

FOOTBALL ASSOCIATION REGULATORY COMMISSION

THE FOOTBALL ASSOCIATION

-and-

EDINSON CAVANI

Commission: Richard Smith QC (Chairman)

Gareth Farrelly

Marvin Robinson

Secretary to the Commission: Paddy McCormack

Hearing: 31st December 2020 (by Microsoft Teams) in the absence of the Parties

REASONS OF THE REGULATORY COMMISSION

1. The Regulatory Commission was appointed to determine proceedings brought against Edinson Cavani ('the Player') who was charged with misconduct.

The Charge

2. By letter dated the 16th December 2020, the Player was charged with misconduct for an Aggravated Breach of FA Rule E3(1) in respect of a post on the Player's Instagram account dated 29th November 2020.
3. FA Rule E3 (in part) provides that:

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

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

4. In correspondence provided to The FA on the 3rd of December 2020, Manchester United FC asserted on the Player’s behalf that the circumstances of the Player’s actions were such that disciplinary action was not warranted, and that the Player’s conduct did not amount to a breach of FA Rules. However, upon being charged the Player admitted the allegation and expressed his wish that these proceedings be determined without the necessity of a personal hearing.

The Facts

5. The Player was born in Uruguay, is Spanish speaking, presently speaks no English and has not previously lived in an English-speaking country.
6. Having signed for Manchester United FC in early October 2020, the Player had received no media training specific to his residence in this country. The Player however had an Instagram account with 7.9 million followers.
7. On 29th November 2020 and after the Player had scored twice for his club in their game against Southampton, a close friend of the Player, Mr Pablo Fernandez, posted a public Instagram message including a photograph of the Player performing a goal celebration with the words *“Asi te quiero Matadorrr!!!!”* (namely, *“I love you like a bull fighter”*).
8. The Player could have responded to his friend privately, but he did not; the response was on the Player’s public platform. The reply to the post included a handshake emoji and the words *“Gracias negrito”* written underneath the picture. Those words translate as *“Thanks little black guy/ Thanks Blackie/ Thanks Black”*.
9. In a transcribed video statement provided to the Commission, Mr Fernandez stated that his life-long nickname was *‘Negrito’* and that he took no offence at all to the posted message. Mr Fernandez observed that he used the same nickname affectionately towards his own son. Copies of private WhatsApp messages between Mr Fernandez and his friends illustrated the use of the term *‘negrito’* as being commonplace between them. Mr Fernandez is a man of Caucasian appearance similar to that of the Player.
10. Professor David Wood, an expert in Latin American studies instructed by The FA, noted that whilst *“negrito”* is commonly used in South America to refer to a male who is of colour, someone familiar with South American culture and language could also have

understood that in the context of friends it was not used with the intention to be racist, insulting or offensive. Unsurprisingly, the Professor added that English native speakers unfamiliar with South American culture would be likely to take offence to the words used.

11. When the Player became aware that when viewed objectively his post “*may be construed as offensive in England*”, he deleted the material and subsequently made a public apology on his Instagram account.
12. The Commission were satisfied that the Player wrote his reply in affectionate appreciation of a message from his Uruguayan friend and that it was not designed or intended to be racist or offensive either to his friend or others reading the content of the Instagram post.

The FA’s Case

13. It was no part of the case presented by The FA that the Player deliberately acted with racist or offensive intent. That was an approach and understanding with which the Commission agreed.
14. It was the FA’s case that a reasonable observer with no understanding of South American cultural norms in respect of the use of the word “negrito”, and with no understanding of the relationship between the Player and his close friend, would inevitably consider the words used by the Player to be of a kind infringing Rule E3(2).
15. In short, when translated in a foreseeable way, The FA submitted that a follower of English Premier League football would have understandably concluded that the words used were racially offensive.

The Player’s case

16. Put succinctly, the Player submitted that he was simply spontaneously responding affectionately to a good friend by his nickname. At the time the message was posted the Player had no idea that the term used could be construed as offensive in this country. “Negrito” was not used in reference to his friend’s colour, but simply because that was the nickname Mr Fernandez had been known by since childhood. So it was that the Player deleted the post and apologised as soon as he became aware of the potentially offensive connotations of that which he had innocently said.

Sanction

17. As both parties to the proceedings correctly observed, previously decided cases are now of very limited assistance to the Commission as they were decided before the implementation of the revised sanctioning regime implemented in the current 2020/2021 season. This is the first case concerning a player to be decided pursuant to the new provisions.

