IN THE MATTER OF THE DISCIPLINE COMMISSION OF THE FOOTBALL ASSOCIATION SITTING ON BEHALF OF OXFORDSHIRE FOOTBALL ASSOCIATION

BETWEEN:

THE FOOTBALL ASSOCIATION

-and-

MR. MARK CRANE

DECISION AND WRITTEN REASONS OF THE COMMISSION

Commission:	Ifeanyi Odogwu (Chairperson) – Independent Legal Panel Member
Secretary:	Mark Ives – Head of Judicial Services
Date:	8 July 2020

Introduction and Summary

1. This is the decision and written reasons of the Discipline Commission considering the non-personal hearing of Mr. Mark Crane ("MC"), the National Futsal League Secretary. By necessity it is a summary document, and does not purport to rehearse all the evidence and submissions that were considered.

2. This case relates to a post on MC's Twitter account on 7 June 2020. By charge letter dated 17 June 2020, MC was charged with a breach of FA Rule E3 – Improper Conduct (including foul and abusive language) ('Charge 1') and FA Rule E3(2) - Improper Conduct - aggravated by a person's Ethnic Origin, Colour, Race, Nationality, Faith, Gender, Sexual Orientation or Disability ('Charge 2'). It

is alleged that the Twitter post was made by him, and the remarks amounted to Aggravated Misconduct as they contained protected characteristics, including reference to disability.

3. MC admitted to posting the Tweet, but denied the Charges. He requested a non-personal hearing.

4. Both Charges were found been proved. Sanction is ordered as follows:

   (1) 6 week suspension from all football and footballing activity, up to and including 24 August 2020.

   (2) Fined the sum of £350.

   (3) One-to-One Education Workshop to be conducted within 4 Months. The failure to attend the education workshop will result in an immediate suspension until such time as the workshop has been attended.

Background Facts

5. On 8 July 2020, MC posted the following Tweet on his Twitter account 'Mark_Crane'; "This has been a hoot fellas, but I need to log off now for an early start tomorrow. I haven't had so much fun since I taught special educational needs classes in Norfolk back in 1986! Tonight the memories came flooding back" (hereinafter referred to as 'the Tweet').

6. The Tweet was in reply to a Twitter conversation (commonly known as a 'Thread') between a number of individual members of the public who were discussing the merits of the futsal league structure as it currently exists in England.

7. A copy of the Tweet is exhibited in my papers, as was a full transcript of tweets that formed the Twitter conversation.

8. On the same day, a member of the public, who shall be referred to in these reasons as 'Complainant 1', sent an email to The FA and Oxfordshire FA ('the County/CFA') where he reported the Tweet. He stated, inter alia, 'The below tweet is made as a derogatory remark to other people in a twitter argument which includes a reference to Disability.'

9. The County received a further report about MC's tweet from another member of the public, 'Complainant 2', on 10 June 2020.

10. As is quite usual in investigations of this nature, the County sought observations from MC. On 17 June December 2019, MC responded and expressed his dismay that The FA were investigating the Tweet. He explained that he taught a special educational needs class in Thetford, Norfolk in the 1980s, which comprised of students with behavioural problems and not a physical or mental disability. He also submitted that there was a distinction between special educational needs and disability under the Equality Act 2010. Rather, he stated that the children he taught were poorly behaved and, "generally talked a lot of rubbish, much like the individuals I was responding to on Twitter, which is why the memories of dealing with these hyperactive, illogical, and troubled kids sprang to mind!" Finally, he described the complaint as frivolous due to a dispute between his league and the league associated with Complainant 1.

11. As already mentioned, the County raised two Charges against MC. MC denied the Charges and submitted further representations, dated 26 June 2020. He made the following points, *inter alia:*

    (1) The language used in the tweet was neither foul nor abusive. Abusive language covers more serious language and behaviour and contains an element of potential threat, menace, harassment or humiliation, which are not present in his Tweet.

(2) Charge 2 conflates special educational needs with disability, which is not factually correct. There is a difference between special educational needs and disability. He relied upon Norfolk County Council webpage, which states, "Children and young people who have special educational needs (SEN) do not necessarily have a disability".

