In the matter of an appeal by Fernando Forestieri against a decision of the Football Association Regulatory Commission.

Appeal Board

Sir Wyn Williams

Ms Aisling Byrnes

Ms Alison Royston

Secretary Mr Paddy McCormack

Date 4 September 2019

Venue Wembley Stadium

Written Reasons for dismissing the appeal

Introduction and Preliminary Matters

1. Mr.Fernando Forestieri ("the Appellant") is a professional footballer registered with Sheffield Wednesday FC. During the course of a match between Sheffield Wednesday FC and Mansfield Town FC which took place on 24 July 2018 an altercation took place between the Appellant and an opposing player, Mr Krystian Pearce, during which, according to Mr Pearce, the Appellant called him a "nigger". In due course Mr. Pearce's allegation against the Appellant was reported to the police. A statement was taken from Mr Pearce and the Appellant was interviewed under caution. A decision was taken to charge the Appellant with an a racially aggravated offence contrary to section 5 Public Order Act 1986. The basis of the charge was that the Appellant had used the word "nigger" towards Mr Pearce. The Appellant steadfastly denied that he had done so.

2. The criminal charge was heard by a District Judge sitting in the Magistrates Court on 28 March 2019. The Appellant pleaded not guilty to the charge and expressly denied using the word “nigger”. The issue at the criminal court was whether the prosecution was able to prove beyond reasonable doubt that the Appellant had used that word. Following a trial the Defendant was acquitted and a verdict of not guilty was entered against him.

3. By letter dated 6 June 2019 the Football Association (FA) charged the Appellant with misconduct. The misconduct alleged was the use of abusive and/or insulting words contrary to rule E3(1) of the FA Rules. The gravamen of the charge was that the Appellant had called Mr Pearce “a nigger”. The FA further alleged that the breach of rule E3(1) was an aggravated breach contrary to rule E3(2) in that the word complained of (“nigger”) included a reference to the ethnic origin of Mr Pearce.

4. A regulatory commission (the Commission) was appointed to determine the charge brought by the FA. A hearing took place on 15 July 2019. On 17 July the Commission announced that it found the charge of misconduct proved. It invited written representations upon the appropriate sanction or sanctions. On 24 July 2019 the Commission provided written reasons for its decision to find the charge proved. It also provided written reasons for the sanctions which it imposed. One of the sanctions it imposed was that the Appellant should be suspended from all domestic football until such time as his club had completed six (6) first team competitive matches in approved competitions.

5. By Notice of appeal dated 7 August 2019 the Appellant appealed against the finding of misconduct. He also appealed against the suspension imposed upon him. The grounds of appeal against the finding of misconduct were (1) that in reaching its conclusion the Commission had misinterpreted and/or had failed to comply with regulation 24 of the FA’s Disciplinary Regulations and (2) that had regulation 24 been properly applied the Commission could not reasonably have come to the decision which it did. The sole ground of appeal against the suspension was that it was excessive.

6. We heard the appeal on 4 September 2019. The Appellant was represented by Mr Craig Harris of counsel. He was also accompanied by his wife, a club official, his solicitors and a registered intermediary. The FA was represented by Mr Michael Rawlinson of counsel. The proceedings were transcribed. At the conclusion of the hearing and after a period of deliberation we announced that the appeal would be dismissed and that we would give our reasons in writing. Following the hearing, the Secretary to the Appeal Board provided the parties with a written notification of our decision which also contained directions relating to the costs of the appeal.

7. These are our reasons for the decision to dismiss the Appellant's appeal against the finding of misconduct and the suspension for six matches.

Relevant Rules and Regulations

8. This case was governed by the Rules of the FA which were in force in the season 2018/2019. All references to the FA Rules in the next paragraph and hereafter must be understood as a reference to those Rules.

