

IN THE MATTER OF AN INDEPENDENT REGULATORY COMMISSION
OF THE FOOTBALL ASSOCIATION

BETWEEN:

THE FOOTBALL ASSOCIATION

The Association

- and -

DAVID MOYES

Participant

WRITTEN REASONS FOR THE DECISION OF
THE INDEPENDENT REGULATORY COMMISSION
FOLLOWING THE HEARING ON 17TH MAY 2017

1. INTRODUCTION

- 1.1 On 18th March 2017, Sunderland AFC played Burnley FC in an FA Premier League fixture at Sunderland's Stadium of Light ground. The match ended in a goalless draw and Sunderland remained at the foot of the league table.
- 1.2 Following the match, the Sunderland manager, Mr. David Moyes, attended interviews with several media outlets, including one conducted by Ms. Vickki Sparks from the BBC. Not surprisingly, Sunderland's precarious position was the focus of the exchange, during the course of which Ms. Sparks asked Mr. Moyes whether he felt under any additional pressure due to the presence in the crowd of the Sunderland owner. At the conclusion of the formal interview, and as the pair were separating, Mr. Moyes said this to Ms. Sparks:

"You were just getting a wee bit naughty at the end there, so just watch yourself or you might get a, you still might get a slap even though you're a woman. Careful the next time you come in."

- 1.3 On Sunday 19th March 2017, Ms. Louise Wanless, the Head of Media and Communications at Sunderland telephoned Ms. Sparks to apologise for the comments made by Mr. Moyes.
- 1.4 During the morning of Monday 20th March 2017, the BBC's Lead Executive for Football, Mr. Steve Rudge, contacted Ms. Wanless to discuss the comments made by Mr. Moyes to Ms. Sparks. At some point during the day, Mr. Moyes telephoned Ms. Sparks to apologise. There were conflicting accounts as to whether he was asked to do so, or whether he made the call unprompted. By common consent, she accepted his apology and expressed her wish that all parties should put the matter behind them.
- 1.5 For reason(s) that remain unclear, Mr. Moyes' comments did not come to light for some time. When they did, The FA wrote to him on 3rd April 2017 seeking his observations. He responded on 10th April 2017, and Sunderland provided a letter of the same date in support of him. A significant development took place between those two dates, as will become apparent shortly.

2. THE CHARGE

- 2.1 By a letter dated 25th April 2017, The FA charged Mr. Moyes with misconduct in breach of FA Rule E3(1). The charge alleged that his comments were improper and/or threatening and/or brought the game into disrepute.
- 2.2 On 9th May 2017, Mr. Moyes formally denied the charge and requested a personal hearing.
- 2.3 It is important to stress at the outset that the charge does not allege that the comments amounted to an Aggravated Breach within the meaning of FA Rule E(3)(2). A breach that is 'Aggravated' includes an express or implied reference to, amongst other things, gender.

3. THE HEARING BEFORE THE REGULATORY COMMISSION

3.1 At the hearing before the Regulatory Commission on 17th May 2017, The FA was represented by Ms. Amina Graham, Head of The FA's Regulatory Advocates. Mr. Moyes was represented by Mr. Paul Gilroy QC, instructed by the League Managers' Association. Prior to the hearing, both Parties had provided us with helpful outline written submissions. In due course, they submitted further written submissions.

3.2 The Commission was provided with the following evidence:

- (i) Video clip of the interview in question;
- (ii) Correspondence from The FA, and in response, including observation letters of Mr. Moyes and Sunderland AFC, both dated 10th April 2017;
- (iii) Mr. Moyes' Reply to the charge;
- (iv) Various media reports in connection with the incident, including a record of a subsequent interview that Mr. Moyes gave;
- (v) Statement of Ms. Barbara Slater, BBC Director of Sport, dated 21st April 2017; and
- (vi) Letter written to Mr. Moyes by a member of the public which made reference to comments of a similar nature that were made by a famous actress to a leading politician.

3.3 In addition to the written evidence referred to above, at his request Mr. Moyes gave oral evidence to us at the hearing. These are the main points that emerged from it:

- (i) He felt that Ms. Sparks' questions were "*rude*";
- (ii) When someone is rude to him, he is "*rude back*";
- (iii) A "*slap*" in the area of Western Scotland where he was brought up meant a "*verbal slap*". It could also be "*a slap across the back of the legs that your mother would give you.*" He denied that the latter amounted to physical violence;
- (iv) He thought that he was having a private conversation with Ms. Sparks;

- (v) When he commented that she should be *"careful the next time you come in"*, he was referring to Ms. Sparks' questioning and that she should be careful with her questions the next time;
- (vi) Mr. Moyes has developed relationships with journalists over the years, particularly during his time at Everton and Sunderland, where *"off the record"* information is exchanged and *"four letter words"* are used in confidence. He accepted that he did not have a relationship of that kind with Ms. Sparks;
- (vii) He did not know anyone who had been charged for off-camera remarks;
- (viii) The reason why he apologised to Ms. Sparks was because he thought that his words were *"possibly not correct"*. He was not admitting his guilt, but *"wanted to make sure that she did not feel uncomfortable"*; and
- (ix) His telephone call to Ms. Sparks was made *"off my own back"* and was not arranged by either the Club or the BBC.

Preliminary issues

- 3.4 In Mr. Moyes' defence of the charge, Mr. Gilroy raised several matters which it is convenient to label as 'preliminary issues'. We address them first before going on to consider the ingredients of the charge itself, and whether Mr. Moyes' comments amounted to a breach of them.

