The standard of proof in sports disciplinary cases: when the balance of probabilities loses its footing

By Sam Shurey
3PB Barristers

The civil standard of proof is widely applied in sports disciplinary cases. Its operation is often referred to as the "*balance of probabilities*" or an assessment of whether a factual assertion is "*more likely than not*" to have occurred. Such is the frequency, and consequent familiarity, with which this trite principle is applied, an assumption that its meaning speaks for itself is entirely forgivable. How hard can it be to apply the usual civil standard in a disciplinary case? In short, sometimes, very.

Guidance on the issue has been provided by an Appeal Board of The Football Association, chaired by David Casement KC, in the case of *The FA v Imran Louza* (November 2022).

The case related to an allegation that Mr Louza, a player for Watford FC, spat at Ryan Manning during a fixture against Swansea City on 5 October 2022. The charge was found not proved at first instance by a Regulatory Commission. In bringing the appeal, The FA contended that the Regulatory Commission misdirected itself and misapplied the civil standard of proof. The Appeal Board dismissed the Appeal, set out an analysis of the relevant authorities, and provided guidance on the standard of proof.

At paragraph 30, the Appeal Board confirmed that:

> *"…The balance of probabilities is simply whether it is more likely than not that some fact in issue occurred. That civil standard does not vary irrespective of the seriousness of the allegations or the consequences of those allegations being accepted. Talk of a "heightened standard" is simply wrong: the standard neither gains height nor loses height."*

At paragraph 31, the Appeal Board acknowledged that:

Over the years, even at the highest judicial levels, there has been language used which may be prone to lead to a misunderstanding that there was some higher standard of proof other than the balance of probabilities or that some particular cogency of evidence was necessarily required because of the seriousness of the allegations…

The Appeal Board went on to endorse the principles arising from the case of *Otkritie International Investment Management Limited and others v Urumov and others [2014] EWHC 191 (Comm)* and summarised them at paragraph 32 as follows:

"…32.1 First, there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not;

32.2 Second, the proposition that "the more serious the allegation, the more cogent the evidence needed" to prove it is wrong in law and must be rejected;

32.3 Third, while inherent probabilities are relevant in considering whether it was more likely than not that an event had taken place, there is no necessary connection between seriousness and inherent improbability…"

The Appeal Board stressed the importance of paragraph 89 of *Otkritie* and, in doing so, set it out in full within its Written Reasons, adding the following emphasis:

"As submitted by Mr Berry, the last point is important – or at least potentially important – in this case. ***I am prepared to accept that in a very broad general sense, it may well be true to say that it is inherently improbable that a particular Defendant will commit a fraud. But it all depends on a wide range of factors.*** *For example, if the court is satisfied (or it has been admitted) that a Defendant has acted fraudulently or reprehensibly on one occasion, it cannot necessarily be considered inherently improbable that such Defendant would have done so on another; or if, for example, the court is satisfied (or it has been admitted) that a Defendant has created or deployed sham or false documents, the court cannot assume that it is inherently unlikely that such Defendant did so on other occasions.* ***For the avoidance of doubt, I should make absolutely plain that this is not to say that inherent probability is irrelevant. On the contrary, as submitted by Mr Casella, I accept, of course, that the court should take into account the inherent probability of an event taking place (or not taking place) as is made abundantly plain by Baroness Hale in the passage from Re S-B quoted above. However, as it seems to me, the court must in each case consider carefully what is – and is not –***

inherently probable having regard to the particular circumstances – but the standard of proof in civil cases always remains the same ie balance of probability."

Therefore it is clear that, post *Louza*, the civil standard is the only applicable standard of proof in cases of this nature before FA Regulatory Commissions. The goal posts should not be moved by a suggestion that a more serious allegation *necessarily* requires more cogent evidence to be proved to the civil standard. However, the inherent probability or improbability of a particular occurrence will, on a case-by-case fact-specific basis, be part of the proper application of the civil standard.

Has the *Louza* case cleared up the confusion? Probably.

2 May 2023

Sam Shurey

Barrister
3PB Barristers

0330 332 2633
Sam.shurey@3pb.co.uk

3pb.co.uk