

IN THE MATTER OF THE FOOTBALL ASSOCIATION

DSC/18/0193

REGULATORY COMMISSION

BETWEEN:

THE FOOTBALL ASSOCIATION

-and-

CONOR HODGSON

Regulatory Commission and Secretariat

David Casement QC (Chair) – Independent Specialist Panel Member

Marvin Robinson – Independent Football Panel Member

Lawrence Selby – Independent Legal Panel Member

Michael O'Connor – Lead Judicial Services Officer – Secretary

Date of Hearing: 27 August 2020

Attendees:

Player

Pippa Manby– 4 New Square- Conor Hodgson’s Counsel

Conor Hodgson – Player

Mrs. Hodgson- Observer and providing support for Conor Hodgson

Jack Birks- Player- Witness

Kareem Hassan Smith-Player- Witness

Daniel Benson- Player- Witness

Taymour Roushdi- Barnsley Football Club- Observer

Ritchie Humphreys- The PFA- Observer

The Football Association

Yousif Elagab –Senior Regulatory Advocate- The FA

Ayo Agobade- Witness

Kamarl Grant- Player – Sheffield United- Witness

Nick Sheppard- Head of Academy Operations- Sheffield United FC- Observer and providing support to Mr Grant

Lewis Brougham- Witness

Kane Brougham- Observer and providing support to Mr Brougham

DECISION AND REASONS OF THE FOOTBALL ASSOCIATION REGULATORY COMMISSION

Introduction

1. By charge letter dated 4 February 2020 The Football Association alleged that Conor Hodgson (“Conor”), in the 90th minute of a match played on 15 April 2019 between Barnsley Football Club and XYZ Academy, used abusive and/or insulting words towards Ayo Agbolade (“Ayo”) contrary to Rule E3(1) of the Rules of The Football Association 2018/19. It was further alleged that this breach of Rule E3(1) is an “Aggravated Breach,” as defined in Rule E3(2), as words used by the Player made reference to ethnic origin and/or race and/or colour.
2. The allegation was that Conor said to Ayo during the closing seconds of the match, just before a free kick was taken, “speak English you fucking [N-word].” In the course of this decision the Commission will not be using the N-word in full. There is no need to give any oxygen to such a word. The parties and their representatives know what the N-word is and are in agreement that if the N-word was used by Conor then he is guilty of the charge brought. It is also common ground that the N-word is one of the most offensive racial slurs that exists.
3. The words are alleged to have been used by Conor approximately 27 seconds before the final whistle. On the 57 second clip that has been shown to the Commission it is alleged to have occurred around the 30 second point before a final free kick was taken.
4. As the whistle blew for full time Ayo made his way directly to Conor to remonstrate with him. In his interview with The FA on 23 May 2019 Conor said that after the whistle Ayo was saying to him “‘Come on then’ and he was shouting ‘Racist,’ then.”
5. Conor joined Barnsley Academy when he was 8 years of age. He is now 17. In the summer of 2019 he signed scholarship forms with Barnsley. The incident in question predates him signing.

6. At the time of the incident Ayo was 16 years of age and was playing as a striker for XYZ Academy based in London which is a team of ex-academy players as a means of getting back into professional football. The XYZ Academy is a means of showing the skills of players with a view to their talent being identified, hopefully leading to them being signed by a club.

Rules and Regulations

7. Rule 3(1) provides *“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 anyone, or a combination of, violent conduct, serious foul play, threatening, abusive, indecent or insulting words or behaviour”*.
8. Under Rule 3(2) *“A breach of rule E3 (1) is an “Aggravated Breach” where it includes a reference, whether express or implied, to anyone or more of the following: – ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability. Mandatory minimum sanctions are applicable to certain aggravated breaches. Further provisions as to sanctions applicable to aggravated breaches are found in The Association’s Disciplinary Regulations.”*
9. The relevant principles are not in dispute as between the parties. It is accepted that the test is an objective one to discern whether a reasonable person reading the statement in context would consider that the charge was made out. The position was set out clearly in the Suarez case at §369 *“We remind ourselves that the test for a breach of Rule E3(1) is an objective test. That means that it is for us to form our own view as to whether Mr Suarez’s words or behaviour were abusive or insulting. It is not necessary for the FA to prove that Mr Suarez intended his words or behaviour to be abusive or insulting.”* There is no dispute in the present case that the comment, if made, would clearly meet the objective test. The question is whether the comment was made.

