

IN THE MATTER OF AN APPEAL FROM
THE DECISION OF A FOOTBALL ASSOCIATION
INDEPENDENT REGULATORY COMMISSION

B E T W E E N :-

WILFRIED ZAHA

Appellant

and

THE FOOTBALL ASSOCIATION

Respondent

WRITTEN DECISION AND REASONS
OF THE APPEAL BOARD

Appeal Board: Graeme McPherson QC (Chairperson)
Tony Agana
Udo Onwere

Secretary to Appeal Board: Paddy McCormack
(Regulatory Commissions & Appeals Manager)

Date: 15 February 2019

Venue: Wembley Stadium

Appearances: Nick De Marco QC (Appellant's Representative)
David Nichol (Head of Legal, Crystal Place FC)
Rebecca Turner (FA Regulatory Advocate)

(A) Introduction and Background

- 1) By letter dated 31 January 2019 the Football Association (*'the FA'*) charged Wilfried Zaha (*'the Player'*) with Misconduct for a breach of FA Rule E3. We refer to that as *'the Charge'*.
- 2) The FA's case in support of the Charge was that the Player's behaviour following his dismissal during the Premier League match between Southampton FC (*'SFC'*) and Crystal Palace FC (*'the Club'*) on 30 January 2019 (*'the fixture'*) amounted to improper conduct. With the Charge the FA served on the Player
 - a) An Extraordinary Incident Report form completed by the match referee, Andre Marriner. That Report stated as follows:

'In the 87th minute of the game I had reason to issue two cautions and then send off [the Player] of [the Club]. He reacted to his sending off by firstly refusing to leave the field of play, and was persuaded to do so by a team mate and an opposing player, whilst leaving he stopped and sarcastically applauded my decision in my direction on at least four separate occasions before finally being escorted down the tunnel by a member of [the Club] coaching staff'; and
 - b) Video clips of what the FA termed *'the incident'*.
- 3) The FA designated the matter as a Non-Standard Case on the basis that the incident had occurred outside the jurisdiction of the match referee.
- 4) Following discussions between the FA and the Player's Representatives the FA confirmed that, on the basis that the Player intended to admit the Charge, its position as to sanction would be that
 - a) The Player's conduct warranted a sporting sanction, and
 - b) A 1 match touchline suspension (in addition to any proportionate financial penalty) would represent an appropriate sanction.

The FA of course accepted that the Regulatory Commission was not bound to adopt that position and retained *'ultimate discretion'* as to the sanction, if any, to be imposed on the Player.

- 5) On 5 February 2019 the Player submitted his Reply Form to the FA. He admitted the Charge and requested a personal hearing for the purpose of addressing the Regulatory Commission on the question of the appropriate sanction to be imposed on him. In advance of the hearing the Player submitted
- a) Witness statements from the Player, Roy Hodgson (the Club Manager) and Dr Muhammad Zafar Iqbal (Head of Medical at the Club), and
 - b) A Reply prepared by Nick De Marco QC on his behalf (*'the Player's Reply'*). The Player's Reply explained that
 - i) The Player disagreed with the FA's position that a 1 match suspension was an appropriate sanction, and
 - ii) The Player's position was that, in all the circumstances, there should be no suspension and that a combination of a reprimand and/or warning as to future conduct, a proportionate fine and a requirement to pay a contribution to the Regulatory Commission's costs of the hearing would be an appropriate sanction.
- 6) The Player's Reply helpfully summarised the Player's position in very clear terms. It was made clear that the Player
- a) Admitted the Charge,
 - b) Accepted that his conduct had been improper,
 - c) Regretted his conduct, and
 - d) Apologised to the match referee and to the FA for his conduct.

Without detracting from such matters, the Player's Reply explained as mitigation (at paragraph 4):

'In short

4.1 The Player has been subject to a number of serious and deliberate fouls during his playing career in the Premier League. Some of the evidence relied upon demonstrates he is deliberately targeted by opposing teams for fouls

4.2 Some of those fouls have led to serious injury preventing the Player from playing for long periods of time

4.3 During [the fixture] the Player believed he was subject to a number of unfair challenges from James Ward-Prowse as well as a number of other players, some of which were not given by the referee as fouls

4.4 In the 86th minute of [the fixture] the Player believed he was pushed over the left touchline by Mr Ward-Prowse, impeding his ability to control the ball

4.5 The Player mistakenly believed the referee had awarded him a free kick and he attempted to take the ball from Mr Ward-Prowse so as to take the free kick

4.6 Mr Ward-Prowse then faked throwing the ball at the Player and raised his hands to the Player's face, while mocking him for not being able to take the ball

4.7 The Player reacted by pushing Mr Ward-Prowse's hand away

4.8 The Player was then shown a yellow card by the referee. Because of his frustration he then sarcastically clapped the referee for showing him the card. This led to the referee showing him a second yellow card and dismissing him from the field of play

4.9 The Player did not leave the field immediately and again sarcastically clapped the referee. However he did leave the pitch relatively quickly and did not confront the referee'.

