

IN THE MATTER OF A FOOTBALL ASSOCIATION
INDEPENDENT REGULATORY COMMISSION

B E T W E E N :-

THE FOOTBALL ASSOCIATION

and

BARNSLEY FC

DECISION AND WRITTEN REASONS
OF THE INDEPENDENT REGULATORY COMMISSION

Regulatory Commission:	Graeme McPherson QC (Chairperson) Phil Rainford Matt Williams
Secretary to Regulatory Commission:	Paddy McCormack (Regulatory Commissions & Appeals Manager)
Date:	12 February 2020
Venue:	Wembley Stadium
Appearances:	Rebecca Turner (FA Regulatory Advocate) Dane Murphy (Barnsley FC Chief Executive) Steve Bailey (Barnsley FC Safety Officer) Taymour Roushdi (Barnsley FC Club Secretary – present as Observer)

(A) Introduction

i) The match and the Chanting

- 1) On 9 November 2019 Barnsley FC (*'the Club'*) played Stoke City FC (*'SCFC'*) in the Football League Championship (*'the match'*). The match took place at the Club's home ground, Oakwell Stadium (*'the stadium'*).
- 2) During the course of the match – more particularly, during the first half - James McClean (*'JM'*) was subjected to abusive and insulting language from individuals within the crowd; in particular, on more than one occasion a number of individuals within the crowd chanted the following at JM:
 - a) *'Fenian bastard'*
 - b) *'Irish bastard'*
 - c) *'Fuck the Pope'* and
 - d) *'Fuck the IRA'*.
- 3) JM reported that use of abusive and insulting language to the Match Referee during a break in play in the 32nd minute of the match. Although (as we describe further below) that report triggered certain action, the use of abusive and insulting language continued for the remainder of the first half. The abusive and insulting language did not recur in the second half of the match.
- 4) In this Decision and Written Reasons we refer to the use of abusive and insulting language during the first half of the match as *'the Chanting'*. We describe the Chanting in greater detail below.

ii) The Charge

- 5) By letter dated 2 January 2020 the FA charged the Club with Misconduct for a breach of FA Rule E20 (*'the Charge'*). The FA alleged that the Club had

'... failed to ensure that its spectator(s) and/or all persons purporting to be its supporters or followers conducted themselves in an orderly fashion and/or refrained from using abusive and/or insulting words which included a reference, whether express or implied, to nationality and/or religion and/or beliefs, whilst attending a match in which it was involved.'
- 6) With the Charge the FA served *inter alia*

- a) Two Extraordinary Incident Report Forms from the Match Referee, Jeremy Simpson (*'the Match Referee'*)
- b) Two Extraordinary Incident Report Forms from the Fourth Official, Marc Edwards (*'the Fourth Official'*)
- c) Extraordinary Incident Report Forms from each of the Assistant Referees, Nigel Lugg and Richard Wild (*'the Assistant Referees'*)
- d) An email from Andrew Penn, the SCFC Club Secretary
- e) An exchange of correspondence between the FA and SCFC:
 - i) a letter dated 11 November 2019 to JM in which the FA asked JM to '*specify the exact wording of all or some of the chanting [and to] give an estimate as to how many people were participating in the chanting*', and
 - ii) An email dated 13 November 2019 recording JM's response: '*Fenian bastard, Irish bastard as well Fuck the pope and the IRA were chanted by a section of fans on more than occasion particularly first half of the game*'
- f) '*Observations regarding the sectarian abuse of [JM]*' provided by the Club under cover of an email dated 18 November 2019 (*'the Club's Observations'*)
- g) A number of video clips.

iii) The Club's response to the Charge

- 7) By its '*Disciplinary Proceedings: Reply Form*' the Club
 - a) Admitted the Charge, and
 - b) Requested a personal hearing before an Independent Regulatory Commission.
- 8) Prior to the hearing (and in support of certain matters relevant to the Charge – see below) the Club served
 - a) A document titled '*Barnsley FC Discriminatory Abuse Action Plan*' (*'the Club's post-match Action Plan'*), together with 2 attachments:
 - i) '*Attachment 1*' – a poster relating to Discriminatory Abuse for inclusion in matchday programmes
 - ii) '*Attachment 2*' – a protocol to be implemented in the event of abusive or offensive chanting within the stadium being report
 - b) A photograph of the SCFC players lined up prior to the match.

iv) The hearing and our Decision

9) The personal hearing of the Charge requested by the Club took place before us at Wembley on Wednesday 12 February 2020. The position before us at the start of the hearing was as follows:

- a) The Charge comprised a single allegation of misconduct for breach of FA Rule E20
- b) The misconduct relied on by the FA in support of the Charge comprised the Chanting
- c) The Club
 - i) Accepted that that the Chanting had occurred as alleged by the FA, and
 - ii) Admitted that the Chanting amounted to a breach of FA Rule E20, and
 - iii) Admitted that the words used during the Chanting had included a reference to nationality, religion and/or beliefs.

10) Accordingly, the sole matter for us to determine at the hearing was the sanction, if any, to be imposed for the admitted breach of FA Rule E20. For reasons that we explain further below, determining the appropriate sanction also required us to consider and determine *inter alia*

- a) Whether the Chanting had been the result of circumstances over which the Club had had no control, and
- b) Whether the Club's responsible officers or agents had used all due diligence to ensure that its FA Rule E20 responsibility was discharged.

11) Since the facts of the Chanting were admitted, we did not hear any oral evidence from JM, the Match Referee, either of the Assistant Referees or the Fourth Official. We read their statements and in JM's case, his emailed response to the FA's letter dated 13 November 2019. We viewed video clips from the match and heard audio accompanying those clips. Having done so, we found the Charge proved on the factual basis described therein. We set out that factual basis in greater detail below.

12) After then

- a) Hearing oral evidence from Steve Bailey ('SB'), the Barnsley FC Safety Officer,¹
- b) Considering relevant documents – in particular, the Action Plan and Attachments, and
- c) Hearing oral submissions on behalf of the Club and on behalf of the FA

we concluded that although the Chanting had been the result of circumstances over which the Club had had no control, the Club had failed to satisfy us that its responsible officers or agents had used all due diligence to ensure that its FA Rule E20 responsibility was discharged.

