

## FOOTBALL ASSOCIATION REGULATORY COMMISSION

*In the matter of disciplinary proceedings brought pursuant to the Football Association Rules for the season 2018-2019*

### THE FOOTBALL ASSOCIATION - and - FERNANDO FORESTIERI

Commission: Christopher Quinlan QC (Chairman)  
Ifeanyi Odogwu - Independent Legal Panel Member  
Udo Onwere - Independent Football Panel Member

Ross McCracken - Team Administrator, The FA Legal and Governance,  
secretary

Date: 15 July 2019

Appearances: *Football Association*  
Rebecca Turner - Regulatory Advocate, The FA

#### *Player*

Fernando Forestieri - ('the Player')  
Craig Harris - Player's Counsel  
Philip Bonner - Player's Solicitor  
Sarah Athi - Player's Solicitor  
Lindsey Hinton - Club Secretary, Sheffield Wednesday FC (observer)  
Andria Forestieri - Player's wife (observer)  
Lucas Cominelli - Player's agent (observer)

#### *Other*

Chris Lang - Stenographer  
Sophie Macgregor - Stenographer  
Changez Khan - Interpreter (Argentinean-Spanish)

## REASONS OF THE REGULATORY COMMISSION

### A. INTRODUCTION

1. The Regulatory Commission ('the Commission') was appointed to hear and determine proceedings brought against Fernando Forestieri ('FF'/'the Player') following his being charged with Misconduct.

2. The Player denied Misconduct.
3. The hearing took place at Wembley Stadium on 15 July 2019. The entire proceedings were simultaneously translated to the Player to ensure he followed and understood. Submissions finished at approximately 16.34. We, necessarily, reserved our decision.
4. On 17 July we announced that we had found the case proved and invited written or oral submissions (via WebEx) on sanction. Initially the Player elected to make oral submissions. When one member of the Commission became detained by a family emergency, such that the prospective sanction hearing was scheduled for 18.30 on 24 July 2019, he elected to rely on written submissions.
5. This document constitutes its final reasoned Decision, reached after due consideration of the evidence, submissions and the other material placed before it. It is a summary. Nothing is to be read into the absence of specific reference to any aspect of the material placed before the Commission. The Commission considered and gave due weight to all of the material placed before it and to the written and oral arguments and submissions advanced on behalf of The FA and the Player.

## **B. BACKGROUND**

### **(1) The Charge**

6. The Player is a professional footballer registered with Sheffield Wednesday FC ('SWFC'). He is 29 years of age. He was born and grew up in Argentina. He moved to Italy when aged 13 years. He started playing football in England in 2012. His first language is Spanish. He also speaks Italian. English is his third language.
7. Therefore, at all material times the Player was a professional footballer and was bound by the Rules of the Football Association ('the Rules'). Part E of the Rules is headed "Misconduct". By Rule 1 the Football Association ('FA') may act against a participant in

respect of any “Misconduct” which is defined as including a breach of “the Rules and Regulations of The Association and in particular Rules E3 to 28”<sup>1</sup>.

8. The relevant Rule is Rule E3. Rule E3(1) provides:

*“A Participant shall at all times act in the best interests of the game and shall not act in any manner which is improper or brings the game into disrepute or use any one, or a combination of, violent conduct, serious foul play, threatening, abusive, indecent or insulting words or behaviour.”*

9. Rule E3(2) provides:

*“A breach of Rule E3(1) is an ‘Aggravated Breach’ where it includes a reference, whether express or implied, to any one or more of the following:- ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability. Mandatory minimum sanctions are applicable to certain Aggravated Breaches. Further provisions as to sanctions applicable to Aggravated Breaches are found in The Association’s Disciplinary Regulations.”*

10. The charge arises out of an incident which occurred during the pre-season ‘friendly’ match played between Mansfield Town FC (‘MTFC’) and SWFC on 24 July 2018 (‘the Match’). Towards the end of the second half of that match the Player was alleged to have abused the MTFC captain, Krystian Pearce (‘KP’). The Player was alleged to have said words towards KP which included “you’re fucking shit” and “nigger”.

11. The Player was charged by letter dated 6 June 2019 (‘the Charge’). The charging letter alleged:

*“You are hereby charged with misconduct for a breach of FA Rule E3 in respect of the above fixture. It is alleged that during the second half of the fixture, you used abusive and/or insulting words towards Mansfield Town FC player Krystian Pearce, contrary to Rule E3(1). It is alleged that this breach of Rule E3(1) is an ‘Aggravated Breach’ as defined in Rule E3(2), as it included a reference to ethnic origin and/or colour and/or race.”*

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<sup>1</sup> Rule E1(b)

12. The Player denied the charge. He denied using the word nigger, but accepted using other abusive or insulting words in Spanish towards KP.

