

FOOTBALL ASSOCIATION REGULATORY COMMISSION

In the matter of disciplinary proceedings brought pursuant to the Football Association Rules for the season 2014-2015

THE FOOTBALL ASSOCIATION

-AND-

DAVE WHELAN

Commission: David Casement QC (Chairman)

Barry Bright

Stuart Ripley

Date: 30 December 2014

WRITTEN REASONS OF THE REGULATORY COMMISSION

Introduction

1. Dave Whelan is a former professional footballer and is the current owner and Chairman of Wigan Athletic AFC. These proceedings arise out of comments attributed to Mr Whelan in respect of an interview (“the Interview”) that was given by Mr Whelan to David Conn, a journalist, and which was published on the Guardian website on 21 November 2014.

2. The Interview took place against a background of media interest in the appointment of Malky Mackay as the manager of Wigan whilst there was an ongoing investigation by The Football Association (“The FA”) in respect of various text messages and emails from Mr Mackay referring to Phil Smith, a Football Agent who is Jewish, and separately referring to the owner of Cardiff City FC, Vincent Tan. One of the reported text messages alleged to have been sent by Mr Mackay, whilst he was manager at Cardiff City, to Mr Smith is reported to have said “Nothing like a Jew that sees money slipping through his fingers.” It was further reported in the media that an email written by Mr Mackay referred to Mr Tan as a “chink.”
3. Given that Mr Mackay is the subject of an ongoing investigation by The FA the Commission makes no comment in respect thereof save to say that the fact and the general nature of that ongoing investigation, as reported in the media, provide important background to the proceedings with which this Commission is seized.
4. Mr Whelan has pleaded guilty to the charge raised against him and has not requested a personal hearing but has asked that the charge is dealt with on the documents provided to the Commission. It is noted that Mr Whelan has not accepted every particular of the charge raised against him and therefore the Commission will make findings in respect of those matters that are not admitted.

Proceedings

5. By charge letter dated 27 November 2014 Mr Whelan was charged with abusive and/or insulting and/or improper conduct and/or bringing the game into disrepute in contravention of Rule E3(1) of the Rules of The Football Association Limited (“the Rules”).

6. The words attributed to Mr Whelan as having been said during the Interview and which gave rise to the charge are as follows:

“The Jews don’t like losing money. Nobody likes losing money.”

(Statement One)

“Do you think Jewish people chase money a little bit more than we do? I think they are very shrewd people” (Statement Two)

“I think Jewish people do chase money more than everybody else. I don’t think that’s offensive at all.” (Statement Three)

“It’s telling the truth. Jewish people love money, English people love money; we all love money.” (Statement Four)

“If any Englishman said he has never called a Chinaman a chink he is lying..” (Statement Five)

“There is nothing bad about doing that. It is like the British Brits, or the Irish Paddies.” (Statement Six)

7. The FA also allege that the breach of Rule E3(1) is an Aggravated Breach as defined in Rule E3(2) of the Rules because it includes reference to ethnic origin and/or race and/or nationality and/or religion or belief.

The Rules

8. Rule E3 (1) states:

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

9. Rule E3(2) states:

“A breach of Rule E3(1) is an “Aggravated Breach” where it includes a reference, whether express or implied, to any one or more of the following: - ethnic origin, colour, race, nationality, religion or belief, gender, gender assignment, sexual orientation or disability.”

10. Rule E3(3) provides for a minimum suspension for five matches in the event of a first Aggravated Breach of Rule E3(1). Rule E3(3) however has no application in the present case because it is disapplied by Rule E3(4) of the Rules where the Aggravated breach is committed in writing only, via use of any communication device, public communication device or broadcast media only or by reference to nationality only. Rule E3(4) provides that the Regulatory Commission may impose any sanction that it considers appropriate, taking into account any aggravating or mitigating factors present.
11. Rule E3(8) of the Rules provides that the Commission may impose a financial penalty or any other sanction that it considers appropriate in respect of an Aggravated Breach of Rule E3(1) whether or not it has imposed a suspension in respect of the same breach. Rule E3(9) states that a Participant who commits an Aggravated Breach of Rule E3(1) will be subject to a mandatory education programme, the details of which will be provided to the Participant by The FA.

Submissions on behalf of Mr Whelan

12. Solicitors on behalf of Mr Whelan namely Brabners LLP (“Brabners”) have provided detailed written submissions on his behalf in their letters dated 12 December 2014 and 22 December 2014, the latter being in reply to The FA’s response letter dated 18 December 2014. The letters from Brabners are in addition to the letter written by Mr Whelan himself dated 26 November 2014 in response to The FA’s request for his comments.