9. Paragraph 1 of Section E of the FA Rules empowers the FA to take action against a player in respect of any misconduct. Misconduct is defined to include a breach of the rules and regulations of the FA and, in particular, rules E3 to E28. Rule E3(1) prohibits the use of abusive or insulting words and rule E3(2) provides that a breach of E3(1) becomes an "Aggravated Breach" if the word or words used include a reference to a person's ethnic origin. If an aggravated breach is proved a minimum suspension of five matches is mandatory (see rule E3(3)) except in limited circumstances which did not apply in this case.

10. The FA has produced detailed Disciplinary Regulations. Section 1 of the General Provisions of the Regulations include the following:

> *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.*

8 Save where otherwise stated, the applicable standard of proof shall be the civil standard of the balance of probabilities.

Regulations 23 and 24 provide as follows:-

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

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

11. This appeal is governed by Appeal Regulations. Regulation 2 specifies the grounds of appeal open to the Appellant. We have set out the Appellant's grounds of appeal at paragraph 5 above which correspond with the grounds specified in regulation 2.2, 2.3 and 2.4.

The grounds of appeal

(a) Misconduct

12. The principal point relied upon by the Appellant was that the Commission's finding that he had used the word nigger was fundamentally flawed because it misinterpreted regulation 24 and/or misapplied it. Mr Harris submitted both in writing and orally that the Regulatory Commission had interpreted the regulation "in accordance with generally accepted rules of law/evidence, as lawyers would understand them in the jurisdiction of the courts of England and Wales" but that, according to him, was erroneous. The correct approach to interpretation, submitted Mr Harris, was to give the words of regulation 24 their ordinary meaning in the context of a "set of rules" incorporated into a private contract that sought to provide proper governance for a major sport.

13. The Commission's approach to the interpretation of regulation 24 is to be found in the section of the Commission's written reasons starting with paragraph 43 and ending with paragraph 57. No useful purpose would be served by quoting those paragraphs in full. However, it seems to us that paragraphs 54 and 57 are those which are crucial to the understanding of the Commission's approach and for ease of reference we set out these paragraphs in full:

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

a. The FA brings the charge and so has the burden of proving it, on the balance of probabilities.
b. Regulation 24 does not operate as a procedural bar to the bringing of FA disciplinary proceedings where there has been an acquittal of a criminal charge whose subject-matter is identical or very similar.
c. Next, the presumptions created by Regulation 24. First as to the result: the Player is presumed to be not guilty of the charge to the criminal standard.
d. Second, as to the findings: The findings upon which that acquittal is based, "*shall be presumed to be correct and true*"*,* unless the contrary is shown by "*clear and convincing evidence".*
e. In that context, the higher standard of proof in criminal proceedings means an acquittal does not necessarily and ordinarily will not equate to a finding that the participant did not commit the misconduct in question.
f. What is "*clear and convincing"* for the purposes of the balance of probabilities may not be for the higher criminal standard.
g. *"Clear and convincing evidence"* does not impose a requirement for new or additional evidence, in the sense of requiring something in addition to that which was before the criminal court.

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

14. By the conclusion of the oral argument it was clear that the focus of Mr Harris' criticism of the Commission's approach was sub paragraph 54 c. and, in particular, the way in which it formulated the presumption applicable in this case by virtue of the Appellant's acquittal before the District Judge. He submitted that the Commission's formulation of the presumption, namely that the Appellant was "presumed to be not guilty of the charge to the criminal standard" was wrong. Rather he suggested that the Commission should have presumed that the Appellant was *innocent* of the charge brought against him (our emphasis of the word innocent) although he also acknowledged that the strength of the

presumption and its application in this case (as in any other case) would be informed by any reasoning available as to the basis for the acquittal.

15. Mr Rawlinson for the FA supported the approach of the Commission. In detailed written submissions he explained why the approach adopted by the Commission was correct. We do not set out his contentions separately because in large measure we accept them as we explain in the paragraphs that follow.