Gender

- 3.5 Consistent with the way in which the charge was framed, Ms. Graham did not seek to advance The FA's case against Mr. Moyes by reference to gender. She did refer to what she described as a *"power imbalance"* between Mr. Moyes and Ms. Sparks, based on their relative positions and experience, but without reference to gender. That point was not accepted and we shall return to it later in the context of sanctions. Mr. Gilroy submitted, and we accept, that having regard to the way in which the charge was formulated, the case fell to be dealt with no differently than if the reporter to whom Mr. Moyes had spoken had been a man. That is how we approached all of the material issues in the case.

Whether Mr. Moyes had a legitimate expectation of privacy when he made the comments

3.6 In his outline written submissions, Mr. Gilroy pointed to the context in which Mr. Moyes' made his comments, a theme which was developed in oral submissions after Mr. Moyes gave evidence to us. Mr. Gilroy argued that at the material time, Mr. Moyes had a legitimate expectation of privacy on the grounds that:

- (i) It is regularly the case that football managers and male journalists/reporters have frank (even confrontational) exchanges 'off camera', without either party taking offence at (or exception to) what the other has said;
- (ii) Ms. Sparks did not take offence, or exception to, what Mr. Moyes said, either at the time, or subsequently;
- (iii) Mr. Moyes had no reason to believe that the material exchange was anything other than 'off camera';
- (iv) There are far more robust exchanges that have passed between football managers and reporters/journalists without intervention by The FA; and
- (v) In the circumstances, it would be quite wrong (and wholly unfair) for Mr. Moyes to be made 'an example of' on the facts of this case.

Mr. Gilroy warned that considerable care needs to be taken to avoid setting a dangerous or unworkable precedent, or benchmark, to govern relations between football managers and the media.

3.7 We make the following observations on those submissions:

- (i) An Independent FA Regulatory Commission is required to consider the particular disciplinary charge(s) brought against the particular Participant that is/are before it. Whether other Participants could and should have been charged with misconduct in the past for similar, or even worse, comments is irrelevant to the judgment that we must make in this case.

- (ii) There was nothing before us to suggest that the decision to charge Mr. Moyes was so arbitrary or capricious that it would offend principles of fairness and justice to allow The FA to pursue it. On the contrary, having regard to the nature of Mr. Moyes' comments, and the circumstances surrounding them, there are eminently sound reasons why it was appropriate to charge him with misconduct. We can therefore see no merit in the complaint that Mr. Moyes has been 'singled out' in some way.

- (ii) In a similar vein, even if Mr. Moyes subjectively believed that his comments were made '*off camera*' and that he had a reasonable expectation of privacy, we could not decline to consider the charge either on that ground, or his contention that it is not The FA's usual policy to do so in such circumstances. The FA denies that it has any such policy. For present purposes, it is not necessary for us to decide whether it does or does not, or whether the decision to charge Mr. Moyes policy would give rise to an unworkable state of affairs. Those are matters for the regulatory authority, not the independent adjudicating tribunal. For the purposes of the privacy argument in this case, if regulatory oversight did not extend to the type of situation that arose between Mr. Moyes and Ms. Sparks, it would give the 'green 'light' to a Participant to make comments of any kind, safe in the knowledge that he or she could not be charged with misconduct. It is for a Participant to judge what comments can and cannot safely be made, to whom and when, in the particular circumstances; and

- (iii) In any event, we find that Mr. Moyes could not himself have held a reasonable expectation of privacy when he made his comments, or that objectively there could have been such an expectation:
 - (a) The comments were made immediately at the end of the formal interview with Ms. Sparks and followed seamlessly on from it;

- (b) When the comments were made, a cameraman was present, operating a 'pool' camera used by all of the media outlets, together with a *Sky Sports* journalist who was waiting to take his turn to interview Mr. Moyes. The fact that neither of the other two persons present may have passed any comment on what he said to Ms. Sparks, whether good, bad, or indifferent, is neither here nor there to the question whether the comments were made in a public or private setting. Although a group that consists of more than two people is capable of being private, there was no evidence before us that Mr. Moyes could reasonably have expected that the other two persons present would treat anything he might say to Ms. Sparks in confidence;
- (c) The nature of the relationship between two people is relevant to the question whether there is a legitimate expectation of privacy between them in communications. In his oral evidence to the Commission, Mr. Moyes described a relationship of trust and confidence with other journalists, built up over time, that enabled him to speak candidly knowing that his comments made in private and 'off the record' would go no further. He accepted that he did not have any kind of relationship of that kind with Ms. Sparks. He cannot therefore have reasonably held out any legitimate expectation that whatever he might say to her '*off camera*' would remain private between them.

3.8 Accordingly, having regard to all of the surrounding circumstances, and the context in which the comments were made, we find that Mr. Moyes' did not have a reasonable expectation of privacy, even if his intention was to direct what he said to Ms. Sparks personally. Insofar as this particular submission is advanced as a defence to the charge on the issue of breach, we reject it.

Natural Justice

3.9 To repeat, The FA wrote to Mr. Moyes on 3rd April 2017 seeking his observations regarding his comments. The following day, 4th April 2017, the FA Chairman, Mr. Greg Clarke, gave an interview to the press during the course of which he was asked about Mr. Moyes' comments to Ms. Sparks. In his outline written submission, Mr. Gilroy drew our attention to the following statements that were made by Mr. Clarke during the interview:

"... It was regrettable, it was distasteful, and I think it showed a complete lack of respect. And we in the game stand for respect.

...

I think it's doubly bad to use such a term to a woman because there is a lot of violence against women in society and terms like that aren't just disrespectful, I think they are bad examples.