13. It was common ground between the parties that the burden of proving the allegation rests upon the FA. Pursuant to Regulation 8, General Provisions, The FA Disciplinary Regulations 2018/19 ('Disciplinary Regulations'), the standard of proof is the civil standard, namely the balance of probabilities. The Player's written submissions were set out in a letter from his solicitors dated 20 June 2019 ('the Player's Written Submissions'). In those submissions the Player submits:

*"When deciding whether The FA has discharged this burden of proof and in order to ensure consistency with the approach adopted in The FA v Hennessey, a Regulatory Commission must bear in mind the dicta of the courts of England and Wales in many cases (including R. (N) v Mental Health H.R. Tribunal [2006] Q.B 468, paragraph 62, as cited in Hennessey) that 'the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities'".*

14. As the Player's Written Submissions (correctly) recognise, the balance of probabilities is a "single unvarying standard"<sup>2</sup>. In *Re D (Secretary of State for Northern Ireland intervening)*, [2008] UKHL 33 Lord Carswell in his speech with which the other Lords agreed, described it as "finite and unvarying"<sup>3</sup>. The balance of probabilities therefore means what it says: "a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not"<sup>4</sup>.

15. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 , 586, some things are inherently more likely than others. One would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian.

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<sup>2</sup> per Mitting J in *R. (Independent Police Complaints Commission) v Asst. Commissioner Hayman* [2008] EWHC 2191 Admin at para.20.

<sup>3</sup> §28

<sup>4</sup> Per Lord Nicholls of Birkenhead, *re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 , 586

16. As Lord Carswell observed in *Re D* in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. He continued:

*“The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann’s example of the animal seen in Regent’s Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts surrounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established.”<sup>5</sup>*

17. That is the approach we adopted, giving appropriately careful consideration to all the evidence in this serious matter. Therefore, when the expression “satisfied” is used hereafter, it means on the balance of probabilities, with the burden resting upon The FA.

## (2) Criminal Proceedings

18. The alleged conduct was reported to police. KP made a witness statement to police and on 23 August 2018 the Player was interviewed under caution by police. He was charged with an aggravated offence contrary to s. 5 of the Public Order Act 1986 (“Criminal Charge”).

19. He stood trial at Mansfield Magistrates’ Court on 28 March 2019. The Player was tried by a single District Judge. The Commission has been provided with a copy the handwritten

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<sup>5</sup> §28

note of his decision ('the District Judge's Notes'). The Player was acquitted. The District Judge expressed the single issue for him to be: "*whether or not the word nigger was used*".

20. So far as is material (at this stage) to his conclusion that the prosecution had not made him sure of the Player's guilt, the District Judge's Notes record, *inter alia*:

- a. "*Mr Pearce has in my judgment provided clear and consistent evidence that on the pitch he was called a nigger...I am satisfied beyond any doubt that Mr Pearce was of the view he was called a nigger – his loss of concentration and emotional [reaction?] together with what is said in the aftermath [?] persuades me of this.*"
- b. "*In fairness to [the Player] he likewise has provided clear and consistent testimony as to what occurred and whilst he may feel it is alright [sic] to insult Mr Pearce's mother he would not use the word nigger*".
- c. "*So I left with two credible witnesses who have given consistent but differing accounts as to what occurred.*"

21. He expressed himself sure that KP "*believed he was called a nigger*". However, he concluded that in the absence of direct corroboration of KP's account and in light of what he called the Player's "*language difficulties*", he had "*to accept it is possible, albeit it is in my judgment unlikely, that Mr Pearce was mistaken.*" Therefore, he found himself not sure that the case was proved.

## C. MISCONDUCT

### (1) The FA's Case

22. In opening Ms Turner said it was not part of the FA's case that the Player is a racist. The FA's case was that he uttered those words nigger "*in the heat of the moment*".

23. The FA relied upon KP. In his written (police) statement dated 31 July 2018<sup>6</sup> KP said this about the first incident of note between him and the Player:

*“After about 80 minutes of the game there was an incident where one of our players had passed the ball back to our goalkeeper and I had blocked off Forestieri's path to help our keeper to clear the ball unchallenged. At this point Forestieri spoke to me suggesting that I had kicked him. I will state for reasons that will become clear that he spoke to me in English. I denied having kicked him, as I hadn't, and continued with the game.”*

24. Thereafter, he said:

*“About five minutes later I intercepted a pass that was intended for Forestieri and cleared the ball away. Forestieri approached me and said something similar to "YOU'RE FUCKING SHIT". I just laughed at him as that is the sort of comment I expect from an opponent throughout the game. I still feel that he was frustrated at the fact that they were losing to us.*

*As I turned [sic] away from him he started to speak again, only this time in Spanish. I turned around immediately as I clearly heard in the middle of his sentence him use the word "NIGGER" and a couple of words later, "SHIT". I was appalled by what I heard and said something like, "SAY THAT TO ME AGAIN". Forestieri then moved position away from where I was playing. By this time I had lost a bit of discipline as I was trying to come to terms with what Forestieri had said and why he had said it. As soon as I found myself in a position near to the referee I told him what had happened. I can't remember exactly what I said to him but informed him that Forestieri had called me a nigger. The referee continued running the game and I was unsure if he had heard me.”*

25. Thereafter, KP stated that he lost all focus and concentration. He fouled the Player and was led from the pitch by his manager. After the match he spoke with the Player in his changing room. The Player denied the allegation and there was (on KP's part) a half-hearted handshake between them.