13) As regards sanction, we concluded

- a) That while it was appropriate to impose a detailed action plan on the Club, that alone was insufficient sanction in this case, and
- b) That it was appropriate for us also to impose a fine on the Club. We determined
 - i) That a fine of £20,000 was appropriate, and
 - ii) That it was not appropriate to suspend any part of that fine.

14) We informed the parties of our Decision at the conclusion of the hearing, and that the written reasons for our Decision would follow. These are those Written Reasons. Before setting them out, we confirm that prior to reaching our Decision, and again in the course of preparing these Written Reasons, we considered with great care the entirety of the materials, the written and oral evidence and the submissions that each party put before us. If we do not explicitly refer to a particular document, piece of evidence or submission below, it should not be inferred that we have overlooked or ignored it; as we say, we have considered the entirety of the materials put before us.

(B) FA Rules E20 & E21

15) FA Rule E20 provides as follows:

'Each Affiliated Association, Competition and Club shall be responsible for ensuring (a) that its directors, players, officials, employees, servants, representatives, spectators and all persons purporting to be its supporters or followers conduct themselves in an orderly fashion and refrain from any one or combination of the following: improper, violent, threatening, abusive, indecent, insulting or

¹ The Club did not serve a witness statement from SB in advance of the hearing; all that was said before the hearing on behalf of the Club was that SB would 'be presenting [the Club's post-match Action Plan]' to explain the steps taken by the Club to ensure that no repetition of the Chanting would occur in the future: see the Club's emails dated 10 & 15 January 2020. In fact, SB's oral evidence went considerably further than this. We allowed him to give such evidence as he (and the Club) wished despite the absence of any witness statement.

provocative words or behaviour (including without limitation where any such conduct, words or behaviour includes a reference, whether express or implied, to any one of more of ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability) whilst attending at or taking part in a Match in which it is involved, whether on its own ground or elsewhere ...'

FA Rule E21 begins

'Any ... Club which fails to discharge its said responsibility in any respect whatsoever shall be guilty of Misconduct'.

16) The burden of establishing the Charge of course rests with the FA; it is for the FA to prove on a balance of probabilities

- a) The facts upon which it relies in support of the Charge, and
- b) That the Charge is in fact made out on the basis of those facts.

17) FA Rule E21 continues as follows:

'It shall be a defence in respect of charges against a Club for Misconduct [under FA Rule E20] by spectators and all persons purporting to be supporters or followers of the Club if it can be shown that all events, incidents or occurrences complained of were the result of circumstances over which it had no control or for reasons of crowd safety and that its responsible officers or agents had used all due diligence to ensure that its said responsibility was discharged'.

In these Written Reasons we refer to that as the '**FA Rule E21 defence**'.

18) However, importantly for present purposes FA Rule E21 continues (emphasis added):

'[The FA Rule E21 defence] shall not apply where the Misconduct by spectators or any other person purporting to be a supporter or follower of the Club included a reference, whether express or implied, to any one or more of ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability.'

19) Since the Club accepted that the words used during the Chanting had expressly or impliedly included a reference to nationality, religion and/or beliefs, it was common ground between the FA and the Club that in this case an FA Rule E21 defence was not available to the Club as a defence to the Charge *per se*. However, whether the Club did or did not exercise all due diligence to ensure that its FA Rule E20 responsibilities were discharged did remain

relevant to sanction, as we explain below. It is for that reason that we make reference to FA Rule E21 in these Written Reasons.

(C) Factual findings in respect of the Chanting in more detail

i) Context

20) For a number of years players in matches taking place on or around Remembrance Day have worn poppies – in various forms – on their shirts.

21) JM refuses to wear a poppy on his shirt. While he did not give evidence before us, and so did not explain to us in his own words the reasons for his refusal to do so, those reasons have been widely publicised in the past. In summary

- a) JM is Irish. He has been capped by the Republic of Ireland
- b) He was born and raised in Derry. It was in Derry that the Bloody Sunday massacre occurred in 1972, during which British soldiers shot at civilians, killing 14 and wounding a similar number
- c) He regards the poppy as a symbol which honours not just British military personnel killed in the First and Second World Wars, but in all conflicts in which British military personnel have fought, including in the North of Ireland
- d) He – together with many citizens of Derry and the North of Ireland – is unwilling to wear a symbol which he considers
 - i) Could be interpreted as honouring and showing support for British military personnel who served in North of Ireland during the Troubles, and
 - ii) Would be interpreted as showing disrespect towards those citizens of Ireland who opposed the British forces during the Troubles and who lost their lives during the Troubles, and on Bloody Sunday especially.

22) That has been the position taken by JM each year since he began playing in England. Because of the position that he has taken, he has repeatedly suffered criticism and abuse.

ii) The match

23) The match took place on Saturday 9 November 2019. That was the Saturday immediately before Remembrance Day. All players other than JM wore poppies on their shirts.

24) During the course of the first half of the match JM was subjected to insulting and abusive comments – the Chanting to which we have referred above.

25) In the 32nd minute JM reported to the Referee that he had been ‘*racially abused*’ (using the words appearing in the Referee’s First Extraordinary Incident Report Form) by Club supporters from behind the goal:

- a) The Referee reported the matter to the Fourth Official. The Fourth Official’s First Extraordinary Incident Report Form records that the Referee told him that JM had reported being called a ‘*Fenian bastard*’
- b) The Fourth Official reported the matter
 - i) To the Club’s Home Technical Area Steward, and asked him to inform the Club’s Chief Steward. The Club’s Home Technical Area Steward confirmed that additional stewards would be deployed to the area of the stadium from which the Chanting had come, and such additional stewarding was indeed deployed,
 - ii) To personnel within SCFC’s Technical Area, and
 - iii) To personnel within the Club’s Technical Area.

26) Following the match the Referee, the Assistant Referees and the Fourth Official met with

- a) JM and (from SCFC) Andrew Penn and Rory Delap, and
- b) Liam Slack (from PGMOL).

JM was asked to give details of the Chanting. His answer – of which a contemporaneous note was taken by the Fourth Official – was as follows:

‘the chants started from the first whistle, they came from the corner, behind the goal and most of the stand occupied opposite the dugout. There was lots of chanting to do with the IRA. They were also calling me a Fenian and Irish bastard. This continued right through the first half, even after I had reported it. There was no chanting in the second half when I swapped over’.