...

We're getting into a trend of people treating journalists doing their jobs badly and I would like to see that stop.

...

Respect is respect for everybody. If a person wants to interview you, the least you could do is treat them with a bit of respect.

...

I've been seeing that more and more: people storming off and being facetious and insulting. I just think, on that level, it has to stop as well.

...

The disciplinary team will crack down on people who break the rules and they will decide whether the rules have been broken and what an appropriate sanction should be. ..."

[emphasis added]

3.10 On 10th April 2017, Mr. Moyes provided his observations to The FA and drew attention to those statements:

“It is most unfortunate that at precisely the same time that I have been asked to provide my observations with a view to The FA deciding whether to charge me with a disciplinary offence, the Chairman of the organisation should have made such remarks to the media, particularly the observation that ‘the disciplinary team will crack down on people who break the rules’. In the public eye, this can only be perceived as amounting to pressure on The FA’s Disciplinary Department to formulate a charge.

I fully appreciate and accept the role that The FA must play in these matters and I trust that you will take into account my comments above when assessing what, if any, action The FA should take in this matter.”

In its letter of the same date, Sunderland described Mr. Clarke’s statements as *“wholly inappropriate”* while the incident involving Mr. Moyes and Ms. Sparks was still being investigated. Subsequently, in his Reply to the charge, Mr. Moyes repeated his concerns about Mr. Clarke’s intervention.

3.11 In his outline submission, Mr. Gilroy went further, describing the statements as *“fundamentally prejudicial”* and *“frankly outrageous”*, coming as they did from the most senior person within The FA. As for their implications, Mr. Gilroy specifically disavowed actual bias on the part of the Regulatory Commission, but invited us to dismiss the charge on the ground that they gave rise to an appearance of bias which tainted the entire disciplinary process, including the Commission itself - and, by clear inference, any decision that we might reach which was adverse to Mr. Moyes. That submission was not made until the morning of the hearing itself. Ms. Graham argued that as Mr. Moyes was seeking to strike the charge out, it should have been the subject of a preliminary application in accordance with section 4.2 of *The FA’s Disciplinary Procedures – Regulations 2016 - 2017*. The Commission decided that the fair course was to allow Mr. Moyes to take the point as part of his substantive defence, but to allow The FA an opportunity to consider and formulate its response.

3.12 The proceedings were therefore adjourned and it was agreed by both Parties that the balance of the case would be dealt with by way of written submissions. The Commission was subsequently provided with a full transcript of Mr. Clarke's interview, together with further helpful written submissions from Leading Counsel for both Parties on the issue of natural justice, including references to authorities.

The law

3.13 In brief summary, the rule against bias is one of the principles of natural justice which underpin any fair and independent system of justice. Disciplinary proceedings of the governing body of a sport, like The FA, must comply with the principles of natural justice. The modern statement of the law relating to the rule was stated by Lord Hope in *Porter -v- Magill* [2002] 2 AC 357 in this way:

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

We make the preliminary observation that that statement of the law focusses on whether there is a real possibility that the tribunal was biased, rather than the prosecuting authority bringing the charge.

3.14 In the context of disciplinary proceedings of a sport's governing body, *Beloff on Sports Law* states that this particular aspect of natural justice requires the adjudicating tribunal:

"... to be free from any bias or appearance of bias against the accused, and free from any vested interest, particularly a financial interest, in the outcome of the proceedings in which it is adjudicating."

Again, we observe that the focus of attention is on the adjudicating tribunal.

3.15 In *Sport: Law and Practice* (3rd Edn.), Lewis and Taylor put it this way:

“Sports governing bodies and their separate disciplinary bodies are generally required to afford minimum standards of procedural protection to the individual, club or other constituent affected by their actions, and to act fairly ... the content of the requirement to act fairly in a procedural sense is, at least in most situations, equivalent to that owed by a public body. Reliance can be placed on the principles developed by the courts in that context.”

3.16 The duty of a sports governing body is to act fairly in its dealings with those who come within its jurisdiction for regulatory purposes, and to comply with the principles of natural justice (see, for example, *Nagle -v- Feilden* [1966] 2 QB 633). It is clear from the statement of Lord Hope in *Porter* and the extracts from the specialist works on sports law cited above that the question of actual, or apparent bias, is one whose principal focus is the court or tribunal which tries a criminal charge, a civil dispute, or a regulatory offence, as the case may be.

3.17 There are three main questions that arise in the present case:

- (i) To whom would a fair-minded and informed observer think that Mr. Clarke’s statements were directed?;
- (ii) Do the statements objectively create the impression of undue influence or pressure being exerted on any aspect of the disciplinary process so as to render it unfair or biased?; and
- (iii) In the light of (i) and (ii), would a fair-minded and informed observer conclude that there was a real possibility that the Regulatory Commission was biased and/or that its decision was unfair?

We shall address each one in turn.

To whom were the statements directed?

3.18 The full transcript of Mr. Clarke’s interview shows that he prefaced his remarks (appropriately) with the following statement:

“The first thing we have is an independent disciplinary process which I have no influence over. It is the other side of a Chinese wall and that will do what it does.”

The reference to *“independent disciplinary process”* in this context could reasonably be construed as the departments of The FA which respectively investigate ‘on-field’ and ‘off-field’ offences and/or FA Regulatory Legal, which makes decisions to charge Participants for breaches of FA Rules and Regulations and then prosecutes charges. It could, though, also be understood to be a reference to an Independent Regulatory Commission of The FA.

