

FULHAM FOOTBALL CLUB (1987) LTD V JEAN TIGANA: TIGANA SECURES AWAY WIN IN BATTLE WITH AL FAYED

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In the battle between Mohammad Al Fayed, the billionaire owner of Fulham F.C. and Harrods department store, and Jean Tigana, the legendary former French international player and team manager of Fulham F.C., it was Tigana who emerged as the clear winner in the case brought against him for breach of his contract of employment. Fulham had claimed compensation from Tigana for alleged repudiatory breach of his employment contract, with Tigana counterclaiming for sums contractually due to him, including substantial sums from various share options owed.

Elias J. heavily criticised the evidence presented by Al Fayed in his stunning defeat. He stated:¹

“Mr Al Fayed gave evidence, particularly in relation to the van der Sar transfer. However, I do not find his evidence on his role in that transfer reliable; it was not supported by other witnesses and was contradicted by a number of witnesses”.

In a case which would hinge on its own facts rather than on arguments concerning legal principles, the judge’s assessment of Al Fayed meant that the prospects for Tigana were considerably brighter than they might otherwise have been.

Although Tigana’s contract was due to expire on June 30, 2003, Fulham chose to dismiss him by fax sent on the same day; their reason being that if Fulham dismissed Tigana (and could show that they were justified in so doing) then they would not need to pay him share options worth £2.1 million to which he was contractually entitled on expiry. In the event Tigana was awarded the £2.1 million in share

1. *Fulham Football Club (1987) Ltd v Jean Tigana* [2004] EWHC 2585 at [33].

options and also around £400,000 in interim costs with a further unspecified amount to follow. He was as a result enabled to claim the £455,000 that he had been awarded following an employment tribunal case last year² and which had been held by the court pending the result of this case.

Employment Tribunal case

The Employment Tribunal case between the applicant Mr J. Tigana and the respondent Fulham Football Club (1987) Ltd had essentially been concerned with unpaid wages, with the critical question being whether Tigana had left his employment in April or June of 2003. If he had left his employment in April, then patently he would not be entitled to his wages from April to June. However, if it were held, as Tigana alleged, that he had not in fact left his employment in April but rather in June, then he would be entitled to claim wages for the disputed period.

At a board meeting on April 17, 2003 Tigana had been replaced as Fulham manager by Chris Coleman. Tigana considered this a repudiatory breach of his contract of employment.³ The club on the other hand claimed that they were not in breach and hence not obliged to pay him lost wages as since that date (on their analysis) Tigana had failed to perform his duties as club manager. The exchange of correspondence between solicitors naturally drew attention to the unpleasant publicity that might arise from any legal action. The representatives of Fulham F.C. wrote to Tigana’s solicitors on June 3, 2003, stating⁴:

“Your client appears clearly to have evidenced an intention not to be bound by his contract, particularly by his failure to co-operate in the Marlet litigation. You will see from the above that our client has more than sufficient reason to dismiss your client and has had for some time. We doubt however that either of our clients wish to become embroiled in the unnecessary publicity that a dismissal would cause. In these circumstances our client suggests that your client’s employment be treated as being terminated by mutual agreement as from the end of April 2003, with your client foregoing any entitlement to salary after that date, and also waiving his rights in respect of the Shadow Share Options. Pending agreement by your client, our client has withheld payment of your client’s salary due to the end of last month.”

2. Employment Tribunals, between Jean Tigana and Fulham Football Club (1987) Ltd, case no.2304500/2003.

3. *ibid.*, at [20].

4. *ibid.*, at [25].

The emphasis placed on unnecessary publicity in this particular correspondence is notable as it is clearly limited to such high-profile dismissals, and would be an issue which would not generally concern usual claims for unfair or wrongful dismissal. Any concern over publicity may weigh heavily in any decision to press ahead with this action and it appears as if Fulham were hoping to use such concern to persuade Tigana not to go ahead with his action.