18. Regulation 45 now provides that;

“Where an Aggravated Breach is found proven, a Regulatory Commission shall apply The Association’s sanction guidelines for Aggravated Breaches set out at Appendix 1 to Part A: Section One: General Provisions.” [“Appendix 1”]

19. Appendix 1 (in part) further provides that;

“A finding of an Aggravated Breach against a Player, Manager or Technical Area Occupant will attract an immediate suspension of between 6 Matches and 12 Matches (“Sanction Range”).

The lowest end of the Sanction Range (i.e. 6 Matches) shall operate as a standard minimum punishment (the “Standard Minimum”).

A Regulatory Commission may impose an immediate suspension in excess of 12 Matches in circumstances where aggravating factors of significant number or weight are present.

Exceptions to the Standard Minimum

A Regulatory Commission may only consider imposing a suspension below the Standard Minimum where the following specific (and exhaustive) circumstances arise such that the Regulatory Commission determines that the Standard Minimum would be excessive:

*Where the offence was committed in writing only or via the use of any communication device **and**:*

Where the Regulatory Commission is satisfied that there was no genuine intent on the part of the Participant Charged to be discriminatory or offensive in any way and could not reasonably have known that any such offence would be caused.

For the avoidance of doubt, the existence of the circumstances above will not necessarily result in a departure from the Standard Minimum. A Regulatory Commission must be satisfied that the unique circumstances and facts of a particular case are of such significance that a departure from the Standard Minimum is justified to avoid an unjust outcome for the Participant Charged. In reaching a decision, the

Regulatory Commission must also consider whether or not it is in the best interests of the game in tackling all forms of discrimination to depart from the Standard Minimum. In any event, a Regulatory Commission shall impose a suspension of no less than 3 Matches.”

20. Accordingly, the starting point for the Commission’s consideration was that this (first) offence would ordinarily attract a suspension of between 6 to 12 matches pursuant to the provisions of Appendix 1 above. The Commission then considered whether the Standard Minimum of 6 games would be “excessive” in this particular Player’s case within the meaning of the Appendix.
21. There was no dispute that the offence was committed via the use of a communication device. The Commission went on to further consider whether it was satisfied that there was “*no genuine intent on the part of the Player to be discriminatory or offensive in any way.*”
22. In submissions made to the Commission, the Player urged that the Commission could be satisfied from his own account of events that there was no intent on his part to be discriminatory or offensive in any way given his lack of knowledge of English and his lack of awareness of the meaning of the words used when translated literally in English. In addition, the Player pointed to the conclusions of Professor Wood in respect of how the words might properly be (innocently) interpreted in South America in the context they were used.
23. In their written submissions to the Commission, The FA did not adduce any evidence to contradict the assertions made by the Player in respect of his intention. Indeed, the sense of the submissions provided was consistent with The FA accepting that which the Player had stated. The Commission considered that to be an understandable and correct approach in the circumstances of this case.
24. The Commission readily concluded that it was satisfied that there was no intent on the part of the Player to be discriminatory or offensive in any way. As detailed herein above at paragraph 12, the Commission were satisfied that the Player wrote his reply in affectionate appreciation of a message from his Uruguayan friend and that it was not designed or intended to be racist or offensive either to his friend or others reading the content of the Instagram post. Such a conclusion was supported by all the available evidence relevant to the circumstances in which the post was made and having regard to the character and response of the Player.
25. However, it is not sufficient that the Player simply had no such intent. Indeed, if a Participant charged with this offence did have such intent, it is difficult to see in such

circumstances how a Commission would consider anything other than a sanction of at least the Standard Minimum. To depart from the Standard Minimum a Commission must in addition be satisfied that the Player “*could not reasonably have known that any such offence would be caused.*”

26. The FA did not present a positive case to the Commission inviting them to conclude that the Player could reasonably have known that offence would be caused by his post. Again, that was an approach with which the Commission concurred having considered the evidence available to them. The Commission was satisfied that the Player could not reasonably have known that any such offence would be caused.

27. In reaching that further conclusion, the Commission had particular regard to the fact that the Player had;

(i) only been in this country for some two months, did not speak English and had not previously lived in an English-speaking country. Accordingly, the Commission could not be satisfied that it would be proper to infer that the Player had been sufficiently exposed to the language and culture of this country so as to allow him to have understood that words that were affectionate and unoffensive in his native language, were unquestionably offensive in this country.

