous two seasons and the argument accordingly lacked credibility.

8.4 The Tribunal accordingly found the Club to be in breach of SCR 3.1.1 in respect of each of the six payments under consideration.

8.5 Turning to sanction, the Tribunal also rejected Mr Budworth's suggestion that it ought to consider (unspecified) previous Agreed Decisions. None were in evidence, and it would have been open to the Club to seek to have them in evidence if it had so wished.

8.6 Addressing the factors set out at SCR 7.11 (aggravating factors) the Tribunal found:

(a) Given the position taken by the Club throughout, not least the late admissions, there could not be said to have been an obvious display of remorse made.

(b) The Club had been found in breach of SCR previously but not in the last ten years. The RFL contended that this should aggravate the offence, although not significantly. Whilst those breaches had taken place under different regulations, the Club should have been on notice of the need to exercise due care in relation to the SCR, given these historic breaches.

(c) Whilst no finding of deliberate breach was made, or argued by the RFL, the position was serious in that there had been multiple breaches of the SCR in circumstances where the RFL had provided email warnings to the Club that it was at risk of exceeding the Finite Salary Cap.

(d) No competitive damage had been caused to the Super League.

(e) No damage had been caused to any player.

(f) The Club had not received a warning as to future conduct (save as referred to in b) above).

(g) There were no other relevant aggravating factors.

8.7 Turning to the mitigating factors set out at SCR 7.12, the Tribunal found:

(a) The Club had at no time fully accepted guilt. Its primary position on [redacted] had been rejected by two separate tribunals.

(b) There were previous offences, in 2006 and 2007, so the breaches on this occasion were not mitigated by a previously clean record.

(c) There had not been full co-operation with the Compliance Team.

(d) There was no impact on the competitive balance of the Super League.

(e) The degree of fault was material and the breaches could not have been seen to have been unavoidable.

(f) There were no other relevant mitigating factors.

8.8 Weighing up all the relevant factors as above, and noting the absence of any relevant precedent providing meaningful authority or guidance, on balance the Tribunal considered an immediate deduction of Competition Points was not warranted, and would not be proportionate.

8.9 The Tribunal had regard to the fact that although there were multiple breaches over a number of weeks, the cumulative total of all the breaches was under £15,000. This equated to less than 1% of the Finite Salary Cap, which was a factor relevant to the proportionality of the sanction to be imposed.

8.10 Although as a rehearing the Tribunal was not bound by the decision of the ORT, the Tribunal was not assisted by the lack of reasoning given by the ORT as to why an immediate points deduction had been ordered.

8.11 The Tribunal rejected Mr Budworth's submission that the appropriate sanction should be limited to a low level fine. In so doing, it held that the sanction needed to reflect the importance of the SCR to the integrity of the game and for there to be a clear statement made to the game at large as to the potentially serious consequences of allowing the SCR to be breached.

9. Decision

9.1 Taking into account all relevant factors, the Tribunal imposed the following sanction:

(i) The Club is deducted 2 Competition Points suspended for a period of 12 months from 6 March 2019.

(ii) The suspension will be activated in the event that the Club commits a further breach of the Finite Salary Cap within the period of suspension i.e. a breach occurring between 6 March 2019 and 5 March 2020.

(iii) The Club is fined the sum of £5,000, payable immediately.

(iv) The Club is ordered to pay costs of £2,000 in respect of the hearing on 24 January 2019, but otherwise no order for costs is made.

(v) The appeal fee is to be retained by the RFL.

9.2 The Tribunal noted the reference in SCR 7.13 to agreed Sentencing Guidelines. These were not in evidence and it is assumed they have not yet been published. The Tribunal further understands that the Super League is due to meet in May to discuss suggested tariffs for breaches of the SCR. In view of the issues raised in this matter, The Tribunal believes that it may be of assistance for this judgment to be made available to all relevant stakeholders.

Jeremy Summers
On behalf of the Off Field Operational Rules Appeals Tribunal
11 March 2019

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