27) According to the Extraordinary Incident Report Forms

- a) At half-time the Club's Deputy Safety Officer, Peter Clegg ('*PC*') reported that none of the Club's stewards had reported hearing any Chanting,² and
- b) None of the Match Referee, either Assistant Referee or the Fourth Official heard any Chanting.

28) Following the post-match meeting to which we have referred above the Match Referee, the Assistant Referees and the Fourth Official met separately with PC. Liam Slack of the PGMOL was again also present:

- a) PC was informed of the Chanting as described by JM
- b) PC accepted that the Chanting had taken place, but commented '*He's a professional footballer, he should be used to it by now*'.

Following that meeting, the Match Referee reported PC's comments – which he (the Match Referee) considered to be unacceptable and inappropriate – to the Club's Club Secretary.

29) During the hearing we viewed 2 video clips from the match. While the audio to those clips is not always clear, it was common ground (and we accept)

- a) That chants of '*Fuck the IRA*' can be heard on a number of separate occasions during the first half of the match, with each 'burst' lasting several seconds, and
- b) That such chanting came from a significant³ number of individuals within the crowd.

30) On the basis of the above, we found that the Chanting, whilst not constant, occurred sporadically throughout the first half of the match, both before and after JM reported the same to the Match Referee in the 32nd minute of the match. We accept that the words used included

- a) Calling JM a '*Fenian*', a '*Fenian bastard*' and an '*Irish bastard*', and
- b) Chants about the IRA, including '*Fuck the Pope*' and '*Fuck the IRA*'.

31) Before we leave this section of the Decision we confirm that we found – as was common ground between the parties – that the Chanting that we found had occurred included (to

² In addition, the Club's oral evidence was that no steward reported hearing any Chanting, either during the match or at the post-match debrief.

³ We found it impossible to put a number on quite how many people in the crowd might have been involved in the chanting. Given what can be heard on the audio, it was plainly more than a few individuals. Equally however it would be an exaggeration to say that it was anything approaching a majority of the crowd. Our best estimate, given the volume of the chanting, is that the number of individuals involved is likely to have been measured in hundreds, rather than in tens or thousands, but we found it impossible to be any more precise than that.

paraphrase the words of the Charge) expressly or implicitly, reference to nationality, religion and beliefs.

(D) Sanction

(i) The relevance of FA Rule E21 in a case such as this

32) As we have said above, since the Club accepted that the words used during the Chanting had expressly or impliedly included a reference to nationality, religion and beliefs, it was common ground between the FA and the Club that in this case an FA Rule E21 defence was not available to the Club as a defence to the Charge *per se*.

33) However, the FA has issued guidance to the applicable approach for alleged breaches of FA Rule E20 involving ‘*discriminatory crowd matters*’. That guidance provides as follows (emphasis added):

‘... FA Rule E21 is not applicable ... in cases of discriminatory behaviour of supporters in accordance with FIFA’s direction. It remains the case however that it will need to be assessed if FA Rule E20(a) has been breached.

Should a Club be charged under FA Rule E20(a) for discriminatory behaviour of their supporters, a Regulatory Commission (which will be chaired by a specialist panel member with the requisite experience in crowd management matters) will consider a range of factors including the following in determining what, if any, sanction should be imposed:

a The number of supporters involved

b The nature of the behaviour of those involved

c The duration of the incident(s)

d Action taken against individual supporters either by club, police and/or courts

e Whether the Club took all reasonable steps in their preparation and planning for the fixture

f Whether the Club and/or its officers took all reasonable steps in dealing effectively with the issue/incident when it arose

g The Club’s actions post-event in identifying any supporters in discriminatory behaviour.

In addition to the above case specific mitigating factors, other matters may also be taken into account including the level of assistance and co-operation with the investigation and process.

Should the Club establish to the Commission’s satisfaction that all events, incidents or occurrences complained of were the result of circumstances over which it had no control and/or that its responsible officers or agents had used all due diligence to

ensure that its said responsibility was discharged, whilst this will no longer be a defence so that a Commission would be bound to find that a breach of FA Rule E20(a) has occurred, the primary focus for sanction would be to consider an action and/or operational advice and/or other practical measures as they see fit to be carried out by the Club. This will subsequently be monitored by the Football Association to ensure implementation and is likely to be taken into account in considering any future offences of a similar nature. Should a Club be found to have breached FA Rule E20(a) and a Commission finds that the Club has not satisfactorily discharged its said responsibility, then sanctions would be open to the Commission's discretion'.

34) So, while an FA Rule E21 defence is not available to the Club in this case as a defence to the Charge *per se*, it is nonetheless necessary for us to determine whether the Club in fact cleared the hurdles described in FA Rule E21 in respect of the Chanting as part of the process of determining the appropriate sanction, if any, to be imposed on the Club.

ii) The 2 limbs of FA Rule E21

35) FA Rule E21 comprises 2 conjunctive limbs, namely

- a) Whether the incident complained of was the result of circumstances over which the relevant club had no control (*'the First Limb'*), and
- b) Whether the relevant club's responsible officers or agents had used all due diligence to ensure that its said responsibility was discharged (*'the Second Limb'*).

36) The burden rests with the Club to satisfy us on both the First Limb and the Second Limb. The standard of proof for discharging that burden is the balance of probabilities.

a) The First Limb

37) As has been said in other cases, when considering the extent to which a club has 'control' over a third party

- a) There is a valid distinction to be drawn between (on the one hand) a club's players and employees and (on the other hand) the club's spectators and persons purporting to be supporters/followers, and
- b) That save to the extent that a club can control its spectators and all persons purporting to be its spectators or followers via its ticketing and ground regulations/policies and signage and stewarding in and around the stadium, a club has limited means by which to 'control' spectators and persons purporting to be supporters/followers at matches.

38) While there was no discussion before us at the hearing about the First Limb, we accept on a balance of probabilities that the Chanting was the result of circumstances over which the Club had had no control; the FA certainly did not suggest otherwise. We were therefore satisfied on the First Limb.

b) The Second Limb

39) In order to satisfy the Second Limb the burden is on the Club to demonstrate that it used ‘*all due diligence*’ to ensure that its relevant responsibilities under FA Rule E20 were discharged. The first question therefore to be addressed is what is meant by ‘*all due diligence*’ in such circumstances.