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<sup>6</sup>Made in accordance with s9 Criminal Justice Act 1967 and therefore with the usual declaration as to its truth and accuracy

26. KP gave evidence in accordance with his statement. He was emphatic that the Player used the word nigger and he was not mistaken. It was in a short sentence with first words in Spanish, then the word nigger, more Spanish, ending with the word shit. The Player was behind him when he spoke the words and KP was not looking at him. He asked him to repeat it, but the Player drifted away. He did that, not because he doubted what was said but because he did not believe the Player had the courage to repeat the words. He then ran out of position to tell the referee.

27. The FA also played footage from the Match. KP identified the moments when he:

- a. Played the ball back to his goalkeeper and blocked the Player's path;
- b. Cleared the ball, after which the Player said, "you're fucking shit" and used the word "nigger". The precise moment what it is alleged that was said is not caught on film as the camera moves; and
- c. When he pushed the Player to the ground; and
- d. The Player's tackle, which incited the melee and his reaction thereafter.

28. The sound was limited to the crowd and surrounding noise; there is no commentary, and nothing can be heard of what is said by players. It does show the melee and something of KP's reaction and the MTFC manager David Flitcroft ('DF') leading KP off the pitch.

29. KP was questioned by Mr Harris, who made it clear at the outset that he was not suggesting KP was lying and accepted he genuinely believed he had been called a nigger by the Player. He remained resolute that he heard the Player use the word nigger. He challenged the Player in the changing room not because he doubted what he had heard but because he was "hoping I was mistaken". It was for the same reason that he contacted by WhatsApp Sam Hutchinson, with who he had played U19 England football (as to which see paragraph 36 below). KP said this:

*"To be honest, I didn't believe I was mistaken, so I was more asking for his advice on what I should have done in the situation, which is why he said he didn't believe he said it, but "you have to do what is right for you".*

30. The FA also relied upon DF. He was not called to give evidence. His statement was relied upon – as agreed evidence – by The FA. In that written statement to police dated 31 August 2018 he spoke of a ‘coming together’ of KP and the Player, after which he saw KP speak to the referee. The referee then communicated with the fourth official, who told DF that KP had reported that the Player had racially abused him. He continued that KP *“was not himself and I felt at that time that I had to do something to avoid Krystian becoming involved in something that could get him in trouble”*. In light thereof, DF then removed KP from the pitch. As he was doing so, KP told him, *“he’s called me a nigger”*. He finished his statement by observing:

*“He is one of the calmest, honest, most considered professionals I have worked with. Losing his focus in the way he did is something I have never seen in him before and it was immediately apparent that something had been said that really threw him off of his game.”*

31. The FA produced the Player’s interview with its investigators. Therein, he accepted there was an exchange between them, during which he told him in Spanish to “fuck off”. He said there was another exchange between them two minutes later during which he said KP was “shit”. He denied using the word nigger. He also said he was speaking in Spanish and would not have switched to English. He also said he never use the word in question.

## (2) The Player’s Case

32. In advance of the hearing we had read the Player’s written statement provided to the police. Therein his account is neatly summarised thus:

*“About 5-6 minutes later, Mr Pearce was facing his own goal and passed it back to their goalkeeper. I then tried to run past him to put pressure on the goalkeeper but Mr Pearce tried to stop me by raising his arm out in front of me. I therefore asked him why he wasn’t letting me go and I told him he was ‘shit’. He then responded by saying when we have finished he will give me his signature and he said I was “shit”. I therefore said ‘la concha de tu madre’ in Spanish to him and that was it.*

*Then, about 2 minutes later, Mr Pearce kicked the ball a long way with his left foot and so I said ‘why would I want your signature if you are shit. Look at your left foot’. He responded by saying ‘shut up cunt’. He then went on to say other words in English that I didn’t understand. I then responded in*

*Spanish saying 'hijo de mil puta, la concha de tu madre, cara de verga, forro'. I said nothing else and walked away."*

33. The Player gave evidence in accordance with his witness statement. He said there was no Spanish equivalent of the word nigger. The Spanish word negro means black. He spoke for our benefit the Spanish words he said he used to insult KP. Translated they include the following insults: son of a bitch and cock face. He said he thought it *"impossible that I can interject with different words of different languages because, if I start in my language to say some bad words, it is very hard to interject with a different language. And it doesn't make sense."* In light of that answer there was this exchange between Mr Harris and the Player:

*"I asked you earlier to try to repeat some words in English, and you effectively spoke in Spanish and then had to pause, and you said the words "fucking cunt", and then continued in Spanish; do you remember earlier when you gave that answer?"*

*A. Yes, I remember. And that is why when I am in this situation - it is calm, it is slow - it is possible, but when you are nervous and you are running at 200 miles an hour and your head is all messed up, it is very hard. It doesn't match. Not matching."*

34. Questioned by Ms Turner he said he thinks in Spanish. When he was not calm or he was heated, he both thought and then spoke in Spanish, because he did not have time to translate those thoughts to English. He said there was a Spanish word for shit (mierda). Asked why he had not used that Spanish word to KP, he said *"Because I was calm. My mind wasn't racing at 300 miles an hour, and it is an easy word to repeat."* He said he did not hear KP ask him to say it again on the pitch. He denied using the word nigger and said he never would.