7) A hearing took place on 6 February 2019 before an FA Regulatory Commission (*'the Commission'*) comprising Ifeanyi Odogwu (Chairperson and Independent Legal Panel Member), Marvin Robinson (Independent Football Panel Member) and Bradley Pritchard (Independent Football Panel Member). The Player was represented by Mr De Marco QC. The FA was represented by Rebecca Turner.

8) At the hearing before the Commission

a) On behalf of the FA Ms Turner

i) Took the Commission through the video footage. As set out in paragraph 10 of the Commission's Decision and Written Reasons, she highlighted what the FA contended were the *'significant features'* that had occurred after the Player's dismissal. Those features included (on the FA's case)

(1) 4 separate instances – spread over a total of 32 seconds and each separated by only a few seconds - of the Player sarcastically applauding the referee. The first was said to have followed the Player *'approaching the Referee and ... leaning closer'*. The last was described as *'the most averse and theatrical'*

(2) A reluctance to leave the field of play, causing one of the Player's team mates (twice) and an SFC player to *'encourage him to move along'*

ii) Accepted that the Player's conduct had not been aggressive

iii) Argued that the absence of aggression did not necessarily detract from the severity of the Player's conduct; the FA's case was that the Player's theatrical, overt and sarcastic applause had directly undermined the referee and made a mockery of his integrity

- iv) Contended that the fact that the post-dismissal sarcastic applause was a continuation of the very conduct for which the Player had been given a second caution (and so which had led to his dismissal) should be viewed as an aggravating factor; in essence, the FA contended that because he had just been dismissed for such conduct, the Player must have known that his sarcastic applause was unacceptable, yet repeated such conduct on 4 further occasions following his dismissal in a deliberate attempt to undermine the referee further;
- b) The Player gave evidence. He repeated his admission of the Charge and his acceptance that his conduct in not leaving the pitch immediately and continuing to sarcastically applaud the referee had been improper. He reiterated his deep regret for his conduct and apologised again to the referee and to the FA. Without wanting to detract from that position, he explained
- i) that his actions were the result of him having been, in his mind, provoked by the SFC player and then unfairly treated by the referee, causing a loss of control on his part, and
- ii) that the FA's interpretation of the video clip as showing a refusal on his part to leave the field of play was incorrect; he was always walking off the pitch, and his team mate had not approached him to encourage him in that regard – his team mate had approached him only to encourage him to stop applauding;
- c) Mr Hodgson gave evidence. That evidence comprised principally character evidence, but Mr Hodgson also confirmed that the Player had in the past often been targeted by opposition teams. Newspaper articles were submitted on behalf of the Player to support that general proposition. In addition Dr Iqbal – who did not give oral evidence before the Commission – confirmed in his statement
- i) That the Player had been targeted by opposition players and appeared to be fouled with disproportionate frequency, and
- ii) That the Player had been injured as a result of fouls.
- Dr Iqbal also explained that the Player had frequently demonstrated frustration and upset after matches because of a belief that opposing players were trying to harm him and that referees were ignoring fouls on him and/or punishing him when he protested. Dr Iqbal stated

‘The Player always says before matches that he has no intention of causing any problems for opposition player or officials but I know the deliberate targeting of him with the aim of injuring him is something he’s not happy with and finds it difficult to control his emotions when it is clear that he not getting the same protection as others. We as the medical team are trying to work with the Player to try and not react but he feels strongly that if he doesn’t say anything its only a matter of time before someone intentionally injures him with an injury that could put him out for a long period of time.’;

- d) Mr De Marco QC developed the submissions set out in the Player’s Reply and contended that, in the circumstances of the case, the appropriate sanction should not involve any suspension; he maintained that the appropriate sanction should comprise
 - i) A reprimand and/or warning as to future conduct,
 - ii) A proportionate fine, and
 - iii) A requirement that the Player pay a contribution towards the Commission’s costs of the hearing.

- 9) In support of that position Mr De Marco QC
 - a) Highlighted as important mitigation
 - i) the Player’s previous good disciplinary record,
 - ii) the fact that the Player had admitted the Charge at the first opportunity,
 - iii) the fact that the Player had expressed remorse, and
 - iv) the fact that the Player had been subject to large number of fouls, both during the fixture and more generally during his career as a whole;

 - b) Contrasted the facts of the case with 3 cases involving Premier League Players on whom sanctions had been imposed for improper conduct following dismissal. In each of those cases – *The FA v Gabriel Armando De Abreu*, *The FA v Diego Costa* and *The FA v Jamie Vardy* –
 - i) The player’s conduct (following his dismissal) had been described variously in the Decisions and Written Reasons of the relevant Regulatory Commission as ‘aggressive’ and ‘confrontational’, and had involved features such as a lengthy refusal to leave the field of play, contact between opposing players, invasion of the referee’s personal space and repeated incidents, and

ii) The player had been punished with a 1 match suspension, a warning as to future conduct, a fine and an order to pay a contribution towards the costs of the relevant Regulatory Commission.