40) The Club made no submissions to us on that issue. That question has however recently been considered by other FA Independent Regulatory Commissions in *The FA v Millwall FC* (23 May 2019), *The FA v Birmingham City FC* (12 August 2019) and *The FA v Hartlepool United FC* (9 January 2020). In those cases the Independent Regulatory Commissions also referenced a number of other previous Decisions. We reviewed each of those Decisions for the purpose of preparing these Written Reasons.

41) In *The FA v Birmingham City FC* (12 August 2019) the Independent Regulatory Commission concluded (at paragraph 23) as follows:

- a) That the question of whether ‘*all due diligence*’ was used by a club prior to/at the time of an incident is to be judged by reference to what was known, or should have been known, by the club at the relevant time. The club is not to be judged with the benefit of hindsight;
- b) That while ignoring hindsight does not prevent an Independent Regulatory Commission from considering matters that have occurred since the incident under scrutiny (such as steps taken by a club to prevent a recurrence of the incident) it should exercise care when considering such matters. Just because a club has, since the occurrence of an incident, decided that something could/should be done differently in the future does not automatically mean that the fact that the club did not do it that way before the incident was the result of a failure by the club to use ‘*all due diligence*’ – although of course, it might mean that;

- c) That using ‘all due diligence’ does not equate to perfection or require that a club should eliminate all risk altogether; merely because
 - i) Something could have been done differently or ‘better’, or
 - ii) A risk that in fact came to fruition could have been avoided
 does not of itself mean that a club failed to use all due diligence by acting as it did. The test is whether all reasonable precautionary steps were taken;
- d) That the fact that FA Rule E21 requires a club to demonstrate that it has used ‘*all due diligence*’ (emphasis added) does however impose a heavy burden on a club seeking to rely on FA Rule E21;
- e) That the individuals whose conduct is to be assessed for the purpose of determining whether ‘*all due diligence*’ has been exercised by a club are the club’s ‘*responsible officers and agents*’. Thus a failure by an individual properly-selected, properly-trained, properly-equipped, properly-briefed and properly-supervised steward, who had been properly deployed by a club pursuant to an appropriate strategy or plan, to fulfil his role (even due to carelessness on the part of that individual steward) would not of itself mean that the club (or its responsible officers or agents) had failed to exercise ‘*all due diligence*’ in the discharge of its responsibilities under FA Rule E20 – although depending on the facts of the case, it might evidence such a failure. The focus should however in each case be on the club and its responsible officers and agents, not on every individual employee;
- f) That the relevant question to address is therefore whether those responsible at the Club for managing the conduct of spectators/persons purporting to its supporters had taken all reasonable steps to ensure that spectators/persons purporting to its supporters (1) would conduct and did conduct themselves in an orderly fashion, and (2) would refrain and did refrain from *inter alia* abusive or insulting behaviour;
- g) That it will not automatically follow that, merely because a club has engaged an appropriate level of resources to deter/prevent misconduct of a type that nonetheless still occurred, the club will be found to have used all due diligence to discharge its

responsibilities under FA Rule E20. In such circumstances the club must also show that it utilised and deployed those resources competently.

42) That approach was endorsed by the Regulatory Commission in *The FA v Hartlepool* (at paragraphs 56 and 57). We also endorse that approach and confirm that we adopted it in this case. As we have said above, the Club did not seek to persuade us that any different test should be applied or indeed make any submissions at all on the test to be applied.

43) Our conclusion was that, for the principal reasons set out below, the Club failed to discharge – by a very considerable margin - the burden of satisfying us on the Second Limb.

44) Prior to the hearing the Club served evidence as to what it had done since the Chanting to prevent a recurrence (see below). However, there was only extremely limited evidence about what steps had been taken by the Club before the match to prevent discriminatory behaviour at matches generally and at this match in particular. In that regard the Club's Observations recorded that

- a) The match had been the subject of 3 separate Police Planning Meetings with South Yorkshire Police at which several items were discussed and planned for, including *'activities surrounding Remembrance Day weekend and any proactive planning around [JM] being a member of the opposition, factoring in his well-documented decision not to have a poppy on his playing shirts'*. The Club's Observations recorded
 - i) that *'there [had] historically, as publicised in the media, been abuse directed towards [JM] by supporters of his own clubs and the opposition'*, and
 - ii) that since *'all parties'* (i.e. the Club, South Yorkshire Police and SCFC) had been keen *'to avoid any action or inaction being a catalyst for disorder'*, South Yorkshire Police asked the Club to *'manage [its] planned pre-match activities to minimise this risk'*.

No detail whatsoever was given about what had been discussed in those Police Planning Meetings or about what steps the Club consequently took to minimise the risk of disorder resulting from JM's refusal to wear a poppy on his playing shirt;

- b) Following a fourth, Extraordinary Planning Meeting with South Yorkshire Police and SCFC specifically on the planning of Remembrance activities (at which all events planned for Remembrance were considered) the Club decided to abandon plans
 - i) to have the teams led out onto the pitch by military personnel, and
 - ii) to include military personnel in a pre-match guard of honouralthough it retained plans to involve military personnel in a pre-match ceremony⁴ and (1) to hold a Minute Silence, and (2) to play the Last Post.

45) The Club's Observations also recorded that during the match itself, upon JM reporting the Chanting, it had moved mobile stewards into those areas of the stadium from where it was understood that the Chanting had originated.

46) At the hearing SB gave oral evidence which significantly expanded on the Club's Observations. His evidence fell into 4 broad parts:

- a) First, evidence about the practices usually adopted by the Club to discharge its FA Rule E20 responsibilities at matches *per se*
- b) Secondly, evidence about the additional measures taken by the Club for this match
- c) Thirdly, evidence about what the Club did during the match once the Chanting had been reported
- d) Fourthly, evidence about what the Club has done since the match to prevent a recurrence of the behaviour in the future.