35. The Player relied upon written statements from Samuel Hutchinson, Atdhe Nuhiu, Lee Bullen and Nicky Weaver. None heard the exchange in question. None gave evidence before us, but we gave the content of their statements appropriate weight, bearing in mind that their evidence was agreed by The FA.

36. Samuel Hutchinson ('SH') was playing for SWFC in the Match. He recalled players coming together towards the end of the Match but did not recall any specific confrontation between KP and the Player. He did not hear any conversation between them on the pitch. He invited KP into the SWFC changing room. He said this:

*"They then had a short conversation where Krystian said to Fernando something along the lines of "you called me a nigger". Fernando denied calling him that and continued to say that he didn't use that word. He just swore at him in Spanish. Both Krystian and Fernando stood their ground and Fernando was clear to Krystian that he was never racist towards him. I do not recall them discussing anything else and at the end of this conversation Krystian and Fernando shook hands."*

37. SH said that after the game (though he did not specify when) KP sent him WhatsApp messages stating that he had "heard that he had done this before". KP accepted doing so but could not recall when. He said he'd heard the rumours after he had given his statement to police. SH said he had never heard the Player use racist language. Naturally, the Commission ignored any such alleged rumours.

38. Atdhe Nuhiu was also playing for SWFC in the Match. He witnessed the exchange in the changing room between the Player and KP. He said the Player *"swears on the pitch like most professional footballers but I have never heard him say anything racist"*.

39. Lee Bullen was a SWFC coach and present at the Match. He saw nothing out of the ordinary occurring between the Player and KP during the Match. After the Match he asked the Player what happened. He gave him an account essentially consistent with what he later told The FA and the Commission. He too said that he had never heard the Player use any racist language.

40. Nicky Weaver is another SWFC coach and was also present at the Match. He too said he had never heard the Player use racist language. He said: *"I didn't hear Fernando use any racist language on the pitch whatsoever. In fact, I cannot recall hearing any discussions between Fernando*

and Krystian”<sup>7</sup>. He also saw the exchange in the changing room between the Player and KP, during which the latter asked the former “to apologise for being racist to him”<sup>8</sup>. The Player “said he wouldn’t apologise for something he didn’t do”<sup>9</sup>.

41. Mr Harris supplemented the Player’s Witten Submissions in his closing arguments. He submitted:

*“You have two equally credible individuals giving directly contradictory accounts. With, in my submission, little reason or no reason to pick one over the other. So, at best, for the FA, I submit, the scales are equal. At worst, for the FA, and I perhaps boldly, but nonetheless submit that in fact it is more probable than not that Mr Forestieri is giving the correct account here.”*

42. He invited us to prefer the Player’s evidence. He set his reasons why we should do so. We had proper regard and gave appropriate weight to those oral submissions. He said he has been consistent and invited us to have due regard (which we did) to his character. He submitted that KP messaging to SH, even though he had by then committed his account to police in a signed witness statement, “indicative of and demonstrative of a concern, and it is a concern as to: do I really have this right?” He made the same submission in respect of the challenge in the changing room and on the pitch, though accepted any force in the point in respect of the latter was “weaker”. He did not suggest KP was not in a position to hear the Player, but said the circumstances were “imperfect”. He suggested there was room for KP’s mistakenly hearing one of the Spanish words for nigger. Insofar as he was angry, that was, he said, after the incident.

### (3) Regulations 23 and 24

43. Under the heading “Other Proceedings” Regulation 23 of Disciplinary Regulations provides:

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<sup>7</sup> §6

<sup>8</sup> §7

<sup>9</sup> §8

*“The fact that a Participant is liable to face or has pending any other criminal, civil, disciplinary or regulatory proceedings (whether public or private in nature) in relation to the same matter shall not prevent or fetter The Association conducting proceedings under the Rules.”*

44. Regulation 24 (the only other Regulation under that heading) states:

*“The result of those proceedings and findings upon which such result is based shall be presumed to be correct and true unless it is shown, by clear and convincing evidence, that this is not the case.”*

45. We are familiar with a not dissimilar provision in criminal proceedings. Section 74(3) of the Police and Criminal Evidence Act 1984 provides (when admissible) that where an accused has been convicted of an offence, they shall be taken to have committed that offence unless the contrary is proved. We understand the purpose and efficacy of Regulation 24 where there has been a ‘positive’ finding in other proceedings, where the issues are the same as, or very similar to, those in subsequent disciplinary proceedings. By way of example, a conviction in a criminal case where the substantive charge is identical (or very similar) to the alleged misconduct or relevant finding/s in proceedings (such as civil, disciplinary or regulatory) where the standard of proof is the same (the balance of probabilities).