10. The burden of proof rests upon The Football Association to establish the Aggravated Breach on the balance of probabilities bearing in mind that the more serious the allegation the more cogent the evidence must be to establish the charge.

Submissions and evidence on behalf of The Football Association

11. The Football Association adduced the evidence of three witnesses: Ayo, Lewis Brougham and Kamarl Grant. The three witnesses were playing on the XYZ team during the match. However, it is clear from their evidence that none of them play for XYZ any longer and in fact Kamarl is presently signed to Sheffield United. It is also clear and undisputed that the three witnesses whilst they played a limited number of matches together for XYZ they did not have any significant social interaction at the time or since. Importantly and properly, it was not suggested to the witnesses that they were lying or that they had gotten together and deliberately concocted a story to get Conor into trouble or otherwise. The suggestion on behalf of Conor was that they were mistaken in what they say they heard and perhaps unconsciously had influenced each other's evidence such that it could not be relied upon to prove the charge to the requisite standard.
12. Ayo gave evidence that he was trying to get inside Conor's head such as to distract him. This included him making fun of Conor's accent which is a Yorkshire accent compared to Ayo's London accent. Ayo said he had never heard the Yorkshire accent before, found it strange and accepted in evidence that he was mocking Conor's accent. He revealed in evidence for the first time that Conor said at one point "Go back to your own country." That was never mentioned previously in any of the documentation provided by The FA nor indeed in his witness statement. When challenged on this new evidence he explained that the reason he did not complain about that was given he was mocking Conor's accent at the time the comment about going "back to your own country" he considered to be part of the general tit-for-tat that was going on between them. He had no complaint about that. The later use of the N-word was of a wholly different magnitude.

13. Ayo said he was in shock when Conor used the N-word. He had never heard it being used in a football match. He had heard racist language outside of football and on occasions this has led to him being involved in a physical confrontation. However he did not react immediately in that way on this occasion. He said he was not sure if he heard it correctly in the sense that he could hardly believe someone would say it. When challenged on the basis that this meant he could not be sure it was actually said he repeated that he was in shock but tellingly he said "You cannot mishear those words" and "I am 100% sure."
14. He accepted that he did not react immediately due to shock. However, when the whistle blew, less than 30 seconds later he immediately went up to Conor to accuse him of having used racist language. The referee noted in his statement that Ayo was agitated. Other players and officials intervened to prevent a physical escalation. It was suggested to Ayo in cross-examination that his failure to immediately confront Conor about the use of racist language or to react in the way that he would outside of football showed that he did not hear it at the time or at least was not sure of what he had heard. He rejected that suggestion. He was in shock but within less than 30 seconds he had made it abundantly clear what had been said.
15. Lewis Brougham gave evidence that Ayo was stood close to him and was being marked by Conor when he heard Conor say "speak English you fucking [N-word]." He noted that Ayo did not lose his head. His witness statement records that he heard Ayo said words to the effect "you wanna be racist? Wait 'til after the game." It was clear from his oral evidence that this was after the whistle blew for full time. When it was put to Lewis that he could be mistaken he said he was definitely not mistaken, he was clear it was said.
16. Kamarl Grant is presently signed to Sheffield United. He gave evidence that he heard Ayo mimicking Conor's accent. He said he heard Conor say "speak English you [N-word]." This was said as the final free kick was about to be taken. He said that the effect of it on him was that he did not concentrate on the free kick. He recalled that

once the whistle went Ayo “went for the player. Like he wanted to fight with him. Ayo was angry.”