16. The rules and regulations of the FA are to be interpreted in accordance with principles which are, in our view, uncontroversial. The words of a particular provision are to be given their ordinary and natural meaning albeit that such a meaning is to be informed by what the words would mean to a reasonable person having all the relevant background information about the context in which the words are used. Further, the words of a particular provision must be read in the light of the document in which they appear; the document as a whole must be considered when the meaning to be attributed to individual parts thereof is being considered.

17. There are a number of phrases within regulation 24 which can only be interpreted in the context in which they arise. So, the phrase "The result of those proceedings" can only be a reference back to the proceedings specified in regulation 23. The phrase "and findings upon which such a result is based" is relevant only if the findings are ascertainable. The phrase "clear and convincing evidence" can only be understood in the context of the factual matrix presented to the tribunal in the proceedings referred to in regulation 23 and the evidence adduced before the regulatory commission which is considering the charge against an appellant.

18. With these preliminary observations we turn to the instant case. The "result" of the criminal proceedings brought against the Appellant was a verdict of not guilty. In criminal proceedings in England there are only two results which are possible, namely a verdict of guilty or a verdict of not guilty (ignoring for these purposes any special verdicts which have no relevance to this case). In a crown court the jury actually delivers a

verdict in those terms i.e. guilty or not guilty. In a magistrates court the district judge or chair of the bench may use different words when an accused person is found not guilty of a charge. It is not uncommon, for example, for the accused person to be told that he has been acquitted or that the charge has not been proved. However, the formal result of the proceedings is still a finding of not guilty.

19. It is generally understood that a verdict of not guilty can encompass a wide variety of conclusions. At one extreme, the jury or magistrate may be sure that the accused is innocent. At the other, the tribunal may be just short of being convinced beyond reasonable doubt of the accused's guilt.

20. In our view, the natural and ordinary meaning of the words not guilty when used after a person has been acquitted in a criminal trial is that it has not been proved beyond reasonable doubt that the accused person was guilty. No doubt that is the meaning that lawyers would give to the phrase (as Mr Harris accepted) but, in our view, it is also the meaning which the reasonable person properly informed of the criminal trial process would attribute to the phrase.

21. It follows that the phrase "the result of those proceedings" in regulation 24 must be understood in that way. There is nothing, either in the phraseology of regulation 24 itself or the regulations more generally, which begins to suggest otherwise. In our view, there is no proper basis for Mr Harris's submission that the phrase "the result of those proceedings", when used in the context of a person who has been acquitted of a criminal charge, should be read as if the court had declared the accused to be innocent.

22. We are satisfied that the Commission correctly interpreted regulation 24 in paragraph 54 of its decision and that paragraph 54.c was a correct formulation of the presumption which applied in this case relating to the result of the criminal proceedings .

23. At one point during his oral submissions Mr Harris seemed disposed to argue that paragraph 56 of the Commission's reasons demonstrated that

it had misinterpreted regulation 24. During the course of argument we made it clear that we doubted that was sustainable and, to be fair to Mr Harris, he accepted when pressed that paragraph 56 was dealing not with the presumption which arose by virtue of the Appellant's acquittal but rather the presumption, if any, which should arise by virtue of the findings made by the District judge to support the acquittal.

24. Self-evidently, regulation 24 requires a regulatory commission to presume that the findings upon which the result of the criminal proceedings were based "are correct and true". In many criminal cases the findings upon which a result is based may not be ascertainable. In proceedings before magistrates' courts it is sometimes the case that brief reasons are given for the verdict of guilty or not guilty but that is not the case invariably. In the crown court the jury delivers the verdict and no reasons are provided. Accordingly, when a person is acquitted of a criminal charge it is often impossible to ascertain the basis of the acquittal. In such a case no presumption that "the findings" upon which the acquittal is based can arise notwithstanding the words of regulation 24.

25. However, in the instant case, the District Judge gave reasons for his decision to acquit the Appellant which were adduced before the Commission. At first blush, therefore, it was to be expected that the Commission would formulate a presumption relating to the "findings" of the District Judge.