3.19 The other statement made by Mr. Clarke which sheds light on the question as to whom he was referring, is one of those to which Mr. Moyes takes strong objection:

“The disciplinary team will crack down ... and they will decide whether the rules have been broken and what an appropriate sanction should be ... I don’t think it will be appropriate for me to comment on what that could be.” [emphasis added]

Putting to one side for the moment the question whether the *“crack down”* comment was appropriate, two points arise out of this statement:

- (i) Firstly, a fair-minded observer would not reasonably conclude that the *“disciplinary team”* which Mr. Clarke had in his contemplation included an independent adjudicating tribunal chaired by a self-employed Barrister in private practice, sitting with two independent members of The FA’s Judicial Panel. That chimes with the excerpt from *Sport: Law and Practice* (Lewis & Taylor) set out above, and the use of the word *“separate”* in the context of the relationship between sports governing bodies and their disciplinary bodies; and

- (ii) If the reference to “disciplinary team” cannot reasonably be read to include the Regulatory Commission, the words that are underlined in Mr. Clarke’s statement provide continuity of reference which can only be interpreted as a reference to The FA’s internal departments referred to at paragraph 3.18 above, principally Regulatory Legal.

3.20 Accordingly, whilst his comments are not free from ambiguity, it is reasonably clear that when Mr. Clarke made his “crack down” comment he was referring to an internal department within The FA, not the independent adjudicating tribunal that would ultimately decide whether any charge that might be brought pursuant to such a robust policy had been proven. As has been observed, his initial reference to “independent” in the context of the “disciplinary process” is capable of being understood to include the tribunal hearing the charge, but that opening remark was appropriately hedged with the caveat: “... which I have no influence over”, and is unobjectionable. Accordingly, none of the statements that Mr. Clarke made can be said to have been specifically directed at the Regulatory Commission (although Mr. Gilroy did not say that that was a necessary requirement for his defence to succeed).

Do the statements objectively create the impression of undue influence being exerted on any aspect of the disciplinary process so as to render it biased or unfair?

3.21 We make three preliminary points that are relevant to this question:

- (i) Firstly, we do not accept The FA’s claim that Mr. Clarke’s statements were without exception broadly-based and neutral. Some were, but he also made certain case-specific statements and went as far as expressing his opinion on an issue very close to, if not on, the one that we must decide, namely whether Mr. Moyes’ comments were improper: “My opinion is that the remarks are inappropriate on two levels ...”;

- (ii) Secondly, we are not convinced that a member of the football-following public would understand there to be some kind of artificial Chinese wall, or barrier, between its Chairman and those at The FA who are responsible for deciding whether disciplinary charges should be brought in any given case. As with any large organisation, we are inclined to think that the public perception is likely to be one of leadership and direction coming from the very top, including in matters of regulation and discipline, even if others discharge those functions within the organisation. In our view, the man on the Clapham Omnibus reading the sports pages of his newspaper is more likely to regard The FA and its internal workings as a single, indivisible entity; and

- (iii) Thirdly, and most importantly for the purposes of this issue, whatever the public perception may be of the internal arrangements within The FA, this Regulatory Commission is independent of it.

3.22 Ms. Graham told us that the decision to charge Mr. Moyes was made free from any pressure, or influence, from Mr. Clarke or anyone else. It follows from our findings in the preceding paragraph that there is unlikely to be a perception of separate functions at The FA on the part of the fair-minded observer. Instead of narrowing the question down to an internal “disciplinary team”, he or she is more likely to ask whether Mr. Clarke’s statements caused The FA as an organisation to act unfairly towards with Mr. Moyes. The “crack down” observation, in context, was capable of being interpreted as a reference to the Participant whose comments were the subject-matter of the interview. Moreover, the statement referred to paragraph 3.21(i) above was *prima facie* unfair, appearing as it did to pre-judge the outcome before Mr. Moyes had provided his observations, let alone a decision having been made as to whether to charge him with any offence.

3.23 There are, though, two significant factors which militate against the submission that The FA acted unfairly, or was biased against Mr. Moyes in some way, as a consequence of Mr. Clarke's statements, or that such an appearance is capable of arising on the facts:

- (i) In the immediate aftermath of Mr. Moyes' comments being made public, a great deal of media attention and comment (including that on social media) surrounded gender issues. It was a central theme of the questions that were put to Mr. Clarke and his statements in response. However, when Mr. Moyes provided his observations, the FA (through its Regulatory Legal Department) only charged him with 'simple' misconduct, with no 'Aggravated' element by reference to gender. By clear implication, the charge as framed rejected Mr. Clarke's statements insofar as they related to gender, as well as the substantial public reaction on that sensitive and emotive issue. In that regard, it cannot be said that The FA succumbed to any internal, or external, pressure; and
- (ii) For reasons that follow, the charge of 'simple' misconduct under Rule E3(1) which The FA elected to pursue was, we find, bound to succeed, even if the basis for it had been limited to the allegation that Mr. Moyes' comments were improper. Mr. Gilroy observes in his submissions on penalties that an allegation that words, or conduct, are improper represents a low bar for The FA to get over. In our judgment, the issue of breach in this case was so clear that The FA required no prompting from Mr. Clarke, or anyone else for that matter, to charge Mr. Moyes with non-Aggravated misconduct under Rule E3(1).

3.24 In those circumstances, a fair-minded and informed observer would not reasonably conclude that The FA acted unfairly (or that it appeared to do so) in bringing the charge against Mr. Moyes that it did, despite the fact that certain aspects of Mr. Clarke's statements, and their timing, were unfair.