13. Although Mr Whelan has admitted in his Reply Form that he accepts the charge he maintains that he does not admit that he made all of the comments set out in the charge letter. In particular it is denied that he made the following statements:

“Do you think Jewish people chase money a little bit more than we do? I think they are very shrewd people” (Statement Two)

“I think Jewish people do chase money more than everybody else. I don't think that's offensive at all.” (Statement Three)

14. Other submissions made on behalf of Mr Whelan are to the effect that certain words that he used have been omitted so the quotations are inaccurate and/or out of context. In particular Brabners submit that Mr Whelan also recalls that he referred to the fact that “Jewish people worked hard for their money and were understandably keen to reap the rewards of such hard work.”
15. The overarching point raised on behalf of Mr Whelan is that The FA have brought the charge and it is The FA that must prove the charge on the balance of probabilities. This includes proving that the quotations relied upon by The FA are accurate and also that no significant omissions were made from the comments of Mr Whelan.
16. It is clear that what Mr Whelan actually said during the Interview, ie whether Statements Two and Three were made and whether there were any serious omissions by the interviewer of any comments that might significantly affect meaning, are preliminary matters to be addressed prior to dealing with the mitigation submissions advanced on behalf of Mr Whelan.
17. In mitigation it is submitted on behalf of Mr Whelan that:

- (1) the context of the Interview was Mr Mackay's appointment as manager and given The FA investigation was ongoing Mr Whelan felt he had to explain why he considered it was appropriate to employ Mr Mackay even though the investigation was ongoing;
- (2) the comments made by Mr Whelan were in the context of an informal conversation with Mr Conn following his unsolicited telephone call to Mr Whelan. It is said that Mr Whelan did not deliberately set out to make comments on race or religion of his own volition;
- (3) the article was published by Mr Conn and the Guardian and not by Mr Whelan who "had not appreciated that Mr Conn's intention was to publish the contents of the conversation in the manner which occurred." It was submitted that the way the article was presented has suffocated what Mr Whelan was actually trying to achieve in his conversation with Mr Conn;
- (4) there is no record of the entire conversation with Mr Conn and the context is missing. There are said to be serious omissions from the published account of the Interview in particular Mr Whelan recalls that he said Jewish people work hard for their money. Likewise he recalls that it was Mr Conn who asked him "Do Jewish people chase money more than anyone else?";
- (5) the comments were not targeted at any individual or group of people and were not intended to be offensive.
- (6) racial stereotyping is a complex area and Mr Whelan's comments were not deemed to be offensive by all sections of the Jewish Community. Particular reliance was placed upon the

statement made by Professor Geoffrey Alderman, chair of Politics and Contemporary History and himself a practising orthodox Jew and who opined that Mr Whelan's comments could not be regarded as anti-semitic. It is said on behalf of Mr Whelan that this is evidence that not all sections of the Jewish community regard the remarks, even as reported by Mr Conn, as offensive;

(7) Mr Whelan made an immediate apology on BBC as soon as he realized his comments had been misunderstood and has already taken action to make amends. He has donated £5,000 to "Brookvale for the Mentally Handicapped", a Jewish organisation which is concerned with the care of the mentally disabled;

(8) Mr Whelan is not a racist as can be seen from his business life as well his private life including his support of charities;

(9) the early plea of guilty to the charges is such that it should attract credit when the Commission considers its sanction;

(10) Mr Whelan has enjoyed an exemplary disciplinary record over sixty years of his involvement in professional football.

Submissions on behalf of The Football Association

18. The FA accepts that it carries the burden of proof and that it must prove the charge on the balance of probabilities. Whilst the written response from The FA dated 18 December 2014 says that any doubt about what was said should be resolved in favour of Mr Whelan the Commission considers that its task is to weigh all the evidence before it, including any doubts arising therefrom, to determine on the balance of probabilities what was in fact said during the Interview.

19. It is submitted on behalf The FA that it is relevant that having asked the Guardian for a full transcript of the Interview such request was refused but the Guardian confirmed that:
- “... the Guardian and David Conn completely stand by the story that was published, and David Conn totally rejects any suggestion that he has misrepresented his conversation with Mr Whelan ...”
20. The FA submits that the Commission should take into account the fact that the Guardian is a well-respected broadsheet newspaper and Mr Conn is a well-respected sports writer and therefore the Commission should be satisfied that the statements alleged were in fact made by Mr Whelan.
21. Further The FA submits that on the one hand Mr Whelan stated in his letter of 26 November 2014 “I do not remember the exact comments that I made and therefore I cannot confirm whether the comments attributed to me are accurate” whilst on the other hand a well-respected journalist with a reputation to protect has not only published the comments but he, together with the Guardian newspaper, stand by the publication in its entirety and reject any suggestion of misrepresentation.