46. The difficulty arises where there is an acquittal in previous criminal proceedings, as in the instant case. By way of example, the findings upon which the acquittal was based are not available. They will not be where the acquittal was at the hands of a jury. Further, even if those findings are known, the standard of proof is different.

47. In its Explanatory Note dated 6 June 2019 (‘The FA’s Note’) The FA submits that *“Regulation 24 does not prevent The FA from pursuing a charge under its own Rules, notwithstanding FF’s acquittal in the criminal courts for the same matter”*<sup>10</sup>. In her closing submission Ms Turner put the matter in this way:

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<sup>10</sup> §6

*“Turning, then, to regulation 24. As we accepted at the outset, not only does the FA have to prove the case to the balance of probabilities, ie whether it is more likely than not that Mr Forestieri used this language and that Mr Pearce is not mistaken. We also have to demonstrate clear and convincing evidence that the acquittal at the criminal courts was incorrect.”*

48. The Player’s Written Submissions accept that *“The FA can nevertheless pursue the Charge against him pursuant to Regulation 23”* and *“Regulation 24 does not act as a procedural bar to these instant proceedings”*. That is a concession properly made: the lower standard of proof in FA disciplinary proceedings means an acquittal of a criminal charge whose subject-matter is identical, is not a procedural bar.

49. However, in writing the Player submitted that The FA *“cannot surmount the Regulation 24 ‘hurdle’ on the facts of this case”*. The ‘hurdle’, created it is argued by Regulation 24, is said to be this:

*“demonstrating, ‘by clear and convincing evidence’, that the result of the Criminal Proceedings and the findings upon which it was based were not correct, before the Regulatory Commission may go on to consider this case on its facts as against the civil standard of proof.”*

50. Reading Regulation 23 and 24 together it is clear that the latter applies to other criminal, civil, disciplinary or regulatory proceedings. In this matter, the *“result”* in Regulation 24 is the acquittal in the Criminal Proceedings. In writing, the Player submitted that The District Judge’s *“findings upon which [the acquittal] is based”* are presumed to be *“correct and true”* unless the contrary is shown by *“by clear and convincing evidence”*. He submitted that The FA had the burden of doing so and could not. Therefore, we could not consider the case on its merits. In support of that submission reliance was placed on *The FA v John Terry, Regulatory Commission, 4 October 2012 (‘Terry’)*.

51. The principal difficulty with applying Regulation 24 where there has been an acquittal in antecedent criminal proceedings comes with the *“findings”* and is illustrated by this case. The District Judge found the Criminal Charge not proved. The District Judge’s Notes contain a number of factual findings. On the central question – whether he was sure the

Player used the word nigger he said this at the very end: “*I have to accept it is possible, albeit it is in my judgment unlikely, that Mr Pearce was mistaken*”.

52. It follows that the District Judge did not find that nigger (1) was not said nor (2) that it probably was not said. Indeed, another way of putting what he found is this: it is likely that KP’s account was correct and so he was not mistaken (when he says the Player called him a nigger). A synonym of the ‘likely’ is ‘probably’. Therefore, it follows that this is a fair interrelation of what the District Judge found: it is likely (or probable) that KP’s account is correct. It is likely (probable) that the Player called KP a nigger. Approaching the issue in that way would not assist the Player; quite the opposite for it imposes upon the Player an evidential burden of displacing that presumption. Asked to address this in the hearing, Mr Harris agreed that it was a possible interpretation. He did not suggest it was an unreasonable one. Candidly, he said he thought The FA might put its case in that way.

53. During the course of his closing submissions, Mr Harris took us through aspects of the Terry decision on the topic of Regulation 24. The Commission posed this question of him: “*What is the presumption created by section 24 where there has been an acquittal in the criminal case?*” Mr Harris replied that was the “*dilemma which is created by the presence of a rule*”.

54. In our judgement, Regulations 23 and 24 work as follows:

- a. The FA brings the charge and so has the burden of proving it, on the balance of probabilities.
- b. Regulation 24 does not operate as a procedural bar to the bringing of FA disciplinary proceedings where there has been an acquittal of a criminal charge whose subject-matter is identical or very similar.
- c. Next, the presumptions created by Regulation 24. First as to the result: the Player is presumed to be not guilty of the charge to the criminal standard.
- d. Second, as to the findings: The findings upon which that acquittal is based, “*shall be presumed to be correct and true*”, unless the contrary is shown by “*clear and convincing evidence*”.

- e. In that context, the higher standard of proof in criminal proceedings means an acquittal does not necessarily and ordinarily will not equate to a finding that the participant did not commit the misconduct in question.
- f. What is “*clear and convincing*” for the purposes of the balance of probabilities may not be for the higher criminal standard.
- g. “[C]*lear and convincing evidence*” does not impose a requirement for new or additional evidence, in the sense of requiring something in addition to that which was before the criminal court.

55. It follows that we reject the Player’s submission, made in writing, that Regulation 24 creates a preliminary burden (the “*hurdle*”) for The FA. It does not place upon The FA a preliminary burden of proving by “*clear and convincing evidence*” that the acquittal and reasons for it were incorrect *before* we consider the Misconduct charge. Instead, it operates, with Regulation 23, in the way set out in the preceding paragraph.

