

IN THE APPEAL BOARD OF THE FOOTBALL ASSOCIATION
ON APPEAL FROM
THE DECISION OF THE REGULATORY COMMISSION

Mr David Phillips QC, Ms Aisling Byrnes, Mr Bradley Pritchard
25 July 2018

BETWEEN -

THE FOOTBALL ASSOCIATION

Appellant

and

ROY HIGGINBOTHAM

Respondent

WRITTEN REASONS

INTRODUCTION

1. This is an appeal by the FA against the decision of the Regulatory Commission in the case against Roy Higginbotham. The Regulatory Commission conducted a paper hearing on 21 June 2018: the Written Reasons are dated 26 June 2018. Mr Higginbotham had admitted the charge: the appeal is against penalty only. The appeal proceedings have been conducted without oral attendance by either party. The Appeal Board met by video link on 25 July 2018.
2. For the reasons explained in these Written Reasons the Appeal Board dismisses the appeal and affirms the decision of the Regulatory Commission.

FACTUAL SUMMARY

3. Mr Higginbotham is a Life President of Macclesfield Town FA. This is an honorary position - Mr Higginbotham is not remunerated and has no formal functions. The position was awarded as a recognition of Mr Higginbotham's past services to the club. Mr Higginbotham is now in his

eighties, has been involved with the club for 35 years, and was a director for approximately 20 years. In his interview with the FA Mr Higginbotham explained that he normally attended most home games – although his attendance has recently diminished due to his wife’s current illness. His role was limited: along with others he met and greeted those who were lunching at the club, and generally assisted with ticketing, seating, &c. He would normally eat in the board room with club officials and guests.

4. The incident in question occurred on 6 January 2018 during a pre-match lunch in the board room. Mr Higginbotham said of Raheem Sterling that he should be put in a zoo, and that he looked like a monkey. Eddie Tarry, who was present at the lunch, described the chilling effect and general discomfort caused by the remarks.
5. The incident was reported to and was investigated by the FA. An interview with Mr Higginbotham was conducted on 25 May 2018 in the presence of Stewart Joseph, the club’s welfare officer, who subsequently wrote to the FA in support of Mr Higginbotham. Perhaps understandably, both Mr Higginbotham and Mr Joseph point to the unsatisfactory length of time between the incident and the interview. Mr Higginbotham explained his role at the club, his wife’s and his own poor health. Mr Higginbotham said that he had no recollection of making remarks about Mr Sterling. He recognised that the alleged remarks would have been *out of order*, and stated that he would not have said such a thing *in company, especially in the board room*. He rejected what he considered to be an insinuation that that statement constituted an admission that he would habitually make.
6. The charge letter is dated 8 June 2018. The FA charged Mr Higginbotham with using abusive and/or insulting words, contrary to Rule E3(1). And alleged the breach to be aggravated by including an implied reference to

ethnic origin, colour and/or race.

7. Mr Higginbotham admitted the charge in his Reply – at the first opportunity. It is clear, however, that he did so for purely pragmatic reasons. His wife’s health is clearly a time-consuming concern and burden. He considered that he simply did not have further time to devote to the matter. Nevertheless, the fact of the admission is clear.

REGULATORY COMMISSION

8. The Regulatory Commission’s decision is apparent from its Written Reasons. We do no more than summarise the reasoning here.
 - (1) The mandatory 5 match suspension required by Rule E3(3) did not apply because match-based suspension would be inappropriate because of Mr Higginbotham’s role (the Rule E3(4)(i) exemption).
 - (2) The Regulatory Commission had an unfettered discretion to impose what it considered to be the appropriate penalty.
 - (3) Mr Higginbotham’s comments were *utterly unacceptable and have no place in society* and were *deplorable*. His position required that he should *lead by example*.
 - (4) Mr Higginbotham had had an unblemished career, and had provided *long service to football*.
 - (5) Mr Higginbotham is in his eighties: his health and that of his wife cause him understandable concern.
9. The Regulatory Commission recognised that suspension was appropriate but considered the personal mitigation to be such that any suspension should have been wholly suspended. That was not possible: Regulation 8.3(d) provides that no more than three quarters of such a penalty may be suspended. The Regulatory Commission considered that the strength of the personal mitigation (in particular the health issues) together with the fact

that Mr Higginbotham would be required to complete a FA education programme made immediate suspension inappropriate. It therefore warned Mr Higginbotham as to his future conduct, and directed that the should complete a FA education programme.