Findings

22. We find on the balance of probabilities, based upon the documents before us, that Statement Two and Statement Three were in fact comments made by Mr Whelan during the Interview. Our reasons for so concluding are as follows:
- (1) Mr Whelan was speaking with Mr Conn in the context of the reported comments made by Mr Mackay and in particular Mr Mackay’s reported comment “Nothing like a Jew that sees

money slipping through his fingers.” Mr Whelan’s objective in speaking to journalists including Mr Conn was clearly to explain and indeed justify his decision to employ Mr Mackay despite the on-going investigation into various comments of which this was one. In that context it appears likely that Mr Whelan was trying to explain away the reported comments of Mr Mackay and in that context he is likely to have deployed Statement Two and Statement Three;

(2) It is clear from a full reading of Mr Whelan’s letter of 26 November 2014, sent only five days after the publication by the Guardian when matters were relatively fresh in his mind, that he had no recollection one way or the other of what comments he made in the Interview. As well as the quotation set out above Mr Whelan also said in that letter “I am not suggesting that the journalist is not reporting the conversation accurately but I have no recollection of saying these words.” We therefore find that Mr Whelan is in no position to put forward any positive case as to what was said or not said in the Interview;

(3) Whilst no transcript has been obtained we are satisfied that the comments have been reported by a reputable newspaper and journalist who stand by the publication. Given their professional standing and in the face of a challenge to the publication’s accuracy they have stood by their article and in the absence of any credible challenge to its accuracy by Mr Whelan we accept the accuracy of the article.

23. Likewise, for the same reasons, we find on the balance of probabilities that there are no significant omissions from the Interview, as it is reported in the Guardian, that would have altered the meaning of the comments that were published.

Sanction

24. We are satisfied on the evidence before us that Mr Whelan is not a racist. We are equally satisfied on the evidence before us that Mr Whelan did not intend to cause any offense by his comments. It is clear that he himself is very upset by the words he used and he has moved quickly to apologise publicly, plead guilty and begin to make amends.
25. However as explained by the Regulatory Commission in The Football Association v Luis Suarez paragraphs 57 to 71 when dealing with charges under Rule E3(1) and E3(2), the words or conduct in question are to be viewed objectively and Mr Whelan's subjective intentions are irrelevant as far as breach is concerned.
26. The use of terms such as "chinks" and references such as those set out above in respect of Jewish people are offensive and insulting and have no place in football and are completely unacceptable. Such comments serve only to alienate parts of society and to bolster negative stereotypes. Those in positions of responsibility and influence within football have an obligation not to use such language or make such comments. We find that the comments made by Mr Whelan are obviously an Aggravated Breach of Rule E3(1) to which Mr Whelan has quite properly pleaded guilty.
27. Mr Whelan must be taken to have known that his comments would be widely reported. He was speaking to a journalist on issues that had attracted a lot of media attention. It should have been obvious to Mr Whelan that those comments were likely to be published on the internet and read by a large number of people.
28. We have taken into account all of the submissions regarding mitigation made on behalf of Mr Whelan insofar as they are not inconsistent with our findings and reasoning set out herein. In particular we take into

account Mr Whelan's early public apology, his guilty plea to the charge and the steps he has already taken to make amends. We also take into account his exemplary record in football. The Commission has decided that the appropriate sanction is as follows:

(1) Mr Whelan is suspended from football and football activities for a period of six weeks;

(2) Mr Whelan is fined the sum of £50,000;

(3) Mr Whelan will undertake a programme of education the details of which will be provided by The FA.

29. The period of suspension will run from the date of the expiry of the period in which Mr Whelan is able to appeal this decision. In the event that Mr Whelan does appeal this decision the suspension will be stayed pending the outcome of the appeal process.
30. The adjusted costs incurred in respect of these proceedings shall be paid by Mr Whelan in such sum as shall be notified by The FA to Mr Whelan within 14 days and shall be paid by Mr Whelan within 14 days thereafter unless the principal of costs and/or the amount is disputed in which case the matter will be referred for determination.
31. The Commission is unanimous in its decision and reasoning.

David Casement QC (Chairman)

Barry Bright

Stuart Ripley

30 December 2014