Mr De Marco QC submitted that the elements of aggression in those cases made them more serious than the present case, and that as a result, the Player should be subject to a less severe sanction than had been imposed on those players;

c) Invited the Commission's attention to 2 further cases – The FA v Lee Bowyer and The FA v Tony Xia - in which non-playing participants (in the first case a club manager, in the second case a club owner and chairman) had publicly made comments (in the first case, in a television interview, and in the second case, on twitter) which questioned the integrity of a referee. In each case the participant had been charged with, and had admitted, misconduct. In neither case had the participant been given any form of suspension; each had been punished with a fine and/or a warning as to future conduct. Mr De Marco QC invited the Commission to conclude that the Player's conduct had been less serious than the conduct of those participants (who had been in positions of responsibility and whose conduct had not been in the immediate 'heat of the moment'), and certainly no more serious.

10) In reply, Ms Turner for the FA

- a) Accepted the points made on the Player's behalf as mitigation;
- b) Disputed Mr De Marco QC's attempts to distinguish The FA v Gabriel Armando De Abreu, The FA v Diego Costa and The FA v Jamie Vardy from the present case. The FA's position was that although (unlike those cases) the Player's behaviour had not been aggressive, it had nonetheless been serious ('*just as serious*') because of
- i) The repetitive and protracted nature of the conduct, and
- ii) The fact that it substantially and deliberately sought to undermine the integrity of the referee in an overt and very public manner;
- c) Invited the Commission to disregard The FA v Lee Bowyer and The FA v Tony Xia. Media comments from non-playing participants, it was submitted, rarely attracted sporting sanctions.

11) The Commission accepted the Player's admission of the charge. It recorded in its Decision and Written Reasons

- a) That in the main it accepted the mitigation presented on behalf of the Player – it expressly recorded (at paragraph 37) that it accepted
 - i) That the Player had been subject to a number of foul challenges during the fixture
 - ii) That the Player believed that he had been subject to a number of unfair challenges from Mr Ward-Prowse in particular
 - iii) That the Player had received some provocation from Mr Ward-Prowse immediately before the misconduct offence when Mr Ward-Prowse had raised his hands to the Player's head, causing the Player to react angrily by pushing his hand away
 - iv) That the Player had become frustrated and '*lost his head*' at a perceived unfairness when he was shown a second yellow card by the referee and dismissed from the field of play
 - v) That there had been no display of any aggression towards the referee, Mr Ward-Prowse or anyone else by the Player following his dismissal
 - vi) That the Player had a good disciplinary record
 - vii) That the Player had admitted the Charge at the first opportunity and had expressed remorse for his conduct;
- b) That it considered the Player's conduct in '*totally undermining the referee*' and '*the protracted and repetitive nature of the misconduct*' to be aggravating features;
- c) That although (because of the absence of any aggression in the Player's conduct) it accepted Mr De Marco QC's submission that the present case was to be distinguished from cases such as *The FA v Gabriel Armando De Abreu*, *The FA v Diego Costa* and *The FA v Jamie Vardy*
 - i) Aggressive behaviour following dismissal is not a pre-requisite for a sporting sanction, although its presence or absence would always likely be an important feature for a Regulatory Commission weighing up aggravating and mitigating factors, and
 - ii) Each case will always turn on its own facts;

- d) That it had not been assisted by the decisions in *The FA v Lee Bowyer* and *The FA v Tony Xia*, on the basis that neither decision was of sufficient similarity to the present case.

12) Having set out those findings the Commission concluded (by a majority decision) that the Player's conduct warranted a sporting sanction. It recorded that, although the Player's conduct had not been aggressive, it had been '*sufficiently culpable to justify a sporting sanction*'. Paragraphs 42 and 43 of the Decision and Written Reasons read as follows:

'[The Player] received a caution, his second of the match, and this led to a dismissal, for the first sarcastic applause. He was therefore sufficiently warned that his conduct had crossed the threshold of acceptable behaviour. Notwithstanding this, immediately following his dismissal [the Player] can be seen to approach the referee and, whilst doing so, leans closer and applauds again. As set out above, his conduct did not stop at this point. There was a delay in him leaving the field of play, while he continued to remonstrate by waving his arms in disapproval. [The Player] sarcastically applauded the referee once more despite a teammate making physical contact with him to stop him from doing so. A few seconds later [the Player] yet again sarcastically applauded the referee for a third time since being dismissed. At this point he is also joined by the same [Club] player and an SFC player to encourage him to leave the field of play. Finally, and perhaps most egregiously, whilst walking off the field of play, [the Player] theatrically turns around and sarcastically applauds the Referee with his hands above his head for the fourth times since his dismissal.