RIGHT OF APPEAL

10. The grounds of appeal open to the FA are limited by Appeal Regulations 1.5. The FA relies on Regulation 1.5 (2) and (3), namely that the Regulatory Commission's decision was one that no reasonable body could have reached; and that the penalty was so unduly lenient as to be unreasonable.
11. The appeal is by way of a review of the Regulatory Commission's decision. It is not a rehearing. The significance of this is that it is not open to the Appeal Board to substitute its own decision for that of the Regulatory Commission. In order to have jurisdiction to vary the penalty imposed by the Regulatory Commission the Appeal Board must be satisfied either (Regulation 1.5 (2)) that the *Wednesbury* criteria are established: or (Regulation 1.5 (3)) that the penalty is so lenient as to be wrong in principle.

CORRECT APPROACH TO RULE E3(2) AGGRAVATED BREACHES WHERE THE RULE E3(4) EXEMPTION APPLIES

12. In order to address whether the penalty is wrong in principle it is necessary for the Appeal Board to consider the correct approach to be adopted in cases involving an aggravated breach. Such cases are rightly described as *aggravated*. As the Regulatory Commission correctly recognised, such breaches are *utterly unacceptable and have no place in society*: they are *deplorable*. Accordingly, they merit a more severe sanction than would otherwise be appropriate. That is both in order to reflect the individual transgression being dealt with; and also to mark publicly and plainly that such conduct has no place in football, and will not be tolerated.

13. The Appeal Board therefore considers that in every instance of an aggravated breach suspension from football should be considered by the Regulatory Commission. Indeed, it considers that in such cases suspension will normally be part of the penalty. However, it is important to recognise that determining the appropriate penalty in any individual case is a matter for the unfettered discretion of the Regulatory Commission. There will be cases in which suspension will not be appropriate. It is not helpful to try to identify in advance what such cases might be: that is a matter that is sensibly left to the judgment of the individual Regulatory Commission. It is equally not helpful to seek to use words such as *exceptional* or *compelling circumstances*: these are decisions that must be left to the individual Regulatory Commission, which will recognise the appropriate case when it sees one.
14. By way of illustration of the practical application of those general statements, and notwithstanding the force of the personal mitigation that so impressed the Regulatory Commission, if it had been sitting at first instance the Appeal Board would have imposed a period of suspension on Mr Higginbotham.

THE FA'S CASE

15. The FA raises three arguments in support of the appeal, namely –
 - (1) Rule E3(3) applied. The Regulatory Commission should have suspended Mr Higginbotham for a minimum of five matches.
 - (2) The Regulatory Commission was wrongly influenced by irrelevant mitigating matters.
 - (3) The Regulatory Commission's decision failed to reflect the seriousness of the transgression.
16. The Regulatory Commission gave no reason for its ruling that the Rule

E3(4)(i) exemption applied. The mandatory Rule E3(3) suspension should have been applied because Mr Higginbotham's role was entirely match based. He was present during home games, performed meeting and greeting, and related functions. A match-based suspension would have been entirely appropriate.

17. Mr Higginbotham's age, his family's state of health are personal matters that do not diminish the seriousness of the transgression. They neither mitigate nor excuse. The admission of the charge was entirely pragmatic, involving no acceptance of wrongdoing; it should not have attracted credit.
18. The offending remarks were made in the club boardroom. Mr Higginbotham was a representative of the club. The Regulatory Commission's finding that the words used were *utterly unacceptable and have no place in society* and were *deplorable* was not reflected in the penalty.
19. In general support of its appeal the FA relied upon the decisions of two Regulatory Commissions, both dealing with aggravated breaches - *Dave Whelan* and *Neil Juggins*. In both cases the offenders were suspended: in *Whelan* for 6 weeks, in *Juggins* for 5 months.