(3) The Charge notification specifically states that the Improper Conduct charge is based on foul and abusive language and not on the other Rule E3 categories of violent conduct, serious foul play, or threatening, indecent or insulting words or behaviour. Therefore, it would be unfair that the Charges specify one category of offence, but a disciplinary commission decides to find a different one is proven.

(4) He deleted the relevant tweet within 24 hours of receipt of the Misconduct Charge Notification.

(5) He has the right to freedom of expression.

(6) The motives of the complainants in reporting the Tweet are disingenuous.

(7) The FA's disciplinary process is not fit for purpose; the balance of probabilities test is improper.

The Rules

12. The applicable FA Rule E3 states:

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

"(2) A breach of Rule E3 (1) is an "Aggravated Breach" where it includes a reference to any one, or a combination of the following:- ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability."

13. General Provision of The FA Handbook states:

4. The bodies subject to these General Provisions are not courts of law and are disciplinary, rather than arbitral, bodies. In the interests of achieving a just and fair result, procedural and technical considerations must take second place to the paramount object of being just and fair to all parties.

5. All parties involved in proceedings subject to these General Provisions shall act in a spirit of co-operation to ensure such proceedings are conducted expeditiously, fairly and appropriately, having regard to their sporting context.

6 The bodies subject to these General Provisions shall have the power to regulate their own procedure.

7 Without limitation to paragraph 6 above, any breach of procedure by The Association, or a failure by The Association to follow any direction given (including any time limit), shall not invalidate the proceedings or its outcome unless the breach is such as to seriously and irredeemably prejudice the position of the Participant Charged.

The Decision

14. I firstly address MC's representations as to the standard of proof. The burden of proving the allegation rests upon the County. Pursuant to Regulation 8, General Provisions, The FA Disciplinary Regulations 2019/20 ('Disciplinary Regulations'), the standard of proof is the civil standard, namely the balance of probabilities.:

15. The balance of probabilities is a "single unvarying standard"[1]. In *Re D* (Secretary of State for Northern Ireland intervening), [2008] UKHL 33 Lord Carswell in his speech with which the other Lords agreed, described it as "finite and unvarying"[2]. The balance of probabilities therefore means what it says: "a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not"[3].

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

17. Lord Carswell's observations in *Re D* neatly encapsulate how the standard of proof ought to be applied:

18. *"The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts surrounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of*

[1] per Mitting J in R. *(Independent Police Complaints Commission) v Asst. Commissioner Hayman* [2008] EWHC 2191 Admin at para.20.
[2] §28
[3] Per Lord Nicholls of Birkenhead, *re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 , 586

those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."[4]

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

20. In assessing liability, I was mindful of the issues to be determined in the case. MC accepts sending the Tweet in question. The issues were whether I was satisfied to the requisite standard that the evidence before me proved that the Tweet was either:

    a. Foul, <u>or</u> abusive, for the purposes of Charge 1. (I address the wording of the Charge Letter using "and" as opposed to "or" below)

    And/or

    b. Made reference to disability so as to satisfy the aggravated Charge 2.

21. The appropriate test is an objective one, commonly known as the 'reasonable observer' test. In other words, I was to consider how a reasonable observer would perceive the words used in the given context. The objective person would be someone of reasonable fortitude. That is entirely consistent with how the test has been previously applied in similar cases, including on appeal in *The FA v Jose Mourinho* decision.

22. The terms 'foul', 'abusive' or 'disability' are not strictly defined by the Regulations, and I consider they should be given their ordinary meaning.

[4] §28

23. The ordinary meaning of abusive language generally refers to offensive and insulting words directed at another person. The Oxford English Dictionary definition of "abusive" includes '[…] speaking to someone in an insulting or offensive way".

24. At this point it is worth addressing MC's submission with respect to the drafting of the Charges. The omission of '*insulting words*' in either of the Charges against him can be addressed briefly. It is not material in this case. As mentioned above, the definition of abusive language covers language which is insulting.