Would a fair-minded and informed observer conclude that there was a real possibility that the Regulatory Commission, as the adjudicating tribunal was biased?

3.25 This is the key question. Mr. Gilroy argued that Mr. Clarke's reference to an "independent disciplinary process" is incapable of representing any kind of caveat or qualification to his comments, because of the concluded view that he went on to express in relation to Mr. Moyes' conduct. Ultimately, though, even if we had been persuaded that Mr. Clarke's statements had caused The FA to act unfairly in charging Mr. Moyes and then prosecuting the charge to a final hearing, the safeguard which he, and every Participant, has is an independent adjudicating tribunal which is under a duty to try the charge fairly in accordance with the evidence, together with the relevant rules and regulations, and to decide whether it has, or has not, been proven. In this regard, the Chinese Wall analogy is an apt one. It represents an insuperable difficulty for Mr. Moyes in his claim that the charge should be struck out.

3.26 We note that in his observations' letter, Mr. Moyes' concern was that Mr. Clarke's comments could be perceived as applying pressure to The FA's Disciplinary Department. That concern has since extended to the independent tribunal which has to consider the charge that has been brought. Mr. Gilroy's acknowledgement that the Regulatory Commission was able to arrive at an independent judgment, free from actual bias, was an appropriate concession to make. This is not a case where the inappropriate comments are attributed to a member of the Commission (cf *Modahl -v- BAF* [2002] 1 WLR 1192), or that any member has a present or past connection with the prosecuting authority (see *Sadighi -v- The General Medical Council* [2009] EWHC 1278). As the Commission is independent of The FA, if there is no actual bias on its part as a consequence of Mr. Clarke's statements, then there is no rational basis upon which a fair-minded informed observer could reasonably conclude that we would favour the prosecution of Mr. Moyes.

3.27 For all of the above reasons, even if we had found that Mr. Clarke's statements were capable of causing a fair-minded observer to have some residual reservations about the motivation for The FA's decision to even charge Mr. Moyes with 'simple' misconduct, we reject the submission that Mr. Clarke's statements are capable of undermining the entire disciplinary process, including the decision of the adjudicating tribunal. Any disagreement with our decision on the substantive merits of the charge set out below is a separate matter. In all other respects, the proceedings before us have been procedurally fair. Mr. Moyes was informed in clear terms of the allegations against him, he was afforded every opportunity to make representations in support of his defence of the charge, and he was expertly represented by specialist Leading Counsel. He had a fair hearing, free from any bias on the part of the Commission. We therefore reject the submission that the charge should be dismissed on the grounds of natural justice.

3.28 Finally, if it is not clear already, we would observe that a Participant who is under investigation for alleged misconduct is entitled to expect that The FA will refrain from making anything other than neutral statements about a case until the investigations relating to it are complete, a charging decision has been made, and any disciplinary proceedings have run their course. That entitlement prevails over any other consideration, including a desire, or request, to state The FA's public position on an issue which a particular case may give rise to.

4. DECISION ON THE CHARGE

4.1 The Parties are in agreement that:

- (i) In order to find the charge proved, the Commission need only be satisfied that Mr. Moyes' comments were either: (a) improper, or (b) threatening, or (c) brought the game into disrepute; and
- (ii) The test is to consider the comments objectively (*i.e.* to consider how they would be perceived by the 'reasonable observer'; and

(iii) The words of the relevant Rule should be given their natural and ordinary meaning.

4.2 We were invited by Mr. Moyes to also take into account the following factors:

- (i) Ms. Sparks did not make any form of complaint to anyone about Mr. Moyes' alleged conduct;
- (ii) Ms. Sparks' employer, the BBC, did not make a complaint about Mr. Moyes' alleged conduct;
- (iii) The statement provided by Ms. Slater on behalf of the BBC was solicited by The FA. It was not volunteered. Ms. Slater's letter did not initiate the disciplinary process against Mr. Moyes;
- (iv) Even by the date of the hearing, there was no first-hand evidence to suggest that Ms. Sparks herself took exception to Mr. Moyes' comments;
- (v) In the circumstances, given that the BBC only provided a statement in response to a request from The FA, it is very hard to accept that "*This matter has been treated with the utmost seriousness by the BBC*", as asserted by Ms. Slater; and
- (vi) No explanation has been provided as to why there was such a delay between the incident on 18th March 2017 and Mr. Moyes being asked to provide his observations on 3rd April 2017.

4.3 The FA relies on the apology and says that it is consistent with Mr. Moyes knowing that what he said was wrong. Mr. Gilroy described it as a "*Catch 22*" scenario for him. If Mr. Moyes had not issued some form of apology it would be relied upon as elevating the seriousness of the matter, or as evidence of lack of insight on his part. The fact that he did make an apology was being relied upon as both evidence of his guilt and of his knowledge that he was guilty as charged. Mr. Gilroy submits that Mr. Moyes simply "*cannot win*".

4.4 Further, in a section of his outline written submission entitled “*Closure*” Mr. Moyes says that Ms. Sparks, the BBC, and Sunderland, all consider the matter to be closed following his apology. Mr. Gilroy submitted that no purpose of the “*wider interests of the game*” would therefore be served by the pursuit of the charge which, in the circumstances, he says is disproportionate. Against that, though, is the fact that The FA does not regard the matter as closed, as its prosecution of the charge to a hearing demonstrates. That is the prerogative of a regulatory body with a duty to protect its sport. Mr. Moyes has denied the charge, which is his prerogative. If the “*Closure*” point is relevant at all, it can only be at the sanctions stage. It is not open to us to dismiss the charge on the ground that all of those who were involved in the incident are said to have “*moved on*” and consider the matter to be at an end.