Despite this correspondence, however, Tigana brought a claim based on a breach of s.13 of the Employment Rights Act 1996. The relevant provision reads⁵:

“s 13 Right not to suffer unauthorised deductions.

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction”.

The figure allegedly owed was made up of £250,000 for wages due, £200,000 for an unpaid bonus which accrued when Tigana guided Fulham to European football qualification, and £5,000 which consisted of rent allowance due despite the fact that Tigana had purchased a house. It was stated by the chairman of the Employment Tribunal dealing with Tigana’s initial claim for unfair dismissal that⁶:

“The rent allowance has been treated by the parties as part of the Applicant’s wages and it has been treated as such by being paid through the payroll subject to PAYE it was part of the remuneration package”.

As such therefore it was not a discretionary bonus nor a payment derived from his employee status but a part of the entitlement owed to him by the club arising from that status.

Tigana’s salary details were spelt out by the tribunal⁷:

“Gross salary, per annum throughout the Team of £1 million save that in the event that the Club achieves promotion to the Premier League⁸

5. Employment Rights Act 1996, s.13(1).

6. n.2 above, at [33].

7. *ibid.*, at [16].

8. At the time of his employment, Fulham were in the division below the Premiership.

at any time during the Term and remains in the Premier League, the gross salary shall be increased to £1.5 million (it being understood that if the Club is relegated from the Premier at any time the gross salary shall revert to £1 million).

Use of a mobile phone for private and business calls.

A contribution towards the costs of renting living accommodation not to exceed £30,000 per annum.

A ‘Harrods’ credit card (At the Chairman of the Club’s discretion) permitting the Manager to purchase goods at Harrods at discounted prices equal to the discount allowed to directors of Harrods”.

It can be seen that the case was dealing with large sums of money and additional benefits beyond the attainment of most who live outside the world of Premiership football.

In the event, the Tribunal found for Tigana, stating⁹:

“The Tribunal concludes that the Applicant’s employment continued until 30 June. There was a mutual agreement to rescind the Applicant’s resignation originally made on 29 April with the effect that the employment continued the Applicant is therefore entitled to his wages for May and June totalling £250,000. The Tribunal finds that the application to the Tribunal in respect of UEFA bonus was in time in the sense that the payment was due either on termination of the employment or in June or July 2003 when it was paid to the other players.”

The crucial factor in the Tribunal’s decision had been an exchange of correspondence between both parties’ legal representatives following the decision taken to dismiss Tigana on April 17. This exchange of correspondence made it clear that there had been a subsequent agreement that Tigana would remain on “garden leave” with¹⁰

“two duties to perform under his contract of employment.

- (a) to assist with Marlet litigation
- (b) to respond to enquiries from the new manager

. . . The Applicant remained employed until 30 June (he was dismissed by the Respondent on

9. *ibid.*, at [32].

10. *ibid.*, at [7].

that day for 'serious and material breaches of contract'."

Tigana did in fact provide a statement which related to the Marlet transfer and it was immaterial that the new Fulham manager made no inquiries of him. He was available for such inquiries if needed.

Background to the High Court case

The case hinged on the conduct of Tigana in three separate transfers, those of Edwin van der Sar, the Dutch international goalkeeper purchased in August 2001 for £7 million from Italian club Juventus; Steve Marlet, the French striker bought from Lyon for a total of £13.5 million, again in August 2001; and finally that of John Carew, the Norwegian international striker initially signed from Spanish club Valencia on January 4, 2002 for an undisclosed sum believed to be around £6 million. Carew subsequently failed the Fulham club medical examination and they refused to sign him, leaving them currently appealing to the Fédération Internationale de Football Association ("FIFA", the governing body of world football), for a ruling on whether they have to pay this transfer fee or not.

The specifics of the claim were that Tigana had breached his contractual and fiduciary duty to his employer in causing them to spend more money than necessary on the purchase of van der Sar; that the Marlet transfer negotiations were conducted without proper consideration for Fulham; and that Tigana had acted dishonestly in the Marlet negotiations, resulting in an inappropriately high fee and salary for the player. Additionally, it was alleged that Tigana had breached his duty of loyalty to the club in obtaining a second medical report on Carew, against the express wishes of Al Fayed. Based on these complaints, Fulham submitted that they were justified in the summary termination of Tigana's contract.