56. We did not approach this case by presuming to be correct, pursuant to Regulation 24, the District Judge’s finding that it was unlikely that KP was mistaken. The reasons demonstrate, in our view, how inapt or difficult application of Regulation 24 can or is likely to be where there has been an acquittal in a related preceding criminal case. We decided not to do so because:

- a. First, that finding is not further expanded upon or reasoned or explained. That is not (and should not be read) as any sort of criticism of the District Judge. It is nothing of the sort. The District Judge’s Notes are written for the purpose of this sort of textual analysis. We are grateful for it. However, the said notes do not explain why he arrived at that particular conclusion. It is possible to infer the reasoning, but we were not content to do so, certainly not where to do so would be to the disadvantage of the Player.
- b. Second that factual finding does not sit alone. The District Judge also described both the Player and KP as “*credible*”, each of whom had been “*consistent*”. As is apparent from paragraphs 20 and 21 above, he gave other reasons why he did not find the offence proved: the absence of “*corroborating evidence*” and the Player’s “*language difficulties*”.

- c. In those circumstances, we were not prepared to infer or extrapolate from the District Judge's Decision factual conclusions which would support a presumption adverse to the Player.

57. Therefore, we approached the case in the way set articulated in paragraph 54 hereof. The Commission formed its own assessment of the evidence and reached its own factual conclusions, in the context of it being presumed the Player was not guilty to the criminal standard of using the word nigger.

#### (4) Factual Conclusions

58. The essential issue for us distilled to a single: is it satisfied that the Player probably called KP a nigger?

59. The only direct evidence came from the KP and from the Player. The other evidence called by The FA established, *inter alia* that KP made a prompt disclosure to the referee on the pitch, which he maintained thereafter.

60. We are satisfied that the Player probably called KP a nigger for the following reasons:

- a. First, KP's reaction, as seen on the pitch, was immediate and genuine and obvious to see on the footage. It is consistent with his believing he'd heard something which offended him greatly. We are alive to the point that such a reaction is also consistent with KP making an immediate (but honest) mistake. However, in answer to that, his consistency does not stand alone. It is supported by other matters probative of nigger being said.
- b. Second, the issue of possible mistake. No one suggested he was lying and had made up the alleged words. The Player's case was that he must have made a genuine mistake. We acknowledge that the two men were apart and KP had his back to the Player. However, we are satisfied that KP heard the word nigger clearly. As to the language issue, on our analysis of the evidence and the Spanish words used by the Player, we can see no reasonable or sensible room for mistake. Not one of those words, when spoken by the Player in Spanish,

sounded, when spoken in Spanish remotely like the English word nigger. Nor, are we satisfied, would they if shouted or spoken in a heated way.

- c. Third, KP as a witness. It may not be entirely helpful to describe a witness as “credible” where there is no suggestion they are lying. We found KP to be honest (not in dispute), clear and consistent, who gave his evidence in a quietly understated way. His evidence was, in our assessment, compelling. It was both clear and it was convincing.
- d. Fourth, we did not reach the same conclusion in respect of the Player as a witness. We reject his claim that he cannot or does not switch from Spanish to English and does not use the English language when heated or in temper or angry. During his evidence (as his Counsel identified) he interposed an English word in a Spanish sentence. We appreciate that he was calm before us. However, he did not dispute using the word “shit” on the pitch during the incident. He denied to us that he was angry at that time. We reject that assertion also: he admitted in interview that he was angry. Further, being angry is also consistent with his abusing KP at that very moment (*with “cock face” and “son of a bitch”*).
- e. Fifth, and it flows from the last point, his use of another offence noun (nigger) towards KP at that time is entirely in context of how he was behaving at the material time. On his own account he was abusing him at the very moment. We are satisfied that that fact, his admission in interview and his conduct on the pitch (after the incident, he committed a bad tackle which caused the melee and might well have led to a red card) that he was angry.
- f. Sixth, the use of the word nigger in English as a term of abuse is explicable. As he said in evidence, there is no such word in Spanish.
- g. Seventh, we accept KP’s evidence that he accused the Player on the pitch of being racist. He pointed out to on the footage the moment he did so. That the Player said he did to hear that, does not undermine that point.

61. We accept KP’s account in evidence that he challenged the Player on the pitch as he did not believe he had the courage to repeat his insult. It was not evidence of doubt in his mind as to the accuracy of what he heard. We also accept this answer from KP when it was

suggested he contacted SH because he entertained doubt about the use of the word nigger. He was seeking advice. As to the suggestion that the exchange in the changing room was also evidence of doubt, KP said:

*“to this day I am still hoping he made a mistake, but I know what I heard”.*

62. We accept that also. We accept those answers as each is a logical explanation for his conduct. They come from a witness whom we found clear, consistent and compelling.

63. For those reasons, we preferred and accepted as correct the evidence of KP.

#### (5) Determination

64. Rightly, no one suggested that use of the word nigger in the context alleged was anything other than an aggravated breach of Rule E3(1) within the meaning of Rule E3(2). It therefore follows from our factual conclusions we find the charge of Misconduct proved.