4.5 It is a curiosity of this case that there is no witness statement, or any other kind of direct evidence from Ms. Sparks herself. Instead, her evidence is given second-hand by Ms. Slater who, at paragraph 4 of her statement, says this:

“Both Ms. Sparks and the BBC consider the comments made by Mr. Moyes unacceptable and unprofessional. However, it should be noted that, whilst Ms. Sparks felt uncomfortable during the incident as a result of the language used and the tone of delivery, she did not feel physically threatened by Mr. Moyes.”

In the absence of any first-hand evidence from Ms. Sparks, that hearsay statement of her reaction is the best evidence that we have. It is broadly consistent with what Mr. Moyes says transpired between them when he rang her to apologise. As the test is an objective one, Ms. Sparks’ subjective reaction to Mr. Moyes’ comments is not determinative, although it seems reasonable to assume that an objective person - and someone who we also presume to be of reasonable fortitude - is unlikely to have reacted to, or perceived, the comments more adversely than Ms. Sparks did.

“Improper”

4.6 The definition of ‘improper’, according to the Oxford English Dictionary (‘OED’), is

“1(a) unseemly, indecent (b) not in accordance with accepted rules of behaviour. 2 inaccurate, wrong”

4.7 The Commission was able to draw on its collective experience of human expression and use of language. On the balance of probabilities, we are comfortably satisfied that Mr. Moyes’ comments were improper, on any objective analysis of what he said and how he said it. Even if there are two ways in which “*a slap*” is understood where he grew up, we are satisfied that most people would regard it as a reference to the use of physical violence. To warn a journalist that he or she “*might get a slap*”, sandwiched between two warnings, falls significantly below acceptable norms and standards of behaviour. It is not merely “*unseemly*”, but entirely inappropriate.

4.8 It is also no answer for Mr. Moyes to say that his comments were intended as mere banter, or a joke, and were not to be taken seriously. We are satisfied from his oral evidence to us that he was at least irritated by what he considered to be a “*rude*” question and that he wanted to convey the sense to Ms. Sparks that, in asking it, she had crossed what he regarded as an acceptable boundary; “*a little close to the wire*” is how the Club described his view of it in correspondence. He was laying a marker down. Further, the point itself was unwarranted. When Ms. Sparks asked him whether he felt under any additional pressure due to the presence of the Club Owner at the match, it was a reasonable question for a journalist to ask and one that he might have anticipated. It did not merit any censure. Mr. Moyes compounded matters by seriously misjudging the words he used to make his point.

4.9 Ms. Sparks' subjective reaction according to Ms. Slater, namely to have felt "uncomfortable", reflects the way in which we find a reasonable observer would have reacted to Mr. Moyes' comments. In our judgment, it is objectively a reasonable and proportionate response to them, without any hint of exaggeration.

4.10 Any doubt as to whether Mr. Moyes' comments to Ms. Sparks were improper - and there can be none - is dispelled by what he himself said to the media after they came to light, including the following fulsome admission:

"In the heat of the moment, I made a mistake in my comment to a BBC reporter which I profoundly regret. I was disappointed with myself for it. I subsequently phoned the reporter and apologised, which she accepted. Its not my character, its not my type, as most people know. Once again, I apologised for it. I think people who know me would say what I'm about. In the heat of the moment I used the wrong words."

We did not need to draw any inference from Mr. Moyes' multiple expressions of contrition in order to arrive at our decision that his comments were improper but, having done so, it was not difficult for us to find them to be consistent with an awareness on his part that they were.

4.11 As both Parties accept that the allegations set out in the charge are disjunctive (*i.e.* should be read separately), it follows that we find the charge proved. For the purposes of penalties, and also in the event of any further proceedings in this matter, we shall go on to address the other two ways in which Mr. Moyes' comments are alleged to have been in breach of Rule E3(1).

"Threatening"

4.12 In the OED, "threat" is defined as:

"1. A declaration of an intention to punish or hurt."

And “threaten” is defined as:

“1. Make a threat or threats against. 2. Be a sign or indication of (something undesirable). 3. Announce one’s intention to do an undesirable or unexpected thing. 4. Give warning of the infliction of (harm, etc).

It follows that for words and/or conduct to be threatening, the indication or anticipation of physical violence is not essential; a declaration to impose some other kind of sanction or punishment, that is either “*undesirable or unexpected*”, is capable of amounting to a threat, or something that is threatening. Inevitably, there is a scale of seriousness, depending on the nature of the threat and how it is communicated.

4.13 We find that a reasonable objective person who may have read Mr. Moyes’ comments in print only would have understood them as a threat of physical violence. The warnings to “*just watch yourself*” and “*careful the next time you come in*”, either side of the “*slap*” reference, amounts to a clear and obvious threat of that kind, in our judgment.

4.14 In their fuller context, the video footage shows that the comments were delivered with some purpose, but not in an overtly confrontational manner. Mr. Moyes was smiling, as was Ms. Sparks. There was, though, a suggestion that she was smiling nervously, which would be consistent with her feeling “*uncomfortable ... as a result of the language used and the tone of the delivery ...*” The reaction of the others who were present is unclear. We accept that Mr. Moyes did try to infuse his point with an element of humour. At the same time, however, we also accept Ms. Graham’s submission that a threat may be communicated in a calm manner, or even as a ‘joke’, but is still capable of being perceived as a threat.