The decision of the High Court

In assessing the manager's role with regards to conducting player transfers, the court was of the opinion that Tigana's duty ran no further than to recommending sales and purchases,¹¹ and that his duty ran short of becoming involved in the recommendation or negotiation of the terms of these issues. Once this premise was established, the claims against Tigana with regards to the transfer fee paid

for van der Sar became irrelevant. The club had paid £7 million for a well-regarded international goalkeeper from one of the highest-profile clubs in the world. Three years later, van der Sar is still at the club and is still the first-choice goalkeeper for his country. Many good judges of football would argue that Fulham got a bargain.

The transfer of John Carew fell through after the player failed a club medical, which suggested that Carew had a small but significant risk of a career-threatening injury.¹² Al Fayed was adamant that this precluded his transfer to Fulham. Tigana sought a second medical opinion in an ultimately failed attempt to persuade the chairman to reassess his decision. Elias J. stated¹³:

"I have no doubt that Mr Tigana did want to secure the player because he thought it was in the best interests of the Club. He was very keen to resuscitate the deal. In my judgment, therefore, there is simply no basis for concluding that the Defendant acted in a disloyal manner towards the Club or its Chairman".

In hindsight, it appears that Tigana has been proved correct in his pursuance of a second opinion. Carew played two more complete seasons for Valencia in the Spanish Primera Liga (winning the league title in 2002), before being transferred to AS Roma, one of Italy's top sides, before the 2003/2004 season.¹⁴

The most serious issues arose from the dealings surrounding the Marlet transfer. The player concerned, in his contract with Lyon (his club at the time), had a clause which provided that in the event of a sale, Marlet would be entitled to a proportion of any agreed transfer fee. This information came into Tigana's possession a short period of time before the transfer to Fulham was confirmed, and it was alleged that he improperly and dishonestly withheld that information. Such clauses are fairly common in footballers' contracts, particularly in France, and it is equally common that should a club come in with a big money transfer offer, then the player concerned will often forego the entitlement. It was suggested that had they been armed with this information, then Fulham would have paid less for Marlet as Lyon would be receiving the whole fee rather than having to pay some to the player. A criminal investigation surrounding some of the issues involved in the Marlet transfer is currently underway in France, although there is no suggestion at all that Tigana dishonestly gained from the transfer. In examining the conduct of transfer dealings within Fulham F.C.

12. *ibid.*, at [75].

13. *ibid.*, at [79].

14. <http://uk.sports.yahoo.com/fo/profiles>.

11. n.1 above, at [10].

(and it is likely that these findings would be common to almost all English Premiership clubs), the court found¹⁵:

“Mr Tigana did not generally become directly involved in transfer negotiations. My impression was that he would have been nervous undertaking that role. However, the evidence is, as one would expect, that Mr Tigana’s opinion would be sought almost as a matter of course when transfers were envisaged. . . . As one would expect, it was always down to the Chairman whether an agreement could be reached or not. He held the purse strings and had a final veto over any proposed transfer”.

In reaching his decision that Tigana had not acted improperly in his conduct in this transfer, Elias J. made much of the fact that although the career of Marlet at Fulham may be labelled a relative failure, (he spent the entire 2003/2004 season on loan at French club Marseille and has scored just 19 goals in 78 appearances for Fulham¹⁶), the transfer fee paid and the salary offered had both been appropriate at the time. In rejecting any notion of personal advantage being gained by Tigana, and in the view of the fact that he had actually informed the club chief executive of the fee problem, there was really no further case to answer in relation to that transfer. Elias J. opined further that it might not even be an obligation that Tigana should have informed Fulham of the issue of Marlet forgoing his transfer fee percentage, as long as the fee paid could be seen to be reasonable. The manager’s duty of good faith stretched to providing the appropriate information to enable a reasonable price to be paid, and if such a price was paid then the club had suffered no perceived loss.