[The Player's] actions totally undermined the referee. His actions were overt and repeated.'

13) Against the background of those findings the Commission

- a) Suspended the Player from all domestic club football until the Club had completed one (1) first team competitive match in approved competition, and
- b) Fined the Player £10,000. The Commission explained that, but for the mitigation available to the Player and his acceptance of the Charge, it would have imposed a fine of £65,000 on the Player.

The Commission also directed that the £100 personal hearing fee should be forfeited and that the Player should pay a contribution of £1,000 towards the costs of the hearing.

14) In this Decision and Written Reasons we refer to the suspension and the fine imposed by the Commission as '*the Sanctions*'.

- 15) The Sanctions were orally communicated to the Player at the conclusion of the hearing on Wednesday 6 February 2019, and confirmed by letter to the Player dated Thursday 7 February 2019. The Commission's '*Written Reasons and Decision*' were also published on Thursday 7 February 2019.
- 16) By email to the FA timed at 07.42 on Thursday 7 February 2019 Mr Nichol, on behalf of the Player
- a) Confirmed the Player's '*intention to appeal the decision of the Commission, subject to review of the Written Reasons*', and
 - b) Requested that the Sanctions be suspended until any such appeal had been determined. The basis for that request was that, if the Sanctions were to remain in place pending an appeal, the Player would inevitably have to serve the 1 match suspension before the appeal was heard and determined, since
 - i) The Club's next first team competitive match in approved competition was to take place on Saturday 9 February 2019, yet
 - ii) The appeal timetable set out in the Fast Track Regulations would mean that an appeal against the Decision of the Commission would not be heard until the following week.
- 17) Later on Thursday 7 February 2019 the Commission granted the Player's application to suspend the Sanctions pending an appeal. As a result, the Player was able to play, and did play, for the Club on Saturday 9 February 2019.

(B) This appeal: Introduction

- 18) The Player did indeed appeal against the Decision of the Commission. That appeal was brought pursuant to The FA Disciplinary Regulations, Fast Track 7: Appeals – Fast Track ('*the Regulations*') et out at pages 222-224 of the FA Handbook.
- 19) On behalf of the Player written Appeal Submissions were lodged on 11 February 2019 ('*the Appeal Submissions*'). The FA lodged a Response to the Appeal Submissions on 13 February 2019 ('*the FA Response Submissions*').

20) The appeal was heard by the Appeal Board at Wembley Stadium on Friday 15 February 2019. At the conclusion of the hearing, after proper consideration of all of the relevant evidence, material and submissions, the Appeal Board dismissed the appeal. This document constitutes the Appeal Board's written Reasons for that decision.

(C) The Grounds of Appeal

21) Regulation 5 of the Regulations sets out the grounds of appeal available to Participant appellants. The available grounds are that the relevant Regulatory Commission

- '5.1 failed to give the Participant a fair hearing; and/or*
- 5.2 Misinterpreted or failed to comply with the Rules and/or Regulations of the Association relevant to its decision; and/or*
- 5.3 Came to a decision to which no reasonable such body could have come; and/or*
- 5.4 Imposed a penalty, award, order or sanction that was excessive.'*

22) The Player appealed against the Decision of the Commission on the single ground that the Commission had imposed Sanctions that were excessive i.e. the ground set out in Regulation 5.4. More particularly, the Player contended

- a) That imposing a 1 match suspension was excessive; no suspension ought to have been imposed; and/or
- b) That a fine of £10,000 was excessive; a lesser fine ought to have been imposed.

23) For reasons which will become clear below, we draw attention to the fact that the Player did not appeal under Regulation 5.3 of the Regulations (*'came to a decision to which no reasonable body could have come'*).

(D) A preliminary matter

24) Regulation 4.3 of the Regulations entitles the FA, if it considers it appropriate to do so, to appeal against a penalty, award, order or sanction imposed by a Regulatory Commission on the ground that it is *'so unduly lenient as to be unreasonable'*.

25) There was no appeal in this case by the FA against the Sanctions. Nonetheless

- a) We were correctly reminded by Ms Turner that under Regulation 16 of the Regulations we have power to *'increase or decrease'* any penalty, award or sanction originally imposed (emphasis added),

- b) The FA suggested in the FA Response Submissions that the financial penalty imposed by the Commission ‘*could be considered lenient*’, and
- c) We were invited on behalf of the FA to consider whether, of our own volition, the financial penalty of £10,000 should be increased.