4.15 According to the statement of Ms. Slater, Ms. Sparks did not feel “*physically threatened*”, and it seems to the Commission unlikely that any reasonable person would have reacted any differently. It is not The FA’s case that Mr. Moyes ever intended to use physical violence against Ms. Sparks. The context in which Mr. Moyes said what he did no doubt informed her subjective assessment of the comments and reaction to them. In the same way, it would also inform the reaction of a reasonable person. There was no direct or indirect evidence before us as to how Ms. Sparks might feel the next time she had to interview Mr. Moyes and so we cannot use her subjective feelings as any kind of indicator of an objective reaction. In our judgment, the comments are likely to affect the way in which a journalist in the same position as her would conduct any future interview with him.

4.16 In this regard, the Commission also noted that when his comments came to light, Mr. Moyes gave a press conference, during which the following exchange took place:

Reporter: “*But that particular language, **threatening** to slap someone, how regrettable was that?*” [emphasis added]

Mr. Moyes: “*I have said that I regret it. I have spoken to the girl, who I apologised to, and she accepted it.*”

In answering the question as he did, and not rejecting the proposition that was put to him, Mr. Moyes appeared to accept that his comments were threatening. He also did not demur when it was later put to him “... *there is going to be anger about this*”. We further note that he was motivated to contact Ms. Sparks to apologise because he “...*did not want her to feel uncomfortable the next time she came in*”, an implicit acknowledgment by him that he had said something that may have caused her to be anxious or concerned.

4.17 Since the test is an objective one, the critical views expressed on social media in response to Mr. Moyes' comments, one of which referred to his "*sexist threats*" (see *The Guardian* on-line, Monday 3rd April 2017), provide us with an insight into how they were perceived by a reasonable bystander. We ignore the reference to "*sexist*", but do not consider that it detracts significantly from the concern expressed about the "*threats*", which are self-standing. The range of reasonable reactions to the comments was within a narrow compass. They are reflected in the questions that were asked of Mr. Moyes when he was interviewed, and his responses, as well as the comments referred to on social media. The reasonable range of responses does not include those who would dismiss the comments as non-actionable banter.

4.18 In all the circumstances, we further find that the threat of physical violence was not one that a reasonable person viewing the video footage would seriously consider Mr. Moyes would carry through with. Instead, the implication of his comments was that Ms. Sparks had had her 'card marked' by him in terms of the way in which she should do her job if, and when, she interviewed him in the future: how he was likely to react to certain lines of questioning, particularly those that he might take objection to - even objectively reasonable questions -, and how 'crossing the line' might affect the development of a professional relationship between them. On Mr. Moyes' own case, she would get a "*verbal slap*" if she crossed that line. In our judgment, that is still a threat, albeit lower on the spectrum of threatening behaviour than a threat of physical violence expressed with serious intent.

4.20 Accordingly, based on our findings, we are satisfied on the evidence and to the required standard of proof, that Mr. Moyes' comments were threatening and that this element of the charge has also been proved.

“Brought the game into disrepute”

4.21 It is detrimental to the image and standing of the game of football for any manager to make comments of the kind made by Mr. Moyes. He may not have intended that they would be widely publicised, but the fact remains that they were. The significant adverse public reaction they have generated on the limited evidence before us reflects negatively on the game of football and brings it into disrepute.

5. PENALTIES

5.1 Regulation 8.1 of the *Disciplinary Procedures* sets out the powers available to a Regulatory Commission when considering sanctions. For economies of scale, we do not propose to set them out in their entirety here. We were told that no sanction guidelines exist for this type of offence. It is simply a question of taking into account all of the relevant factors in the particular case, including any aggravating and mitigating features, whether a Participant admitted or denied the allegations, and whether there are any relevant antecedents (*i.e.* disciplinary history). Although The FA accepted that that the Commission might seek guidance and draw comparisons from previous cases, each one turns on its own particular facts. We were not provided with any previous decisions with comparable facts by either The FA or Mr. Moyes, the simple reason being that there are none.

Aggravating features

5.3 The aggravating features of the offence are these:

- (i) As we have indicated, we reject Mr. Moyes' complaint that Ms. Sparks' questioning of him was rude. The question that he particular took exception to was reasonable. There was therefore no basis for him to respond in kind (*i.e.* to be rude back).

- (ii) We accept that Mr. Moyes attempted humour, but it was still his intention to convey a point to Ms. Sparks, which he succeeded in doing, and in an entirely inappropriate way.

- (iii) We could not fathom Mr. Moyes' unwillingness to accept during the cross-examination of him that a slap across the back of the legs with a flat hand constitutes physical violence. That seemed to us to demonstrate a lack of basic understanding on his part.

- (iv) It is wholly unacceptable for a Participant, particularly a high profile Premier League manager whose statements/opinions are closely scrutinised, to threaten physical violence towards a journalist in the terms used by Mr. Moyes, or at all, even if the threat was not one that Ms. Sparks, or any reasonable person who saw the video footage of his comments, seriously thought that he would carry out. Although such a person would have reasonably understood the threat to be of a lower order than physical violence, it was nevertheless capable of impinging upon the way in which a journalist in Ms. Sparks' position would do the job of interviewing Mr. Moyes in the future.

- (v) We do not attach any great weight to Ms. Graham's "*power imbalance*" point. Ms. Sparks was entrusted with a high profile interview by the BBC. She did not shy away from asking questions. It seems to us that the more pertinent point is that Mr. Moyes was not familiar with her, rather than their relative experience/inexperience. It was that lack of familiarity which informed what he said to her about how she should conduct herself in future, if and when she interviewed him again.