47) As regards the 'usual' steps taken by the Club to discharge its FA Rule E20 responsibilities SB explained

- a) That in the years since he had been Safety Officer he had been aware of (and had dealt with) 3 separate incidents of abusive or insulting words or behaviour being used by supporters towards players that had included reference to race. SB candidly told us that certain factions within the local community were less tolerant of individuals of different ethnic origins, colour, race, nationality and the like than he considered appropriate. We formed the strong impression from his evidence that he was thus acutely aware that there was a risk of supporters of the Club using language and behaviour which included

⁴ See the Club's 10 January 2020 email.

a reference to matters such as ethnic origin, colour, race or nationality, and that work was needed at the Club to address that risk

- b) That the Club is (and was prior to the match) aware of its Rule E20 responsibilities. He told us that the Club has historically worked within the local community and with organisations such as Kick It Out to try to educate its fan base and prevent discriminatory and abusive behaviour from taking place. SB did not however give any detail about what such work had involved or when it had taken place, and we were left very much in the dark about the extent of the efforts that the Club has in fact made in recent times in this regard
- c) That the Club had in the past, prior to the match, used initiatives such as
 - i) Posters and signage around the stadium, and
 - ii) Pages within match day programmesto deter individuals from engaging in discriminatory and abusive behaviour and from using discriminatory or abusive language. Regrettably however SB was once again unable to give any detail whatsoever about what such posters/signage and pages had said, how frequently they had been deployed and published, or when they had last been deployed and published prior to the match. We concluded that if in fact such initiatives had been used in the past by the Club, they were infrequent and certainly not in use at the time of the match. As the FA pointed out, the Club's post-match Action Plan referred to such initiatives being '*introduced*';
- d) That matchday programmes contained a telephone number which fans could use to report discriminatory and abusive behaviour, although (1) that telephone number did not appear on posters or on relevant pages in the programmes; it simply appeared in a list of 'contact numbers' printed elsewhere in the matchday programme; and (2) he was unable to tell us how that number was described or 'advertised' (and so how supporters would have known the purpose for which it existed);
- e) That the Club had historically made announcements over the public address system and on the big screen at the stadium prior to the start of matches to warn against discriminatory and abusive behaviour. However

- i) Once again SB was able to give no detail of what such announcements had said; he was unable to confirm whether such announcements had been made prior to this match, and
- ii) We concluded
 - (1) That if in fact such announcements had been made in the past by the Club, they had been made infrequently, and
 - (2) That no such announcements had been made prior to the match itself. As the FA again pointed out, the Club's post-match Action Plan referred to such announcements being '*introduced*';
- f) That historically
 - i) The Club had had in place plans and protocols to deal with abusive or discriminatory behaviour. However
 - (1) No such plans or protocols were produced before us. Indeed, the Club did not produce any written evidence whatsoever before us from which it was possible for us to see
 - (a) What relevant plans and protocols it had in place, or
 - (b) How such plans and protocols were in practice implemented, and
 - (2) SB was unable to tell us what such plans and protocols comprised; and
 - ii) Matchday stewards had been briefed (by PC) about how to react to abusive or discriminatory behaviour if it occurred. However
 - (1) He was unable to tell us what such briefings had involved, and
 - (2) Once again no documentary evidence of such briefings was produced before us.

48) As regards the further steps taken by the Club for this particular match SB explained

- a) That the Club had appreciated almost immediately the fixture list for the 2019/2020 season had been released that
 - i) Since it was to play SCFC immediately before Remembrance Day, and
 - ii) Given JM's historic refusal to wear a poppy on his shirt, and
 - iii) Given the abuse historically directed at JM as a result
 it would be necessary for the Club to take steps to avoid '*disorder*'⁵

⁵ To use the term in the Club's Observations.

- b) That in light of this, he had spoken with Safety Officers at various other clubs who had found themselves in similar situations. However, he gave no detail of those conversations – what he had spoken about and what conclusions he had drawn from those conversations – and we were thus left in the dark about what, if anything, was done as a result of those conversations;
- c) That the matter had been raised at the three Planning Meetings and the fourth Extraordinary Planning Meeting described in the Club's Observations. However, he still gave little detail about exactly what had been discussed or decided at those meetings;
- d) That because of concern that JM might refuse to engage with each process (and thereby antagonise the crowd) the Club abandoned plans to have military personnel
 - i) Form a Guard of Honour prior to the match through which players would pass, and/or
 - ii) Accompany the players onto the pitch;
- e) That the Club had attempted to liaise with SCFC to obtain input (from SCFC and/or JM himself) into the steps that it was proposing to take on match day:
 - i) SCFC was involved (by telephone) in the Fourth Extraordinary Planning Meeting referred to above. However, SB told us nothing about SCFC's actual involvement or role at that meeting, or what (if anything) he had learned from SCFC which had informed the Club's planning for the match
 - ii) Having asked whether JM had any views on proposed match day steps, the Club
 - (1) Did not receive any response from SCFC, and
 - (2) Made no effort to chase for any response
- f) That the Club had seen no reason to abandon plans for a Minute Silence or for the playing of the Last Post; those events went ahead prior to kick off;
- g) That the Club had done nothing else prior to the match to prevent or deter individuals within the crowd from engaging in abusive language or behaviour of the type that had historically been encountered at Remembrance Day matches in which JM had played

without wearing a poppy on his shirt. In a nutshell, the Club had done nothing over and above what it did for any other match. SB explained that it had taken this ‘passive’ stance because it felt that to do anything ‘proactive’

- i) Would have drawn attention to the matter, and so
- ii) Would have increased the risk of abusive language or behaviour of the type that had historically been encountered at Remembrance Day matches in which JM had played.

49) We return below to the evidence that SB gave about

- a) How the Club reacted during the match to the Chanting, and
- b) What the Club has done since the match in relation to the Chanting.

50) Against that background, we turn to consider whether the Club discharged the ‘all due diligence test’ that we have set out above.

51) Whilst we acknowledge that it may be difficult – even impossible – to prevent every individual who purports to be a club’s supporter or follower from using inappropriate language and from behaving in an inappropriate way, there are obvious proactive efforts that any club can make in that regard to forestall the same before it happens, particularly when a club has reason to know that there is a risk of such language being used and/or of such behaviour occurring. That was of course the case here given that (as the Club accepted)

- a) It was known before the match that JM’s refusal to wear a poppy had previously resulted in abuse being directed at him from spectators within crowds, and
- b) The Club was concerned to ensure that disorder within the crowd in reaction to any ‘*action or inaction*’ by JM was avoided i.e. prevented from happening before it began.