17. It was put to Kamarl that because he did not recall the F-word being used, unlike the other two witnesses’ evidence, it is likely that he misheard or his recollection was affected, albeit unconsciously, by the comments of others. He rejected that: “things like that do not come out of your head once said”, he went on to say, “it was as clear as day.” Kamarl said he did not say anything and did not react. It was put to him that if this had been said he would have reacted. He rejected that suggestion. He said “I was a peacemaker even though I was angry.”
18. It was submitted by Mr Elagab that the witnesses were independent and unwaivering in their evidence. On the substance of the charge they were entirely consistent. Ms Manby took the contrary position which is that the difference in the recollection of the wording and the differences or uncertainty as to precise timings, during a 10 second window, as to when the statement was made damaged their reliability as witnesses. Further the lack of immediate reaction to the comment was indicative that they either had not heard the comment or they were uncertain.

Submissions and evidence on behalf of the Player

19. As well as evidence given by Conor other witnesses were also called for the defence namely Jack Birds, Kareem Hassan-Smith and Daniel Benson. All four players play for Barnsley.
20. Conor gave evidence that there had been some trash talk between him and Ayo along the lines of Ayo saying “you’re fucking shit” and Conor responding “well I can’t be because you play for this shite team, and I’m playing for an academy.” (transcript of interview, bundle page 24). He denied there was anything said outside of the football sphere.
21. In his interview he gave his account that before the free kick this trash talk was taking place and Ayo said “Don’t run” and “Oh after the same, if you want it, don’t run.” This appears at the transcript at page 25 of the bundle. It was put to him at the

hearing that it was unclear, based on Conor's account, why Ayo would have been suggesting a fight after the game. Likewise he continued in his interview to say "Then after the game, I was walking diagonally off the pitch and he was walking towards me. I was walking that way and he was walking to meet me head-on and then he just came in my face, so I just moved him, I just moved him out of my face."

22. He confirmed he had been elbowed in the face earlier in the game, not by Ayo, but by another player. He was adamant that this injury did not make him lose his composure with the XYZ team. In his evidence Conor gave evidence that Ayo told him to speak English. He said Ayo was trying to get into his head but he was not bothered.
23. Conor was consistent in his evidence as he was at his interview that Ayo accused him after the whistle of saying something racist. He was not aware of what it was that he was alleged to have said. He accepted that he did not ask what it was that he was alleged to have said. He was unable to think of any reason why Ayo would make the allegation if it was untrue. He had not had any dealings with Ayo or any of the XYZ team before or after the match.
24. Jack Birks gave evidence that he was in close proximity to Conor and Ayo at the relevant time however he said he could not say one way or the other if anything was said between them. He said he was not listening to what other people were saying.
25. Daniel Benson and Kareem Hassan Smith gave evidence to the effect that they felt confident there was no exchange of any words whatsoever between Conor and Ayo.
26. All three of the witnesses called by Conor witnessed the incident at full time when as Daniel said in evidence, he saw Ayo "go after" Conor.
27. Ms Manby submitted that the evidence of defence witnesses was to be preferred above that of The FA's witnesses. They would have heard this comment if it had been said given their proximity and they did not hear it. Mr Elagab took the contrary position. The fact that another player does not hear a comment does not mean it was not said. There is no other plausible explanation to explain not only the account

of Ayo and the two witnesses called by The FA, but also the incident at the end of the match when Ayo clearly alleged a racist comment was made by Conor. It was also notable that at no time during that incident did Conor ask what the comment was that he was alleged to have made.

Regulatory Commission Findings

28. The burden of proof rests with The Football Association to prove the charge on the balance of probabilities test. Given the serious nature of the allegation cogent evidence is required so as to persuade the Commission that the balance of probabilities test has been made out.
29. The Commission has considered all of the evidence and the submissions made. The Commission takes into account and make all due allowances for the age of the witnesses, the fact that the hearing took place by way of video-conference, and the fact that the incident was alleged to have occurred in April 2019. During the course of hearing additional breaks were taken for the benefit of all participants but in particular Conor and it was made clear that if anything was not understood then anyone should say so and the matter in question would be explained.
30. Having taken all of those matters into account, the Commission came to the unanimous view that the charge was clearly made out. The reasons for arriving at the conclusion are as follows:
 - 30.1 the evidence of Ayo was clear and compelling. He was consistent throughout as to the comment that was made by Conor. The fact that he never mentioned a previous comment by Conor about “going back to your own country” was explained by him as tit-for-tat. The use of the N-word was of a different magnitude altogether.
 - 30.2 his account of what was said was corroborated by Lewis and Kamarl. The fact that Kamarl did not recollect the use of the F-word does not detract from the fact that he was adamant that the N-word was used by Conor.