25. Foul language does not appear to me to be contentious. In any event, no foul language was used in the Tweet. In my view, this limb of the Charge falls away.

26. MC does not take a technical point in respect of the word "and" in 'foul and abusive language' as set out in the Charge Sheet. Rightly so. The E3 Charge, whilst unhelpfully drafted by the County on the Charge Sheet, is not intended to be conditional on both elements being found proven, namely foul <u>and</u> abusive language. Indeed, the Rule E3 does not even contain a provision dealing with "foul language" per se, although this can be implied into the extremely broad scope of the Rule. To hold otherwise and require foul language to be proved would be contrary to the actual Rules, it would lead to a triumph of form over substance and, further, open the way to all sorts of irregularities where obvious egregious language may circumvent sanction. This is entirely inconsistent with the General Provisions of the Disciplinary Regulations.

27. As to 'disability', Section 6 of the Equality Act 2010 ('the Act') contains the statutory definition of disability:

(1) A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

28. A substantial effect is one that is more than 'minor or trivial': s. 212(1). This is a very modest hurdle to surmount. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

29. Paragraph 2 of Sch 1 of the Act provides that for the purpose of deciding whether a person is disabled, a long-term effect of an impairment is one which (1) has lasted for at least 12 months; (2) is likely to last for at least 12 months; (3) is likely to last for the rest of the life of the person affected;

30. It is clear then that a disability encompasses a very wide range of impairments, including learning disabilities, as per the Equality Act 2010: 'Guidance on matters to be taken into account in determining questions relating to the definition of disability'. Whilst MC is correct in submitting not all special educational needs student will be automatically considered disabled under the Act, a significant number will clearly fall within the definition. Importantly, there is an obvious objective association between special educational needs as a learning difficulty and disability as defined under the Act.

31. Turning to the Tweet itself, I place little, if any, weight on the complainants purported harm that the Tweet is said to have caused them subjectively. Liability does not turn on this finding so their motives are not relevant. As mentioned above, the test is an objective one.

32. The reasonable observer would have understood the context of the Tweet, including the sequencing of events and the Thread to which it related to. The Tweet was a satirical reference to children with learning difficulties. MC's own account was that he was seeking to draw a comparison between his experience of the types of behaviour displayed by special educational needs students and those of the individuals in the conversation, whom he apparently disagreed

with. He describes those particular features as talking "a lot of rubbish", and "hyperactive, illogical, and troubled […]"

33. Objectively, it is clear the content of the Tweet was disparaging whether or not the intention was satirical. That is not mutually exclusive with the comments being insulting and abusive, which I consider it to be. Therefore, I am satisfied Charge 1 is proved.

34. As to whether the Tweet was abusive and made reference to disability, as I have already discussed above, there is an irresistible close association between special educational needs and disabilities. Particularly when used as an insult, as it was in this context, rather than a term of art in the educational sector. An informed and objective bystander would have perceived the Tweet as abusive with reference to disability. Charge 2 is therefore proved.

35. I therefore am satisfied find that the County have proved MC's Tweet to be in breach of FA Rule E3 and both Charge 1 and Charge 2 are found proved.

Sanction

36. Following the decision on liability, I was informed of MC's previous misconduct charge within the past 5 seasons.

37. My attention is drawn to a very recent breach of FA Rule E3, occurring four months before the present charge - the decision of that case was handed down a day before the Tweet in this case was posted. The previous case also involved a post on Twitter by MC. It is not necessary for the purposes of these reasons to set out the detail of that case. It suffices to state that it was not Aggravated and MC received a fine of £250 and was warned as to his future conduct.

38. I am aware of a precedent of similar cases of Aggravating FA misconduct Charges against non-playing Participants. They invariably each involve a period of suspension, an educational requirement, and fine.

39. The previous decisions on sanctions are not binding on this Commission. In the end, each case turns on its own facts and it is not appropriate to simply rachet up the suspension. I recognises for my part that penalties in individual cases should be broadly within any established range for offences of similar type and gravity. Notwithstanding this, the record of multiple breaches due to social media use in close time proximity is an aggravating factor, as of course is the Aggravated nature of the Charge.