52) . Whilst certainly not intended to be an exhaustive list, we have in mind things such as

- a) Appropriate anti-discrimination signage being placed at entrances to the stadium and/or around the stadium
- b) Displaying appropriate anti-discrimination messages on advertising hoardings and on the stadium’s big screen
- c) Placing prominent and clear anti-discriminatory wording in the matchday programme
- d) Including within the matchday programme something from the Royal British Legion that it respected JM’s – and everyone’s – right to choose whether to wear a poppy

- e) Making clear and regular anti-discriminatory PA announcements before and during the match (and generally)
- f) Emphasising to spectators that discriminatory behaviour would not be tolerated and would be severely punished
- g) Specific training of stewards to ensure that inappropriate language is not ignored or missed, and is to be dealt with effectively and quickly; in effect, promoting a proactive, ‘zero tolerance’ stewarding policy, and ensuring that such policy is understood and enforced by all stewards.

53) Some of those things are steps that the Club is now in the process of implementing ‘to ensure that this does not happen again’⁶ – in particular

- a) The Club’s post-match Action Plan with which we were provided identifies a number of measures that the Club is to introduce⁷
 - i) First, in an attempt to prevent discriminatory abuse from occurring at all, but
 - ii) Secondly, to detect, respond to and sanction discriminatory abuse *if* it was to happen again in the future
- b) The Attachments to the Club’s post-match Action Plan are examples of 2 of those measures:
 - i) A poster to be displayed around the stadium and included in matchday programmes making it clear – in plain, effective language – that discriminatory abuse is illegal, offensive and will not be tolerated by the Club (although we note that that poster
 - (1) Still does not provide any method for reporting discriminatory language or behaviour, and
 - (2) Identifies only the potential consequences for the Club. Not for any individual found to have engaged in such language or behaviour), and
 - ii) A detailed protocol to be implemented following any report of abusive or offensive chanting within the stadium.

⁶ Quoting from the Club’s email to the FA dated 10 January 2020.

⁷ In his evidence SB suggested that a number of the measures described therein had in fact already been in place before the match e.g. deployment of posters/signage and announcements over the public address system. However, as we have said above, we were not satisfied that that was in fact the case.

54) However, in our view those sort of measures should have been taken before the match and before the Chanting began, and the fact that they were not means that the Club fell well short of demonstrating that it used all due diligence in this case to ensure that it discharged its relevant FA Rule E20 responsibilities prior to the Chanting. That is particularly so given the likelihood that abuse of the very type that in fact occurred

- a) Had to the Club's knowledge been directed at JM on previous occasions when he had played in matches around Remembrance Day without wearing a poppy on his shirt, and
- b) Was thus anticipated by the Club.

Bluntly, despite such awareness, the Club did nothing in advance of the start of the match or (with the exception of deploying additional stewards to a part of the stadium after the 32nd minute of the match) during the match to address the known, increased risk that abusive and insulting language would be used by individuals within the crowd at the match, and was in fact being used by such individuals during the match. Doing nothing – as the Club chose to do – to prevent or deter such behaviour was not an acceptable option.

55) In reaching that conclusion we are not judging the Club with hindsight or using what the Club has done since the match as evidence of pre-match failings; we are simply saying that most, if not all, of the steps that have now been taken by the Club are ones that we would have expected any reasonable, prudent Club to have had in place well before the match in order to meet its FA Rule E20 responsibilities.

56) Accordingly, the Club failed (by a long way) to satisfy us that it had discharged the burden of the Second Limb.

iii) Basis upon we accordingly approached sanction

57) In light of our findings on the 'all due diligence test' above, we approached sanction on the basis that

- a) The Club was not entitled to benefit from the '*primary focus*' provision in the FA Guidance, and
- b) Our discretion as regards the sanction to be imposed on the Club for the admitted breach of FA Rule E20 was thus unfettered by that '*primary focus*' provision in that FA Guidance.

58) As a starting point we carefully considered each of the 7 factors set out in the FA's Guidance. We concluded

- a) That it was impossible for us to identify with anything like precision the number of supporters involved in the Chanting. However, as set out above the number involved was significant, and was likely to have been measured in hundreds [Factor (a)]
- b) That the relevant individuals had engaged in using the abusive and insulting words, which included a reference to nationality, religion and belief, which we have set out above [Factor (b)]
- c) That the Chanting had comprised several separate occasions of abusive and insulting words making reference to nationality, religion and belief, spread over the course of the first half of the match, albeit that the duration of each occasion had been seconds rather than minutes [Factor (c)]
- d) That the Club had done little to identify individuals who had used the insulting and abusive words and behaviour, and no such individuals had in fact been identified [Factors (d) and (g)]. SB told us that CCTV had been reviewed, although once again no detail was given. No appeal appears to have been made for assistance from members of the crowd to identify those involved, either on the day of the match or since. The assistance of the police does not appear to have been requested by the Club
- e) That the evidence did not demonstrate that the Club had taken all reasonable steps in its preparation and planning for the match [Factor (e)]. As we have said above, the Club's preparations for the match fell a long way short of amounting to 'all relevant due diligence'
- f) That the Club had not taken all reasonable steps in dealing effectively with the Chanting when it occurred [Factor (f)]. While the Club had deployed 20 mobile stewards to 2 corners of the stadium
 - i) That had not been done until the 40th minute of the game, some 8 minutes after JM had made his report to the Match Referee. SB could not explain this, and we were

not provided with a copy of the Control Room log to enable us to see what had happened during that period

- ii) The Match Referee and Fourth official had informed the Club's Home Technical Area Steward that the Chanting reported by JM had come from the Beckett Stand behind the goal. The mobile stewards were not however deployed across the width of the front of that stand; they were simply deployed to the corners, where individuals who SB described as his 'risk fans' were located
- iii) The deployment of mobile stewards did not bring the Chanting to an end. JM's evidence was that the Chanting continued until the end of the first half of the match. That may be because the mobile stewards were unaware of why they were being deployed to the Beckett Stand; there was no evidence before us that they were told that it was to counter the Chanting, identify perpetrators and/or prevent a recurrence
- iv) There was, we find, no announcement made over the public address system and no message displayed on the big screen decrying the Chanting, warning that it must stop and should not be repeated, or warning of the consequences that might follow should it continue or be repeated
- v) While the Club had focussed additional CCTV cameras on the relevant parts of the stadium, that was not done until the second half of the match, and so after the Chanting had ceased.