26) We rejected that invitation. While there *may* be cases where an Appeal Board chooses to take matters into its own hands and alter penalties, awards or sanctions imposed by a Regulatory Commission of its own volition, this is not such a case. In the absence of any appeal by the FA under Regulation 4.3 of the Regulations we concluded that it would have been inappropriate for us to consider increasing the Sanctions in any way.

(E) The approach to be taken and the test to be applied by an Appeal Board considering an appeal under Regulation 5.4 of the Regulations

27) At our instigation, there was some debate about the test to be applied by us as an Appeal Board when judging whether a penalty, award, order or sanction imposed by a Regulatory Commission should be considered ‘*excessive*’. That debate involved 2 broad strands:

- a) First, what does ‘*excessive*’ actually mean in the context of the Regulations ?
- b) Secondly, is a sanction excessive only if it is a sanction that no reasonable Regulatory Commission could have imposed ?

We were greatly assisted by both parties’ submissions on those issues.

i) What is ‘excessive’ ?

28) On behalf of the Player, Mr De Marco QC

- a) Drew attention to the fact that Regulation 5.4 of the Regulations uses the term ‘*excessive*’ rather than ‘*manifestly excessive*’. That, he contended, set the bar for an appellant appealing under Regulation 5.4 lower than that set in other sporting and other contexts when ‘*excessive*’ was accompanied by the word ‘*manifestly*’, and
- b) Suggested that we should interpret ‘*excessive*’ as meaning simply ‘*more than was necessary or proportionate in the circumstances of the case*’.

29) Subject to one important wrinkle, the FA broadly agreed with the Player’s suggested interpretation of ‘*excessive*’ for the purpose of Regulation 5.4 of the Regulations. On its behalf Ms Turner contended that when asking itself whether a sanction imposed by a Regulatory Commission was ‘*excessive*’, the question for the Appeal Board should be

whether that sanction was '*materially more than was necessary or proportionate in the circumstances of the case*'.

30) In reply Mr De Marco QC accepted that qualification; he (quite rightly in our view) accepted that it would be wrong for an Appeal Board to interfere with a sanction imposed by a Regulatory Commission simply because the Appeal Board would itself have imposed a slightly lower sanction.

ii) A requirement of 'reasonableness' ?

31) On behalf of the FA Ms Turner suggested that, when asking ourselves whether the Sanctions were excessive, we should not interfere with the Decision of the Regulatory Commission unless we concluded that the Decision of the Commission was one to which no reasonable Regulatory Commission could have come; in other words, we should dismiss the appeal unless we concluded

- a) That the Commission had imposed Sanctions that were so severe that they could not have been imposed by any reasonable Regulatory Commission, and/or
- b) That the Sanctions were outside the range of sanctions that a reasonable Regulatory Commission could have imposed in this case.

32) That in our view went too far, primarily for the reasons suggested by Mr De Marco QC. Regulation 5.4 of the Regulations is in different terms to Regulation 5.3. While Regulation 5.3 requires an Appeal Board to adopt an approach along the lines of that described in the previous paragraph, Regulation 5.4 does not; it simply requires the Appeal Board to consider whether sanctions imposed by a Regulatory Commission were 'excessive'.

33) Of course, if an Appeal Board was to conclude that a Regulatory Commission had imposed a sanction that was outside the range of sanctions that a reasonable Regulatory Commission could have imposed on the facts of a case, it may well follow that that sanction is excessive. However, the tests for Regulations 5.3 and 5.4 are not identical, and there *may* be instances where application of each test leads to different results. It is therefore important to apply the correct test.

iii) The correct approach and the approach that we took

34) In light of the above, the question that we asked ourselves in determining this appeal was whether the Sanctions were excessive, in the sense of being materially more than was necessary or proportionate in the circumstances of the case.

(F) What are ‘the circumstances of the case’ ?

35) The Player did not appeal against any finding of fact made by the Commission. That said, during submissions Mr De Marco QC did criticise the Commission’s finding (at paragraph 42 of the Decision) that the Player had had to be ‘*encouraged to leave the field of play*’ by a teammate and an SFC player. He explained

- a) That the only evidence before the Commission had been the Player’s evidence that the involvement of others (from the Club and SFC) as he left the field of play had been to stop him applauding,
- b) That that evidence had not been challenged, and
- c) That the Commission ought therefore not to have made the finding that it did in such regard.

36) We do not accept that criticism:

- a) It is not correct to say that that was the only evidence before the Commission; the Commission also had the video clips of the incident and could form its own view of why other players had involved themselves
- b) In any event, as Ms Turner submitted, the Player could not have known why teammates and the SFC player joined him and made physical contact with him as he left the field of play.