- (vi) Mr. Moyes has two previous breaches of FA Rule E3 within the last five seasons; the most recent being in the season that has just ended, and for which he received a one-match touchline suspension for comments made to match officials. This raises concerns that he has failed to respond to previous sanctions that have been imposed on him, including a recent one.

Mitigating features

5.4 The mitigating features include the following:

- (i) Post-match interviews take place as soon as a game has finished. There is not just one interview to give, but several. Football managers have particular skills that people employed in other walks of life do not have. An ability to communicate is clearly essential, but managers do not always use words with the forensic care of a lawyer. That is particularly so in the immediate aftermath of what may have been a disappointing result, when feelings are running high, and where there is often pressure. In that environment, managers have to field questions and respond to them without any time to prepare. A consistent theme of Mr. Moyes' oral evidence to us was his grievance that managers are given insufficient protection in their dealings with journalists, and also the scale of their media commitments. We do not underestimate the difficulties in saying the right thing, first time, when then there is only one chance to get it right, and where getting it wrong could result in a misconduct charge.
- (ii) Having said all of that, Mr. Moyes' language on this particular occasion fell significantly short of what could reasonably be regarded as acceptable, even when one makes generous allowance for all of the factors referred to above. To characterise what he said as banter, or a poor choice of words, underplays their significance and seriousness.

- (iii) We accept that Mr. Moyes did not anticipate that his comments would be widely published, although we have rejected his argument that that expectation was reasonable.

- (iv) Mr. Moyes apologised to Ms. Sparks personally, and publicly via interviews with the press. His apologies were timely, and apparently profuse and sincere. However, even when one puts his other defence arguments to one side, Mr. Moyes maintained his denial throughout the proceedings that his comments were even improper. This was so, despite giving an interview in which he said that his words were "*wrong*" and that he "*deeply*" and "*profoundly*" regretted them. The two positions that he has maintained are contradictory; likening it to a "*Catch 22*" situation casts him in the role of the victim and seeks to blame others for his predicament. If he did not say anything that was improper, then there was no reason to apologise. The impression that has instead been created is that the apologies were cosmetic, and only made because Mr. Moyes felt that they were expected of him in an attempt to diffuse a difficult situation in which he found himself, and perhaps to avoid any further repercussions. To that end, we note what Ms. Slater says at paragraphs 5 and 6 of her statement about how Mr. Moyes came to speak to Ms. Sparks, and what prompted him to do so. In his oral evidence to us, Mr. Moyes maintained that he had made the call "*off his own back*". On that issue, we are prepared to give him the benefit of the doubt, but the credit to which he would otherwise be entitled for his timely apologies is reduced somewhat by the residual concerns that we have as to why and when he made them.

- (v) In turn, the uncertainty surrounding Mr. Moyes' apologies feeds into his "*Closure*" point, insofar as it is relied upon in mitigation of sanctions. Nevertheless, we take into account the fact that those involved in this incident consider the matter to be resolved.

Fine

5.5 As there is no allegation of aggravated breach by reference to gender, a sporting sanction was not indicated, unless we found that Mr. Moyes' previous disciplinary record disclosed a recidivist pattern of offending. It does not. We decided that a financial penalty was appropriate. Our starting point was to consider Mr. Moyes' income, as set out in his Reply to the charge. We then took into account the nature and seriousness of the offence, based on our findings. When placed in the scales, we considered the aggravating and mitigating factors to be broadly equal in weight. Upon completion of that exercise, we concluded that an appropriate fine for the offence was one of £30,000 (thirty thousand pounds).

Costs

5.6 In addition to the financial penalty, we order that Mr. Moyes should pay the full costs of the Regulatory Commission, details of which shall be provided to him by The FA's Judicial Services. We did consider whether we should make any reduction in the costs incurred in relation to the natural justice issue, which required substantial consideration, but decided against doing so for the following reasons:

- (i) Costs should follow the event unless there are good reasons for departing from that course;
- (ii) The hearing on 17th May 2017 had to be adjourned to give The FA a reasonable opportunity to respond to the submission that the charge should be dismissed;
- (iii) Although certain statements made by Mr. Clarke were regrettable, the fact that the natural justice point would not otherwise have arisen is not a good reason for departing from the principle that the losing party should pay the costs on a discrete issue such as this. Mr. Moyes chose to pursue the point, as he was his entitlement. We rejected it for the reasons set out above.

6. APPEAL

- 6.1 Both Parties have a right of appeal against our decision. Due to the truncated way in which the proceedings before the Regulatory Commission took place, we direct that the timing of notification of an intention to appeal against any aspect of the decision (breach and/or penalties) shall be in accordance with paragraph 1.3 of The FA's *Regulations for Football Association Appeals* ('*Commencement of Appeal*') and the relevant date under paragraph 1.3(2) shall be the date of these Written Reasons.
7. Finally, we wish to thank Counsel who were involved in the proceedings before us for their assistance, including the two sets of further written submissions that they were each required to prepare following the hearing.

Dated: 12th June 2017

The Independent Regulatory Commission

Mr. Craig Moore, Barrister, Chairman

Mr. Marvin Robinson, Independent Member of The FA's Judicial Panel

Mr. Alan Hardy, Independent Member of The FA's Judicial Panel

Appearances

The Football Association

Ms. Amina Graham, Head of FA's Regulatory Advocates

Mr. Jonathan Laidlaw QC (written submissions on the issue of natural justice)

Mr. David Moyes

Mr. Paul Gilroy QC

Ms. Lindsay Gordon, Director, In-House Lawyer, League Managers' Association