59) We then considered the mitigating factors available to the Club in this case. The Club did not itself identify any mitigating factors that it wished us to take into account; Mr Murphy expressly declined our invitation to identify any such factors. However, in our view the following are properly to be regarded as mitigating factors in this case, and we took the same into account:

- a) First, the Club's guilty plea in response to the Charge. However, given
 - i) The strict liability nature of FA Rule E20 in cases of discriminatory crowd behaviour, and
 - ii) That we rejected the Club's attempt to satisfy us that it had all used all due diligence to prevent incidents such as the Chantingonly very limited credit is to be given for that guilty plea. This is certainly not a case where a traditional one-third discount is appropriate;

b) Secondly, the apology that the Club has made for the Chanting. We accept that its apology before us was genuine and we gave the Club credit for that. However, we were concerned

- i) That the Club appeared to have made no public apology for the Chanting, or to JM himself, and
- ii) That the Club does not appear even to have made any statement condemning or addressing the Chanting until (on SB's evidence) after the Club had been charged by the FA i.e. until several weeks after the match. Nothing was apparently published by the Club following the match itself.

Those matters led us to give the Club less credit for its apology before us than would otherwise have been the case;

c) Thirdly, the fact that the Club has no relevant previous disciplinary record;

d) Fourthly, the steps that have been taken by the Club since the match to make efforts to prevent discriminatory and abusive behaviour and language from recurring in the future. In that regard we paid careful attention

- i) To the Club's post-match Action Plan and Attachments, and
- ii) To SB's oral evidence about what the Club now does (and will do going forward) in that regard.

However, while such efforts are a good starting point, it is clear that more still needs to be done, and we set out in the Action Plan appended to these Written Reasons what (as a minimum) still needs to be done.

60) Against the above we balanced what we considered to be a serious aggravating feature, namely the reaction of PC upon being informed of the nature and duration of the Chanting after the match – *'he's a professional footballer, he should be used to it by now'*:

- a) Like those that heard those words when they were spoken, we took the view that such words were wholly unacceptable and inappropriate
- b) In fairness to the Club, it has also acknowledged (both in the Club's Observations and before us) the wholly inappropriate nature of those words. It has spoken with the external organisation by whom PC is employed. That organisation has apologised to

the Club for PC's conduct and has warned PC as to his future conduct. It has also instructed PC to undertake an Equality and Diversity course for re-education. However

- i) We noted that PC has not been disciplined by the Club, which continues to use him in the role of Deputy Safety Officer, and
- ii) We do have concerns (based on SB's evidence) as to PC's suitability to hold a role of responsibility at the Club, particularly one which requires him to play an important role in the implementation of the Club's Ant-Discriminatory Abuse Action Plan

- c) While the matters described in the first half of the previous paragraph do soften the consequences of PC's post-match reaction to a degree, there is no avoiding the fact that that reaction aggravates the Misconduct for which the Club is to be sanctioned in this case.

61) We also took into account what the FA submitted was a further aggravating feature in this case, namely that the Club

- a) Was effectively 'on notice' of the increased risk or likelihood of abusive and discriminatory behaviour at the match (given the history of the same whenever JM played around Remembrance Day), yet
- b) Did nothing positive or proactive to prevent history from repeating itself.

That is, we agree, something of which account must be taken when we determine sanction.

iv) Appropriate sanction

62) Having considered all of the above matters we came to the view that it was appropriate that an action plan should be imposed on the Club.

63) The action plan that we believe is appropriate is annexed to these Written Reasons as an Appendix. We did not hear submissions at the hearing from the Club or the FA as to what should (and should not) be contained in such an action plan. Thus as we explained at the hearing

- a) We have prepared an action plan which we believe to be appropriate to reflect what needs to be done by the Club, but
- b) Each of the Club and the FA has 14 days from receipt of these Written Reasons to apply to us to vary the terms of that action plan if either considers it appropriate to do so.

- 64) The steps set out in the action plan must all be implemented by the Club by the start of the 2020/2021 season at the latest. However, we would expect the Club to begin work to implement those steps without delay, and to complete as many of them as possible as quickly as possible.
- 65) The action plan will remain in place
- a) For the remainder of this season, and
 - b) Until the end of the Club's final match of the 2020/21 season.
- 66) We considered whether this was a case where imposing an action plan alone was an adequate sanction. However, given (in particular)
- a) That the Club failed to clear the '*all due diligence*' hurdle in the Second Limb by a very considerable way,
 - b) The gravity of the Misconduct that occurred, and
 - c) Our conclusions on the various factors listed above
- we concluded that that would be inappropriate, and that we should impose additional sanction on the Club over and above the implementation of an action plan.
- 67) We concluded that the appropriate additional sanction should be a fine. Having had regard to the aggravating and mitigating factors that we have set out above (and giving appropriate credit for the latter), we determined that a fine of £20,000 was appropriate. Had such mitigating factors not been present, we would have imposed a fine of £25,000.
- 68) In reaching that figure we did not have any regard to the financial position of the Club. That was because we were provided with no information about the Club's financial position. While we invited Mr Murphy to provide us with such information, he did not do so save in the very vaguest of terms.
- 69) In reaching that figure we also took into consideration the FA's submission
- a) That each case of discriminatory abuse is different, and so
 - b) That only limited assistance can be derived from sanctions imposed by other Regulatory Commissions in other cases of a breach of FA Rule E20 involving discriminatory language or behaviour.

We agree that each case is different. We did however review the sanctions (and in particular, the level of fines) imposed by other Regulatory Commission in other cases. Our decision to impose a fine of £20,000 reflected our conclusions as regards the gravity of this case, adjusted to reflect the aggravating and mitigating features present in this case, in comparison to other cases of discriminatory abuse.

70) Although the Club did not invite us to do so, we nonetheless considered whether any part of the fine should be suspended. We saw no reason to suspend any part of the fine in this case.

(E) Order and Costs

71) We order that Barnsley Football Club

- a) Is warned as to its future conduct, and
- b) Is fined the sum of £20,000.

72) We impose an action plan in the terms set out in the Appendix to these Written Reasons, although we give permission to the Club and the FA to apply to us within 14 days from receipt of these Written Reasons to vary the terms of that action plan if either considers it appropriate to do so. That action plan

- a) Shall be implemented in full by the start of the 2020/2021 season, and
- b) Shall remain in place until the end of the Club's final match of the 2020/21 season.

73) We also order that the Club should pay the costs of the Regulatory Commission relating to this case in the sum of £2,250.

74) This decision – which is the unanimous decision of this Regulatory Committee – is subject to the relevant Appeal Regulations.