- 30.3 whilst Ayo did not react instantly to the comment made by Conor he did react less than 30 seconds later and called out the abuse he had received when he confronted Conor. The fact that he did not react immediately was entirely understandable. We return to this point below.
- 30.4 Conor could provide no explanation for a number of the parts of his account. First, he could not explain why Ayo prior to the whistle was telling him not to run after the game. In other words why was Ayo so angry with him that he was offering him a fight. Secondly, he could not explain why Ayo would be accusing him of racism after the whistle and why he was so agitated. Conor's account did not make sense and was unconvincing.
- 30.5 it is notable that Conor did not ask what it was that he was alleged to have said. That might be considered an obvious question to ask when accused of saying something racist. We find it more likely than not he did not ask the question because he knew what he said.
- 30.6 the witnesses called by Conor namely Jack, Kareem and Daniel gave evidence that they did not hear anything being said between Conor and Ayo. That is not merely the comment in question. They heard absolutely nothing being said. That is not even consistent with Conor's evidence which is that there was some trash talk and Ayo saying "don't run." The fact that these players did not hear something being said does not mean it was not said. They were focussed on their game and the imminent free kick.
31. There is one particular aspect of the case that the Commission wishes to draw particular attention to. It was a theme of the defence case that because Ayo, and to a lesser extent Lewis and Kamarl, did not react immediately to the comment it is likely that it did not happen. The Commission had no difficulty in rejecting that suggestion as unreal.

32. What reaction is a person supposed to have when they are called the N-word? Is there a particular way or timescale in which that person is meant to react absent which there is some negative inference to be drawn about the reliability of their evidence? Even worse is the suggestion that if they do not react in a physical way, as they might do say outside of football, that somehow suggests the incident did not occur at all. The Commission found that line of questioning and approach very unimpressive. Every person is different and there are a whole range of possible and reasonable reactions of someone who is faced with racist language. In the present case Ayo was understandably in shock to hear what he heard. He had never heard the word used before in a football environment. A free kick was about to be taken and he tried to focus and get on with the match hardly believing what he had just heard. Less than 30 seconds later, after the whistle, Ayo made his complaint about the racist comment loud and clear.

Sanctions

33. The minimum sanction for an offence such as this under the 2018/19 Rules is a 5-match suspension. The following year the minimum sanction was increased to a 6-match suspension. However, it is the sanction stated for the season in question that applies.
34. The Commission takes into account all of the matters submitted in mitigation. In particular the Commission takes into account Conor's age, that this is his first offence and that he is of good character. However, the Commission also takes into account that the comment used involved one of the worst racial slurs there is.
35. It also takes into account the fact that Conor contested the charges to a full hearing which he is entitled to do, but thereby forfeits the credit that he would otherwise have received had he accepted the charge at the outset.
36. The appropriate sanction that reflects these matters and marks the seriousness of the offence is a 6-match suspension.

37. Given Conor's modest financial circumstances a fine of £150 is imposed and he is ordered to complete a mandatory education programme. Given his financial circumstances there is no order as to costs.

Conclusion

38. The Player Conor Hodgson is:

- (i) suspended from all domestic club football with immediate effect until such time as Barnsley Football Club has completed six Category 2 Non-First Team Competitive Matches in approved competitions;
- (ii) fined the sum of £150;
- (iii) ordered to attend a mandatory face-to-face education programme the details of which will be provided to the Player by The Football Association. That programme is to be completed within a four-month period commencing with the date of these Written Reasons. If the Player fails to satisfactorily complete the programme in that period, he will be immediately suspended from all domestic club football until such time as the mandatory programme is so completed. Given the ongoing pandemic if, for any health and safety related reason, the programme cannot be delivered face-to-face within the four months indicated then, with the permission of The Football Association, the programme may be undertaken by means of video-conference and/or there may be a reasonable extension of the time period allowed for completion.



DAVID CASEMENT QC (Chairman)

MARVIN ROBINSON

LAWRENCE SELBY

31 August 2020