40. The starting point for sanction is the FA Rules and Guidelines.

41. Rule E3(2) provides mandatory minimum sanctions. Those are set out in Disciplinary Regulation 46, which provides:

"Whether or not a suspension has been imposed by the Regulatory Commission in accordance with paragraphs 47 to 50 below, in respect of an Aggravated Breach that Regulatory Commission:
46.1 must order that the Participant who commits an Aggravated Breach be subject to an education programme, the details of which will be provided to the Participant by The Association;
46.2 may impose a financial penalty or any other sanction that it considers appropriate.

42. Disciplinary Regulation 47 provides:

"*Subject to paragraphs 48 and 49 below:*
47.1 where a Participant commits an Aggravated Breach for the first time, a Regulatory Commission shall impose an immediate suspension of at least six Matches on that Participant. The Regulatory Commission may increase the suspension where additional aggravating factors are present.

47.2 [does not apply]…."

43. Regulations 48 applies here.

" Where an Aggravated Breach is committed:

48.1 by a Participant for whom a match-based suspension would be inappropriate due only to that Participant's particular role in football (for the avoidance of doubt, this sub paragraph shall not apply to a Manager, coach or Player);

48.2 in writing only;

48.3 via the use of any communication device, public communication network (to include, but not limited to, social media) or broadcast media only; or

[…]

a Regulatory Commission will not be bound to impose an immediate suspension of at least six Matches for a first such breach, or of no fewer than seven Matches for a second or further such breach. Instead the Regulatory Commission may impose any sanction that it considers appropriate, taking into account any aggravating or mitigating factors present.

44. This is the Participant's first Aggravated Breach. The minimum sanction is a suspension of at least six matches. However, Regulation 48 provides that in this case the sanction is at my complete discretion, with no minimum or maximum tariff. I shall consider and have regard to mitigating and/or aggravating factors.

45. I noted representations from MC which touched briefly on sanction.

46. MC has contested the Charges. It was his right to defend his case. However, as proven Charges, MC was unable to avail himself to any credit that he would have received had he accepted the Charges.

47. I do consider there to be aggravating features of this case beyond the Aggravated nature of Charge 2. The very recent previous misconduct breach for a social media post and MC's position within the game is further aggravating factors.

48. As for relevant mitigating features:

a. The post was eventually deleted, albeit only after MC was charged.
b. MC has no previous Aggravated charges.
c. The offending comment was contained on one Tweet.

49. I have balanced the competing factors and assessed all that I have read and heard. In doing so I am alive to the risk of, and guard against, double-counting of the two Charges since they in reality relate to one Tweet. I will sanction in totality.

50. I order MC to undergo and complete to The FA's satisfaction an education course, face to face, the details of which will be provided to him by The FA. This is to be completed within 4 months of this decision.

51. I have taken a fair and realistic assessment of MC's level in the game and the Charge itself, and consider a fine of £350 is reasonable and appropriate.

52. There should also be a sporting suspension in my view, due to the serious nature of the Charge. The FA has reflected the gravity of Aggravated offences by, *inter alia,* providing for a minimum of a six-match suspension for players, coaches and non-playing staff in the Guidance. MC's conduct undermines campaigns to promote inclusivity, equality and diversity. On the other hand, there are the features of mitigation identified above. Due to the COVID-19 pandemic, the period of a sporting sanction ought to be carefully considered so that it is meaningful and effective. I also take into account the position MC holds in futsal and the impact any sporting sanction would have on the National Futsal League and Oxford City Futsal Club.

53. I make the following orders, which I considered fair and proportionate;

a. 6 week suspension from all football and footballing activity, up to and including 24 August 2020.

b. Fined the sum of £350.

c. One-to-One Education Workshop to be conducted within 4 Months. The failure to attend the education workshop will result in an immediate suspension until such time as the workshop has been attended.

54. This decision is subject to appeal in accordance with the relevant regulations within The FA Handbook.

Ifeanyi Odogwu (Chairman),

13 July 2020