Graeme McPherson QC (Chairperson)

Phil Rainford

Matt Williams

14 February 2020

IN THE MATTER OF A FOOTBALL ASSOCIATION
INDEPENDENT REGULATORY COMMISSION

B E T W E E N :-

THE FOOTBALL ASSOCIATION

and

BARNSLEY FC

**APPENDIX TO THE DECISION AND WRITTEN REASONS
OF THE INDEPENDENT REGULATORY COMMISSION**

ACTION PLAN

- 1) Barnsley FC (*'the Club'*) shall forthwith conduct a review of its stewarding management, provision, deployments, and quality of steward training. In addition, existing processes should be closely examined to ensure quality steward incident reporting (verbal & written) is in place to support proportionate reactions to match day incidents and potential post-match investigations.
- 2) The Club shall review, develop and enhance all match day operational planning and steward briefing processes, all of which shall be fully documented to support and evidence due procedure; to ensure that the prevention and detection of any discriminatory or inappropriate behaviour is sufficiently addressed.
- 3) The Club shall develop and improve match by match steward deployment plans in association with Green Guide guidance and also relating to intelligence based information

surrounding incidents of previous or expected discriminatory or inappropriate behaviour within the stadium.

- 4) In association with EFL guidance, the Club shall develop a detailed operational protocol in support of their safety management and stewarding teams; to be fully briefed to all stewards prior to every match and how to be implemented following any report of discriminatory, abusive or offensive chanting or behaviour within the stadium. This should include:-
 - a) Step by step match day protocols
 - b) Supporter / Steward reporting methods
 - c) Prepared public address messages (to assist in the prevention, reaction towards and detection of offenders – pre match / during match or post any incident of discriminatory chanting or behaviour)
- 5) The Club's CEO and Safety Officer
 - a) Shall visit and liaise with other clubs from both Premier and English Football Leagues, to obtain best practice policies associated with the prevention and detection of discriminatory and inappropriate behaviour, and
 - b) Shall thereafter review and develop their own policies for the prevention and detection of discriminatory and inappropriate behaviour in light of the policies of other clubs.
- 6) The Club shall
 - a) Develop proactive supporter initiatives in addressing the potential for discriminatory or other inappropriate supporter behaviour.
 - b) Develop ongoing positive dialogue with *Kick It Out* and further enhance the relationship by seeking advice and ratification of new and developing associated policies and procedures.
 - c) Develop additional supporter and steward educational programmes in conjunction with *Kick It Out* to include the issues associated with the potential inappropriate usage of words, chanting, gestures or conduct associated with ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability, including supporter education programmes especially in the raised awareness of acceptable fan behaviour.

- 7) The Club shall evaluate their existing stadium CCTV capabilities and operator training in relation to match day crowd monitoring and evidence gathering. Furthermore, the Club shall consider appropriate CCTV infrastructure improvements to enhance its operational capabilities, in conjunction any potential ‘Stadium Improvement Plan’.
- 8) The Club shall review and update the ‘Discrimination section’ of its Club Supporter Charter to include relevant and specific information on discriminatory or offensive chanting, words or behaviour, in an effort to educate supporters on what language and actions are acceptable / unacceptable at their stadium. Furthermore the Club shall develop its Club Supporter Charter, listing appropriate match day offences and associated sanctions, in particular relating to discriminatory behaviour. The Club shall also create a Fan webpage on their Club website which will reference the revised Charter and any relevant match communications, likely to affect supporter behaviour as appropriate.
- 9) The Club shall arrange for an appropriately advertised dedicated mobile phone number to be made available to enable fans to anonymously text or to ring the Club in real time, if they witness any racist or other discriminatory behaviour within the stadium or en route to it. This facility should be developed in tandem with the existing *Kick It Out* mobile telephone reporting application. Such initiatives should be developed to encourage the existing Barnsley “See it, Hear it, Report it” objectives to be effectively supported and thereby facilitating its supporters to expeditiously report on any abuse they hear in an effort to increase the probability of identifying any discriminatory abuse before it escalates.
- 10) The Club shall develop and deploy
- a) Match day PA announcements, and
 - b) Printed messages in its match day programme, on its big screen, on advertising boards and on stadium advisory posters
 - c) Content on the Club website and social media platforms
- to target the prevention, usage and detection of any potential racist or discriminatory words or behaviour. Such announcements, messages and content (i) shall make clear in plain effective language that discriminatory abuse is illegal, offensive and will not tolerated by the Club, and (ii) must be supported by clear reporting methods and facilities.

- 11) The Club shall continuously review ticket sales policies to ensure that such policies do not increase the risk of discriminatory or inappropriate fan behaviour, and also to provide usable data to support post-match investigations and potential associated sanctions.
- 12) The Club shall consider the use of ‘professional witnesses’ and stewards’ use of body cameras to deter, detect and evidence any incidents of racist or discriminatory supporter behaviour. This facility can be further developed to address other potential incidences of inappropriate fan behaviour.
- 13) The Club shall develop and deliver an appropriate diversity education programme in conjunction with *Kick It Out* through their work in the local community and schools.
- 14) The Club shall endeavour to establish a Club “Anti-discrimination Task Force” (ATF) comprising members of the Barnsley Council, members of different Club supporters groups and the Club’s Safety Officer, to be chaired by the Club’s CEO. The ATF
- a) Will work together with *Kick it Out*, the EFL, the FA and the police to successfully develop, initiate and enforce this action plan, and
 - b) Will continue to review, develop and devise policies and proactive plans to address issues of discriminatory language and behaviour.
- 15) Upon publication of
- a) The Regulatory Commission’s Written Reasons, and
 - b) This Action Plan
- the Club shall communicate via the Club website, via social media and in the match day programme for its next home match an appropriate message and response to their supporters. Such message and response should explain the background to the Charge, the Club’s condemnation of the Chanting that underpinned the Charge, the sanction imposed on the Club by the Regulatory Commission and the initiatives the Club is to develop, to make the Club more inclusive and more proactive in the prevention and detection of any potential discriminatory or inappropriate words or behaviour going forward. The Club shall thereafter introduce an appropriate media campaign across the Club website and the Club’s social media accounts emphasising the Club’s policies and zero tolerance toward discriminatory abuse, and including the promotion and success of the Football League’s ‘Code of Practice’ for “Inclusion and anti-discrimination”.