The Commission was therefore entitled to make the finding that it did in such regard.

37) The ‘circumstances of this case’ are thus for our purposes fully and properly described in the Decision of the Commission.

(G) Determining the appeal: the 1 match suspension

38) Mr De Marco QC helpfully took us through the Appeal Submissions and addressed the FA’s Response Submissions. His overarching submission was that the findings made by the Commission – and thus the circumstances of the case - simply did not warrant the imposition of any suspension:

- a) The appropriate sanction to reflect the Player's conduct and all of the circumstances of the case was a reprimand/warning as to future conduct and a financial penalty;
- b) Imposing a suspension was excessive and
 - i) Out of line with sanctions imposed in comparable cases, and
 - ii) Comparable to sanctions imposed for far more serious cases.

39) In support of that overarching submission he first identified a number of respects in which he contended the Commission had erred when assessing the gravity of the findings of fact that it had made. In doing so he was careful to stress that (apart from the one instance we have described above) he was not seeking to challenge the underlying findings of fact made by the Commission – rather he was seeking to demonstrate that, when properly analysed and understood, the findings of fact made by the Commission did not give an overall factual picture of such gravity as to warrant a suspension:

- a) First, he submitted that the Commission had erred in finding as an aggravating feature that the Player's misconduct was a repetition of conduct for which he had just received a yellow card, resulting in his dismissal. We disagree. Where a player has been punished for conduct – here, sarcastic applause resulting in a yellow card – and then immediately repeats that conduct, necessitating further sanction, a Regulatory Commission is entitled to take into account the fact that the Player is expressly 'on warning' that such conduct will not be tolerated, yet has chosen nonetheless to repeat such conduct;
- b) Secondly, he submitted that the Commission was wrong to break down the Player's conduct into 4 separate instances of sarcastic applause; it was, he submitted, in reality one instance of continuous (mis)conduct. We disagree. The video clips show – as the Commission found – that the Player sarcastically applauded on 4 discrete, separate occasions, albeit that those instances were each separated by only a few seconds. To put it another way, after the first instance of applauding and then stopping the Player consciously chose to repeat the conduct a second time. After applauding and then stopping a second time, the Player consciously chose to repeat the conduct a third time. After applauding and then stopping a third time, the Player consciously chose to repeat the conduct a fourth time. That is different to a single instance of sustained applause, and the Commission was certainly entitled to view it differently,

particularly when (as they did) they came to consider the overall impact of the Player's behaviour and conduct;

c) Thirdly, he submitted that the Commission had been wrong to place emphasis on the Player's '*delay*' in leaving the field of play. While it is correct that the Player had to walk across almost the entire pitch to leave the field of play – which of course took time – the Commission was perfectly entitled to conclude that he delayed in doing so (because the video shows as much) and that the delay was bound up with the dissent that the Player was showing to the referee; periods of delay coincided with periods of sarcastic applause. Thus while it is correct that any '*delay*' is to be measured only in seconds, the Commission was nonetheless entitled to consider such delay as significant in this case given its cause and link to the misconduct;

d) Fourthly, he criticised the Commission for emphasising the '*theatricality*' of the Player's conduct and for failing to distinguish the Player's manner with '*very dramatic acts on the field of play*' resulting from (for example) aggressive confrontation. That criticism did not seem to us to be justified. The Commission was entitled to consider how overt the Player's conduct had been. The Commission was entitled to conclude that the final bout of sarcastic applause had been more overt than the other bouts. The Commission did not purport to equate the '*theatricality*' of that final bout with the '*drama*' of an aggressive confrontation.

40) It follows that we reject the criticisms made of the Commission's interpretation of the facts of this case as they found them to be. The Commission was entitled to characterise the Player's conduct as it did; indeed, we agree with their characterisations of that conduct.

41) As we have set out above, having characterised the Player's conduct as it did, the Commission concluded that that conduct had '*totally undermined the referee*', particularly given its repeated and overt nature. That conclusion cannot be criticised; it is plainly correct.

42) As he did before the Regulatory Commission Mr De Marco QC carefully drew our attention to 5 previous Regulatory Commission decisions, namely *The FA v Gabriel*

Armando De Abreu, The FA v Diego Costa, The FA v Jamie Vardy, The FA v Lee Bowyer and The FA v Tony Xia. Although it was put far more elegantly by him, the thrust of his submissions on those decisions was that

- a) Aggressive and confrontational conduct by players following dismissal – even when accompanied by aggravating factors such as repeated misconduct and lengthy delay in leaving the field of play – had on 3 occasions been found by Regulatory Commissions to justify ‘only’ a 1 match suspension (together with a warning/reprimand and a financial penalty)
- b) This case was less serious than any of those cases (given the absence of any aggressive or confrontational conduct by the Player), and the sanction to be imposed on the Player should be correspondingly less severe
- c) Post-match, off-field dissent by participants without any element of aggression or confrontation had on 2 occasions been found by Regulatory Commissions not to justify any form of sporting sanction and to justify ‘only’ a warning and/or financial penalty
- d) This case was comparable to such cases, and justified a comparable sanction to that imposed in those cases.