#### D. SANCTION

65. Rule E3(2) provides of mandatory minimum sanctions. Those are set out in Disciplinary Regulation 46 provides:

*“Whether or not a suspension has been imposed by the Regulatory Commission in accordance with paragraphs 47 to 50 below, in respect of an Aggravated Breach that Regulatory Commission:*

*46.1 must order that the Participant who commits an Aggravated Breach be subject to an education programme, the details of which will be provided to the Participant by The Association;*

*46.2 may impose a financial penalty or any other sanction that it considers appropriate.*

66. Disciplinary Regulation 47 provides:

*“Subject to paragraphs 48 and 49 below:*

47.1 where a Participant commits an Aggravated Breach for the first time, a Regulatory Commission shall impose an immediate suspension of at least five Matches on that Participant. The Regulatory Commission may increase the suspension where additional aggravating factors are present.

47.2 [does not apply]....”

67. Regulations 48 and 49 do not apply.

68. The only disciplinary matter recorded against him is a finding arising out of his part of the melee in this case. It follows that this is the Player’s first Aggravated Breach. The starting point is a suspension of at least five matches. Regulation 41 provides that in imposing penalties, a Commission shall consider any applicable standard sanctions or sanction guidelines and have regard to mitigating and/or aggravating factors.

69. There are no applicable guidelines. There is no relevant tariff.

70. In its written submissions, The FA submitted “that a suspension of 5 matches would be appropriate in this case”<sup>11</sup>. It also contended that there should be a financial penalty commensurate with the Payer’s income<sup>12</sup>.

71. In written submissions filed on his behalf, the Player confirmed the content for the question of sanction to be determined on the papers<sup>13</sup> given that the Respondent and his Club, Sheffield Wednesday FC, are at an important stage of pre-season preparations and squad finalisation. He submitted that “the mandatory minimum suspension should be imposed”<sup>14</sup>. He “respectfully reminded”<sup>15</sup> us of what he described as our “arbitral role in this regard”. Sanction is not a matter to be agreed between the parties. As Mr Harris rightly acknowledged that “sanction is a matter for the Commission”<sup>16</sup>. He invited us “impose as lenient

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<sup>11</sup> §6

<sup>12</sup> §15ii

<sup>13</sup> §5

<sup>14</sup> §8

<sup>15</sup> §9

<sup>16</sup> Ibid.

*a fine as it deems appropriate*”, and invited us to have regard a number of factors in mitigation<sup>17</sup>.

72. We assess the aggravating features to be as follows:

- a. The offending word is deeply offensive.
- b. We (respectfully) agree with and cannot improve upon the following observation in *Suarez*:

*“The use by a footballer of insulting words, which include reference to another player's colour, is wholly unacceptable. It is wrong in principle. It is also wrong because footballers, such as Mr Suarez, are looked up to and admired by a great many football fans, especially young fans. If professional footballers use racially insulting language on a football pitch, this is likely to have a corrosive effect on young football fans, some of whom are the professional footballers of the future. It also has a potentially damaging effect on the wider football community and society generally. Every professional footballer should be able to play competitive football in the knowledge that references to the colour of his skin will not be tolerated. The same goes for all levels of football. Those who are victims of misconduct of this nature should know that, if they complain and their complaint is upheld, the FA will impose an appropriate penalty which reflects the gravity of this type of misconduct.”*<sup>18</sup>

- c. In doing so we are alive to the risk of, and guard against, double-counting: The FA has reflected the gravity of such offences by, *inter alia*, providing for a minimum (in this case) of a five-match suspension.

73. As for relevant mitigating features:

- a. The offending word was used once.
- b. At the time of the Misconduct he had no disciplinary findings against him.
- c. He has never offended in this way before.

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<sup>17</sup> §10

<sup>18</sup> §441

- d. His good character more generally, including the points made in paragraph 10(ii) of his written submissions on sanction.
- e. The time these proceedings have necessarily taken and the effect upon him.
- f. Totality: we note that he was “suspended for three matches and fined £25,000 on account of his actions in that fracas”<sup>19</sup>. That refers to earlier FA disciplinary proceedings which arose out of, and reflected his role in, the melee in the Match before KP was removed from the pitch. Those proceedings were correctly dealt with separately from these. The Player’s role in that melee is a separate offence from the instant. However, there is some force in this point and we take it into account in the Player’s favour.

74. We also considered the following Regulatory Commission decisions: *FA v Luis Suarez*, 30 December 2011 (*‘Suarez’*) *Terry* and *Anelka FA v Nicolas Anelka*, 3 March 2014 (*‘Anelka’*) decisions. None bind us, but received consideration, not least for reasons of parity. *Anelka* is factually different. *Suarez* was decided before the introduction of the minimum five-match sanction; at that time E3(2) directed as an entry point double what would have been the case absent the presence of an aggravating factor<sup>20</sup>. In that case an eight-match suspension was imposed for conduct with five identified aggravating factors including the repeated use of the word “negro” or “negros”. In our view that was clearly a more serious example of an ‘Aggravated Breach’ than the instant case.