(ii) received no media training upon his arrival in England to enable him to be better placed to understand the cultural differences that might give rise to issues with a foreign player posting information on a social media platform. In light of the Player’s high profile in the game, his inability to speak English and the fact that he had approaching 8 million Instagram followers, the Commission were surprised that no such ‘training’ had been specifically put in place for the Player by his club.

28. The Commission also carefully considered whether it could properly be said that the Player would have been aware of other previously decided cases in this country of a similar kind that should have reasonably alerted him to the fact that his use of language might be construed as inappropriately offensive. There was no evidence before the Commission to provide a safe foundation for such a conclusion and the Commission further considered that the Player’s very recent arrival to this country did not leave him well placed to have appreciated the existence or significance of any such previous decisions.

29. The Commission went on to conclude that they were also satisfied that “*the unique circumstances and facts of this Player’s case were of such significance that a departure from the Standard Minimum was justified in order to avoid an unjust outcome for [the Player].*” The context and background of how this Player came to say what he did were of

a kind that would have resulted in a disproportionately unfair length of sanction if the Standard Minimum had been applied. The Commission were mindful to ensure that the sanction imposed was particular to the specific circumstances of the individual Player's case.

30. In reaching their conclusion in that regard, the Commission carefully considered whether it was *"in the best interests of the game in tackling all forms of discrimination to depart from the Standard Minimum."* The Commission were of the opinion that any reasonable observer who had full knowledge of the background and context to this case, would consider that a ban from playing of less than 6 games would properly reflect the culpability of the Player without distracting in any way from the common wish to tackle discrimination in the game.
31. Having concluded that it would be right and proper to depart from the Standard Minimum suspension, the Commission then went on to consider the appropriate length of suspension to be imposed on the Player, mindful that the minimum suspension is now one of 3 games. In so doing, the Commission had regard to those factors which could properly be said to aggravate and mitigate the Player's offending. Specific consideration was given to those factors listed in Appendix 1.

Aggravating Factors

32. In their written submissions to the Commission The FA did not specifically point to any matters that they considered to be of a kind to aggravate the Player's offending.
33. The Commission concluded that there was one aggravating factor present in this case. The Player did not have a legitimate expectation of privacy in that he posted his message in reply to his friend on a public social media platform with a very high number of followers, namely 7.9 million.

Mitigating factors

34. The Commission concluded that the following matters were mitigating factors in this case;
- (i) The Player is properly described as having a good character and good disciplinary record. The only on-field matter falling under the jurisdiction of The FA was one caution for a foul tackle on the 21st November 2020.
- (ii) The charge was admitted, although the Commission noted that the Player did not originally accept a breach of the relevant provisions when first asked to comment on his conduct and maintained in observations made on his behalf in his reply to the

charge, that he continued to hold the view that disciplinary proceedings were not necessary in his case.

(iii) The Player had demonstrated genuine remorse and had apologised for his conduct having promptly deleted the social media post. He made clear his continuing wish to be seen to support the fight against discrimination.

(iv) The Player and his Club have taken steps to ensure that the Player has a greater understanding of his responsibilities on social media.

35. The Commission carefully balanced the mitigating and aggravating factors, such factors themselves being assessed in the particular, and somewhat unusual, context that gave rise to the admitted misconduct.

36. In assessing the appropriate length of the playing suspension, the Commission considered whether it would be right to conclude that in circumstances where an aggravating feature was present, it would be wrong to apply the minimum suspension of 3 games. Whilst readily recognising that there might be cases where such an approach would be appropriate, on the facts of this particular case the Commission concluded that taking all relevant matters into account, a suspension from playing of 3 games properly marked the gravity of the Player's offending.

37. In addition, the Commission concluded that it was correct to impose a financial penalty on the Player commensurate with the financial information that had been provided in the proceedings.

38. By reason of the provisions of Appendix 1 the Commission is bound to order that the Player is made the subject of an education programme.

Summary of Sanction

39. The Player Edinson Cavani is;

(i) Suspended from all domestic club football with immediate effect until such time as Manchester United FC have completed 3 First Team competitive Matches in an approved competition.

(ii) Fined the sum of £100,000.

(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.

40. There will be no order as to costs.

Richard Smith QC (Chairman)

Gareth Farrelly

Marvin Robinson

4th January 2021