26. We do not propose to lengthen these reasons with a minute analysis of what the District Judge said when giving his reasons for the verdict of not guilty. It suffices that we say that the reasoning of the District Judge makes it clear, at the very least, that he considered that it was likely that the Appellant had used the word nigger. In our view that conclusion on the part of the District Judge was, without doubt, part of the "findings" upon which the result of the criminal trial was based. If the Commission had presumed, pursuant to regulation 24, that it was likely that the Appellant had used the word nigger, which, in our view, it would have been entitled to do, that would hardly have assisted the Appellant. In fact the Commission did no such thing. It decided that it was not

appropriate to permit of any presumption relating to the "findings" upon which the result of the criminal trial was based. In proceeding in that way it acted with conspicuous fairness towards the Appellant and very much in accordance with the letter and spirit of General Provision 4 of the Disciplinary Regulations (see paragraph 10 above).

27. We understand that this is the first case to have been taken on appeal which has focussed upon the proper interpretation of regulation 24 when the person charged by the FA has been acquitted by a criminal court of a charge based upon the same factual allegation as that with which the FA is concerned. That being so we have endeavoured to reach our own view of the proper approach to the presumptions within regulation 24 uninfluenced by previous decisions of regulatory commissions. We should record, however, that we were provided with a recent decision of a regulatory commission which has considered the interpretation of regulation 24 and another decision of a commission which considered in detail its predecessor regulation. The recent decision has not yet been made public because the proceedings as a whole have not yet been concluded. In these circumstances it would not be appropriate to identify of the person against whom the FA has taken disciplinary proceedings so we shall refer to the case as "Case A". However, we note that the views expressed by the commission in Case A upon the interpretation of regulation 24 are in their final form. In our view, the approach we have adopted is entirely consistent with the approach adopted by the commission in Case A – see in particular paragraph 13 of its decision. The earlier decision related to the case brought by the FA against Mr John Terry. The regulation in Mr Terry's case (then regulation 6.8) was not precisely in the form of regulation 24 but it was not suggested before us that there was any material difference between the two regulations so far as the presumptions which each contained is concerned. Again, the approach of the commission in that case is entirely consistent with the approach we have adopted – see section 5 of the decision.

28. Despite the best endeavours of Mr Harris to argue to the contrary, we were satisfied that the Commission did not misinterpret regulation 24. We were equally satisfied that the Commission did not misapply it.

There were a number of reasons for that conclusion. First, its written reasons makes clear that the Commission began its deliberations by presuming that the verdict in the criminal trial was correct – see paragraphs 54 and 57. Second, it correctly identified the scope of the presumption which operated as a consequence of the Appellant's acquittal by the District Judge. Third, it declined to proceed on the basis of any presumption relating to the "facts and matters" upon which the verdict was based which, as we have said, was conspicuously fair to the Appellant in the circumstances prevailing in this case. Fourth, it identified the "clear and convincing evidence" which it concluded justified rebutting the presumption created by the Appellant's acquittal – see paragraph 60 of its decision. In that paragraph the Commission identified seven reasons why it was driven to conclude that the Appellant had probably used the word nigger. All the reasons were based upon a proper and cogent analysis of the evidence adduced before the Commission and, in our view, fully entitled the Commission to conclude that clear and convincing evidence existed which justified a departure from the presumption

29. One further issue needs to be considered before leaving this ground of appeal. Paragraph 4 of the General Provisions of the Disciplinary Regulations (see paragraph 10 above) provides that the standard of proof in disciplinary proceedings before a regulatory commission shall be "the civil standard of the balance of probabilities". In his written submission Mr Harris developed the argument that the requirement for "clear and convincing" evidence to rebut the presumption(s) arising under regulation 24 meant that "some higher standard of proof than the balance of probabilities" was necessary to rebut the presumption. This argument, submitted Mr Harris, was given considerable support because in Case A leading counsel for the FA had made that very submission.