75. Similarly, when *Terry* was decided there was no mandatory entry point; E3(2) was in the same terms as in *Suarez*. He was suspended for four matches for insulting (once) an opponent in these terms: “*fucking black cunt*”.

76. We have balanced the competing factors and assessed all that we have read and heard. The offence is aggravated by the deeply offensive nature of the abusive word, his profile as a professional player and the fact that such conduct undermines campaigns to promote inclusivity, equality and diversity. On the other hand, there are the features of mitigation identified above. However, there is no evidence of remorse or regret. Nor is he entitled to

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<sup>19</sup> §10(iv)

<sup>20</sup> §427

the reduction which would have followed an admission. He maintains his denial. Balancing those matters and having regard to facts and circumstances of the Player's conduct, we concluded that the appropriate sporting sanction was a suspension of six matches. That is what we impose.

77. We order the Player to undergo and complete to The FA's satisfaction, within four months of notification of this decision, a face to face FA education programme, the details of which will be provided to him by The FA. Failure to do so within the relevant time frame shall result in the Player being immediately suspended, from all football and football related activity, until such time as the course is satisfactorily completed.

78. We were provided with details of his weekly salary. In light thereof, we fine the Player £25,000, a sum which reflects his means, the mitigation we have identified and is arrived at adopting the standard methodology for computing fines in such cases. The sum is both appropriate and proportionate to his misconduct.

79. We also warn the Player as to his future conduct.

80. Other issues were raised by the Player in his written submissions on sanction which we now address.

81. First, the Player applies for the implementation of the sanction to be suspended. The FA does not oppose that application. We will grant a stay in the terms set out below in paragraph 89<sup>21</sup>.

82. Second, in relation to publicity:

*"It is submitted that the Commission should direct that the outcome of the proceedings thus far not be published until (i) the time period in which the Respondent would have to lodge any appeal has*

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<sup>21</sup> In doing so we are obviously not commenting on the merits of any appeal nor §15 of the Player's written submissions in sanction. A proper reading of the hearing transcripts, together with the Decision, reveals our views of Regulation 24 and the issues which can arise.

expired, or (ii) any such appeal is determined, and in any event not without advanced notice of publication being given to the Respondent and his Club by the FA.”<sup>22</sup>

83. He expands upon the reasons for so doing. He argues, *inter alia*, that:

“It is inevitable that the reporting of this finding will draw adverse publicity upon the Respondent and possibly his Club, by a press that has little or no regard for the legal reality of the charge that has been found proved and will report as if the Respondent is ‘a racist’.”<sup>23</sup>

84. The FA objects, arguing that application is, ultimately, a matter for The FA and in any event, we have no power to make the order the Player seeks. Mr Harris cites no regulatory derivation in support of his submission that we have the power to make the order he seeks.

85. The Disciplinary Regulations are silent on the point. Even if we had the power to make the order we would not do so for these reasons:

- a. There is a clear and strong public interest in maintaining transparency in the regulatory process. An integral part of that is informing the public of the outcome of proceedings, especially of this kind.
- b. In any event, if the Player does appeal and is successful, the Appeal Board’s decision and reasons will be released. If he is vindicated, it will be in public.

86. Finally, The FA has indicated that it wishes to inform KP of the outcome of this hearing, “subject to any strong objections...the understanding that it remains strictly private and confidential”<sup>24</sup>. The Player does object. That is a not a matter for us.

87. Given that he denied both Charges and they were proved, we determined that he should pay the full costs of the hearing and so ordered (Disciplinary Regulation 54). The details of which will be provided to him by The FA in due course.

## **E. SUMMARY**

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<sup>22</sup> §17

<sup>23</sup> §18

<sup>24</sup> §14

88. For the reasons set out above we:

- a. Find the charge of Misconduct by a breach of Rule E3(2) proved.
- b. Impose the following sanctions:
  - i. He is suspended from all domestic club football until such time as SWFC complete six First Team Competitive Matches in approved competitions.
  - ii. He must undergo and complete to The FA's satisfaction, within four months of notification of this decision, a face to face FA education programme, the details of which will be provided to him by The FA. Failure to do so within the relevant time frame shall result in the Player being immediately suspended, from all football and football related activity, until such time as the course is satisfactorily completed.
  - iii. A fine of £25000.
  - iv. He is warned as to his future conduct.
- c. He must pay the costs of the hearing in full.

89. We order a stay of the six-match suspension pursuant to Disciplinary Regulation 61 until:

- a. The expiry of the seven-day period from receipt of our written reasons in which the Player has a right of appeal against this decision, if no appeal is lodged during that period; or
- b. Written notification to the FA of any decision by the Player not to appeal, if served prior to the expiry of period for appealing; or
- c. The outcome of any appeal lodged by the Player against this decision, if an appeal is lodged during the period for appealing.

90. The Player has a right of appeal as provided by Disciplinary Regulations.



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24 July 2019

Christopher Quinlan QC

Chairman

Signed by the Chairman on behalf of the Regulatory Commission