43) We heard much debate as to where on the ‘spectrum of misconduct’ the Player’s conduct should be viewed as falling. It was repeatedly suggested on the Player’s behalf that his conduct

- a) Should be viewed as being ‘less serious’ than the conduct in cases such as The FA v Gabriel Armando De Abreu, The FA v Diego Costa, The FA v Jamie Vardy which had involved aggression and confrontation and which might be considered at the upper end of the spectrum of misconduct, and
- b) Should be viewed as being akin to dissent, and so considered as being towards the lower end of the spectrum of misconduct.

44) Ultimately we concluded that none of the previous decisions to which we were referred are really comparable to the present case. We did not find it terribly helpful to ask whether the Player’s misconduct in this case was ‘more serious’ or ‘less serious’ than other types of misconduct in other cases; to do so risks comparing apples and oranges and attempting to decide which is the tastier fruit. Indeed, it was broadly common ground between the parties

- a) That whether or not a suspension was justified would always depend on the circumstances of the case rather than the particular ‘type’ of misconduct;
 - b) That while aggressive or confrontational conduct following dismissal would frequently justify a suspension, aggressive or confrontational conduct was not a prerequisite to a suspension being imposed for post-dismissal misconduct; other forms of post-dismissal misconduct could justify a suspension;
 - c) That the potential consequences of post-match dissent would generally be different to the potential consequences of post-dismissal dissent (whether verbal or by conduct) during a match. As the FA contended and the Player accepted, criticism of match officials during a match has the potential to undermine their ability to manage the game and can adversely impact on performance during the rest of the game. It will be witnessed by teammates, opposition and supporters, and carries with it an inherent risk of provocation and further acts of dissent or criticism taking place; bluntly, it has the real potential to ‘raise the temperature’ of the game. It can impact the flow of the game and cause delay. It also sets a bad example to those who witness it and who subsequently, at any level of play, might copy it.
- 45) As an aside, we would also make a further observation on the previous decisions that were before us. Those cases date from 2015 and 2016. Attitudes change, in football as in life, over time. The perceived gravity of what might have been considered acceptable behaviour at a particular point in time, or behaviour that warranted only a relatively minor sanction at that point in time, can alter over time. Future Regulatory Commissions may well wish to consider for themselves whether, given the fundamental importance of upholding respect for the role of decision makers, a 1 match suspension is now a sufficient sporting sanction for a player who behaves in an aggressive or confrontational manner following his dismissal.
- 46) Returning to the matter before us, the task for the Regulatory Commission was accordingly not to ask where within the range of previous cases this case ‘slotted in’. The task for the Regulatory Commission was to decide what sanction was necessary and proportionate to reflect the circumstances of this particular case as a whole. The task for

us is to determine whether, in doing so, the Regulatory Commission imposed Sanctions that were excessive – and in particular, whether imposing a 1 match suspension went materially beyond what was necessary and proportionate on the facts of this case.

47) In our view, in imposing a 1 match suspension the Regulatory Commission did not go materially beyond what was necessary and proportionate to reflect the facts of this case. Our view is that the Regulatory Commission ‘got it right’ – the facts of the case well justified a sporting sanction in addition to a warning/reprimand and a financial penalty. It was said by the Regulatory Commissions in *The FA v Diego Costa* (at paragraph 19) and *The FA v Jamie Vardy* (at paragraph 17) that it is of fundamental importance that respect for the role of the referee and match officials as decision-maker must be upheld by all participants within football, and must be seen to be being upheld. We endorse that wholeheartedly. In this case the Commission found – correctly in our view – that the Player’s overt, protracted and repeated conduct ‘*totally undermined the referee*’. In such circumstances it is perfectly understandable that a Regulatory Commission might consider a sporting sanction – in particular, a suspension – to be an appropriate sanction even where the ingredient of aggression or confrontation is absent from the conduct. Indeed, we would go further – where post-dismissal conduct of a participant, viewed as a whole, is found to totally undermine respect for the role of match officials, that participant should not be surprised if a Regulatory Commission concludes that a sporting sanction is appropriate.

48) That is of course not an end to the matter; just because a sporting sanction *might* be appropriate does not mean that it always will be. Regard will always have to be had to the particular circumstances of the case and to any mitigating and aggravating factors. In this case the Commission carefully considered those factors and concluded that a 1 match suspension was justified. That conclusion was in our view correct. While there was significant mitigation available to the Player, that mitigation was not so substantial as to justify him avoiding a sporting sanction.