30. It is correct that in Case A leading counsel for the FA submitted that regulation 24 imposed a higher standard of proof than the balance of probabilities. However, her submission was roundly rejected by the commission-see paragraphs 15-17 of its decision. In Case A the commission held that the words "clear and compelling evidence" in regulation 24 "serve the purpose of requiring evidence to have that

quality before the presumption is rebutted on the balance of probabilities." While we accept that the commission in Case A also made it clear that its view of the applicable standard of proof did not impact upon the actual decision in Case A that cannot undermine its view of the applicable standard of proof.

31. As we have set out previously, we have endeavoured to reach our own conclusions about the meaning of regulation 24 and the way in which it should be applied uninfluenced by previous decisions of regulatory commissions. However, as it happens, we find ourselves in agreement with the view of the commission in Case A. There is an in-built flexibility in how the standard of proof is applied in the courts in civil proceedings – see by way of example the decision of the Court of Appeal in *R(N) v Mental Health Review Tribunal (Northern Regions) and others [2006] QB 468* at paras 62 to 64. In summary, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before the court will find the allegation proved on the balance of probabilities. The FA has sought fit to specify, unequivocally, in its Disciplinary Regulations that the applicable standard of proof shall be the civil standard of the balance of probabilities (see paragraph 10 above). Further, that standard is to apply unless "otherwise stated". The reference within regulation 24 to the need for "clear and convincing" evidence to rebut presumptions arising within the regulation cannot, in our view, be categorised as a clear statement that some different standard of proof is being imported into that regulation when a need arises to rebut a presumption. In our view, much more specific language i.e. words relating specifically to a different standard of proof would have been necessary to displace the civil standard. Additionally, by stating expressly that the standard of proof is the "civil standard of the balance of probabilities" the regulation is making it clear that the standard is to be applied flexibly in accordance with the way in which that standard is applied in the civil courts.

32. Before us, Mr Rawlinson took a different stance from that which had been taken by leading counsel for the FA in Case A. Essentially he adopted the position which the commission in Case A had found to be correct. While we acknowledge that the FA has appeared to take

contradictory positions on this issue (which is not ideal for a governing body) we accept Mr Rawlinson's assurance to us that the FA now accept that the reasoning of the commission in Case A is correct.

33. Having considered all the main oral and written arguments of the parties we were satisfied that ground 1 of the grounds of appeal could not succeed and had, therefore, to be dismissed. Mr. Harris was realistic enough to concede before us that ground 2 was not sustainable if ground 1 failed. The decision made by the Commission was obviously one to which it could reasonably have come if, as we have found, it correctly interpreted and applied regulation 24. Mr Harris was correct to make the concession which he did and we are grateful to him for his realism. In the light of the concession however, nothing further needs to be said about our reasons for dismissing this second ground of appeal.

(b) <u>Sanction.</u>

34. Under the Appeal Regulations an appeal board can allow an appeal against sanction only if it concludes that it was excessive. As we have said the Commission was bound to impose a suspension of five matches by virtue of Rule E3(3). The question for us, therefore, was whether a six match suspension could properly be categorised as excessive.

35. We concluded that it could not. The Commission had the significant advantage over us of hearing substantial evidence thereby being in a much better position to judge the culpability of the Appellant and identify appropriate aggravating and mitigating features. The Commission provided a clear and reasonable justification for an increase from the mandatory term of suspension. Immediately after identifying the aggravating features of the case it specifically directed itself that it should be alive to the risk of double-counting when dealing with aggravating features and that it should guard against that risk – see paragraph 72.c. While it may be that some regulatory commissions would have limited the period of suspension to the minimum term under the Rules (especially since the advocate for the FA did not argue

for a longer term) we were not persuaded that it would be right to conclude the suspension imposed by the Commission was excessive.

Wyn Williams
Aisling Byrnes
Alison Royston

12 September 2019