Implications

Although laying down little in terms of general legal principle, the case essentially being decided on its facts, the end result contains at least a clear statement of the duties that a football club manager will owe to his team. The manager, it seems, cannot be held responsible for the price paid by the club (at least when the purse strings are held by another individual) for any player. The particular clauses in Tigana’s contract as manager of Fulham (and it is likely that most if not all Premier League club managers have similar duties contractually defined) essentially obliged him to perform his duties with loyalty and in good faith and if he performed those

duties in such a manner then he would sufficiently discharge his legal obligations to the club.

Perhaps the two most important clauses in this respect contained in Tigana’s contract and conventionally contained in all club managers’ contracts were cl.1.2 which read¹⁷:

“The Manager shall have overall responsibility for the Team which shall include the motivation and training of players, the performance of the Team, the selection of players, *recommending to the Board the buying and selling of players and liaising with other Clubs within the Football League*” [emphasis added]

and cl.2.1 which stated¹⁸:

“The Manager shall faithfully and diligently perform to the best of his abilities such duties and exercise such powers in relation to the business of the Club as are consistent with his appointment hereunder and as may from time to time be assigned to or vested in him by the Board and shall at all times and in all respects conform to and comply with the reasonable directions and regulations made by the board”.

With the clarification received from the court on these clauses, the board of a club will be unable to dismiss a manager for common transfer dealings unless he/she illegally profits personally from a transfer deal. Ultimately, it is the chairman or chief executive who holds the purse strings and so it is they who have the power of veto over any recommendation made by the club manager. Football fans worldwide may do well to remember this fact in calling for the head of the manager when new signings do not settle as well as planned.

Decision of the Court of Appeal: *Fulham Football Club (1987) Ltd v Tigana*¹⁹

In the aftermath of this defeat Fulham F.C. appealed the decision of Elias J. The appeal was heard by the Lord Chief Justice, May L.J. and Sir Martin Nourse, the lead judgment being given by the Lord Chief Justice. The issue concerning the transfer of Edwin van der Sar was not appealed, nor was the allegation that Tigana had paid Steve Marlet more than necessary, and awarded him a greater salary than necessary. The basis of the appeal focused on the question of whether Tigana had known about and communicated to Fulham the existence

15. n.1 above, at [36]– [38].

16. <http://news.bbc.co.uk/sport1/shared/bsp/hi/football/statistics>.

17. n.1 above, at [8].

18. *ibid.*

19. [2005] EWCA Civ 895.

of a clause in Marlet's contract that gave Marlet an entitlement to a proportion of any transfer fee paid (known as the "Marlet entitlement") and that, further, Lyon, the selling club, were requiring Marlet to drop that entitlement which in turn would enable Fulham to reduce their offer.

The appeal, as the Lord Chief Justice saw it, came down to essentially two questions. These he stated were²⁰:

- "a) Did Elias J come to the conclusion that Mr Tigana acted honestly and in the best interests of Fulham in relation to the *Marlet Entitlement* and in providing information to Fulham in respect of his role in relation to that arrangement?; and
- b) Was Elias J entitled to come to those conclusions for the reasons that he explained, or were those conclusions wrong or otherwise flawed on the evidence he heard?"

20. *ibid.*, at [36].

In answering his own questions and finding quite categorically for Tigana, the Lord Chief Justice stated simply²¹:

"In my judgment therefore . . . it is clear that the Judge [Elias J.] did come to the conclusion that Mr Tigana had acted honestly, and that this conclusion was objectively justified".

Throughout his employment at Fulham the court found that Tigana acted honestly and in the best interests of his employer, and that furthermore his dismissal had indeed been unfair. The court, in dismissing the appeal, overwhelmingly backed the decision of Elias J., awarding costs and an interim payment,²² pending a detailed assessment to Tigana.

21. *ibid.*, at [42].

22. Of £50,000.