49) We therefore conclude that the 1 match suspension imposed on the Player by the Commission was not an excessive sanction.

(H) Determining the appeal: the financial penalty

50) Mr De Marco QC contended as a second ground of appeal that the financial penalty of £10,000 imposed on the Player was excessive.

51) We have no hesitation in dismissing that ground of appeal. That financial penalty was in no way excessive. Indeed, given that the Commission

- a) Identified an appropriate starting point for a financial penalty of £65,000, and
- b) Reduced that sum by almost 85%, to £10,000, to reflect the mitigating factors in this case

a fine greater than £10,000 would have been justifiable on the facts of this case.

52) Although not strictly an issue for us, the extent of that reduction to reflect the mitigating factors in this case (in the region of 85%) is at first blush surprisingly large. While matters such as an early admission of guilt, remorse, a good previous disciplinary record and sincere apologies to those affected by misconduct can certainly justify a significant reduction in sanction, a reduction of the magnitude applied by the Commission in this case is unusual. When a future Regulatory Commission considers that an exceptional reduction is justified, it would be helpful for it to explain in its Decision and Written Reasons

- a) How it reached the ‘starting point’ that it did, and
- b) Why it then concluded that an exceptional reduction from that starting point was appropriate.

(I) Determining the appeal: the Sanctions as a whole

53) Although we have considered the 1 match suspension and the financial penalty individually above, we also considered whether the Sanctions were excessive when considered as a whole. They were not. The Sanctions as a whole were not materially more than was necessary or proportionate in this case. Indeed, we would go further and confirm that in our view the Sanctions as a whole were entirely appropriate.

(J) The outcome of the appeal and a further ancillary matter

54) Having carefully analysed

- a) The materials before the Commission,
- b) The Commission’s Decision and Reasons, and
- c) The written and oral submissions advanced before us

we were not satisfied that the Sanctions or any part of them were excessive.

55) Accordingly, we dismissed the appeal and affirmed the order made by the Commission, namely that the Player

- a) Should be suspended with immediate effect for 1 match, and
- b) Should be fined £10,000.

56) Having informed the parties of our decision, we drew the attention of the parties to the fact that, in light of the workings of the fixture list

- a) The practical effect of the Decision of the Commission would have been (had it not been appealed) that the Player would have missed the Club's Premier League match on Saturday 9 February 2019, while
- b) The practical effect of our decision to dismiss the appeal would – unless the effective date of the suspension was postponed - be to cause the Player to miss the Club's FA Cup 5th round tie to be played on Sunday 17 February 2019.

So as to ensure fairness, we therefore invited submissions as to whether (1) we should (as would be usual) make the Player's 1 match suspension effective from the conclusion of the appeal (meaning that he would miss the FA Cup tie) or (2) we should order that the suspension should become effective on Monday 18 February 2019 (meaning that the Player would miss the Club's next Premier League match).

57) Having heard submissions from both parties, we concluded that it was appropriate to order that the suspension should have immediate effect i.e. from Friday 15 February 2019. The Commission's Decision had been to suspend the Player '*from all domestic club football until such time as [the Club] has completed one (1) first team competitive fixture in an approved competition*'. We saw no reason to depart from that wording. That outcome is fairest for all concerned.

58) During the course of those submissions it became apparent that there was a concern (on the part of both the Player and the FA) that the Player's appeal from the Decision of the Commission has been perceived in some circles as an attempt to manipulate the date of any suspension and thus to enable him to play in one match at the expense of missing another. Whilst we cannot influence how others might think, we make it clear that there is no basis for such a conclusion in this case. The Player had a right to appeal against the

Decision of the Commission. The Decision of the Commission was reached by a majority rather than unanimously. While we have ultimately dismissed the appeal, the appeal was in no way vexatious or frivolous – the Player was perfectly justified in commencing and pursuing the appeal. The Player has not ‘manipulated’ the timing of the appeal or the fixture from which he will be suspended.

(K) Final Order and Costs

59) The appeal is dismissed. We confirm the Decision of the Regulatory Commission that the Player

- a) Is suspended with immediate effect from all domestic club football until such time as the Club has completed one (1) first team competitive fixture in an approved competition, and
- b) Is fined £10,000.

60) We also order that the Player should

- a) Pay £2,300 towards the costs incurred in connection with the appeal to the Appeal Board, and
- b) Forfeit his appeal deposit of £100.

Those sums are in addition to (1) the £100 personal hearing fee, and (2) the £1,000 contribution towards the costs of the hearing on 6 February 2019, that the Commission ordered the Player to pay.

Graeme McPherson QC (Chairperson)
Udo Onwere
Tony Agana

Signed by the Chairperson on behalf of the Appeal Board
17 February 2019