MR HIGGINBOTHAM'S CASE

20. Mr Higginbotham's Response was submitted on his behalf by Mr Joseph. It does not in a conventional sense join issue with the arguments advanced by the FA but makes a number of observations intended to support the conclusion reached by the Regulatory Commission. We summarise them as follows -
 - (1) The FA delayed the process inexcusably. The incident was not raised at the time. Mr Higginbotham was first questioned about it only in late May 2018. That delay was not only unfair, but caused Mr

Higginbotham real prejudice because the passage of time led him to have no recollection of events that had taken place five months before.

- (2) In the circumstances the decision to admit the charge was responsible. Proper credit was due for the admission.
- (3) Mr Higginbotham had limited involvement at the club – *the reality is that he assists...if the club is short of staff*. He is not a representative of the club and is not in a position of influence. His presence at the club has recently been restricted by his wife's and his own poor health.
- (4) Mr Higginbotham is a person of integrity with an unblemished record. Both he and the club deplore discrimination.

The Appeal Board notes that in the Unused Evidence section of its papers is an undated statement from Mr Joseph reporting that he has been educating Mr Higginbotham on discrimination issues and has been making *some progress*.

DISCUSSION

21. We consider that although unexplained in the Written Reasons the Regulatory Commission's construction of Rule E3(4)(i) was correct. We consider the purpose of the exemption is to exclude from mandatory suspension those who are not directly involved with the match. That is the intention behind the use of the words *match-based* suspension. We are fortified in that construction by the application of the rule against doubtful penalisation – if a provision carrying penal consequences is capable of two meanings the meaning that avoids penal consequences should be preferred.
22. Mitigating factors can operate in two distinct ways. First, they can diminish the seriousness of the transgression. Second, they can be factors that are personal to the transgressor: they do not diminish the seriousness of the transgression, but provide reasons for a lesser penalty. The Appeal Board

is satisfied that it was open to the Regulatory Commission to take into account the personal mitigation that clearly so impressed it. Those factors did not diminish the seriousness of the transgression, but the Appeal Board is satisfied that it was not wrong for the Regulatory Commission to have found them to constitute substantial personal mitigation.

23. The Appeal Board has no doubt that the Regulatory Commission recognised the seriousness of the transgressions. That is apparent from its use of expressions such as *utterly unacceptable*, *no place in society* and *deplorable*. The correct approach to aggravated breaches where the Rule E3(4) exemption applies recognises that suspension will not be an automatic consequence of the transgression. What is required is that the Regulatory Commission should recognise the seriousness of any aggravated breach. Once it has done so it is a matter for the Regulatory Commission to exercise its discretion, balancing the seriousness of the transgression with the mitigating factors, so as to arrive at what it considers to be the proper penalty. The decisions in *Whelan* and *Juggins* are examples of that decision making in practice. The fact that suspension was imposed in both cases does not show that cases in which suspension was not imposed were wrongly decided. *Whelan* and *Juggins* are decisions in which the facts of the transgression and the strength of the mitigation were properly balanced by the respective Regulatory Commissions.
24. The Appeal Board is satisfied that it is plain from the Written Reasons that the Regulatory Commission carried a similar balancing exercise, and that it discharged its duties properly. The Regulatory Commission considered the matters that required consideration, and it did not take into account matters that should not have been taken into account. This appeal process involves a review, not a rehearing. The Appeal Board can intervene only where there has been an error of principle: it is not open to it simply to substitute its own

discretionary determination for that of the Regulatory Commission.

CONCLUSION

25. The Appeal Board therefore dismisses the appeal. It does so in circumstances in which if it had been in the position of the Regulatory Commission it would have imposed a period of suspension. But it recognises that the decision of the Regulatory Commission was properly taken, and that the conclusion is one that falls within the spread of conclusions properly open to it. There is therefore no basis upon which the Appeal Board can interfere.

A handwritten signature in blue ink, appearing to be 'D. Phillips', with a horizontal line underneath.

David Phillips QC
Aisling Byrnes
Bradley Pritchard

27 July 2018