

FOOTBALL ASSOCIATION REGULATORY COMMISSION

THE FOOTBALL ASSOCIATION

-and-

MARC BOLA

Hearing 3rd November 2021 (by Microsoft Teams).

Commission: Richard Smith QC (Chairman)

Gareth Farrelly

Udo Onwere

Michael O'Connor –Lead Judicial Services Officer– Secretary to the Commission

For the Player

Nick Cusack- Legal Representative

Karen Nelson - Observer

For the FA

Rebecca Turner– Regulatory Advocate

James Williamson- Observer

REASONS OF THE REGULATORY COMMISSION

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

The Charge

2. By letter dated the 3rd September 2021, the Player was charged with misconduct for an Aggravated Breach of FA Rule E3(1) in respect of a post on the Player's Twitter account dated 14th April 2012.

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 anyone, 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 16th of August 2021, the Player immediately accepted his wrong doing and made a prompt apology for his actions as a teenager. In reply to the subsequent charge from The FA, the Player unsurprisingly accepted that the Tweet was homophobic and indicated his immediate intention to accept the charge. The Player again apologised for the comment and denied being homophobic.

The Facts

5. The Player is currently playing for Middlesbrough Football Club.

6. In April 2012, and when 14 years of age, the Player was attached to Arsenal Football Club Academy. In the late evening of the 14th of April, he posted a homophobic tweet on his Twitter account.

7. The tweet remained posted to the Player's account for several years thereafter. In the summer of 2021, the tweet was brought to the attention of The FA by a member of the public.
8. The Player had no recollection of posting the tweet or the circumstances in which he decided to do so. He described himself to be "shocked" and "disgusted" when the post was brought to his attention. The tweet was thereafter immediately deleted.
9. The Player's reaction is well placed. The content of the tweet was deeply offensive and would have caused considerable revulsion and distress to those who read it. That is particularly so where the tweet had endorsed violence against gay people.
10. It is right to observe that The FA did not assert that the Player is homophobic. Having considered all the evidence and having heard from the Player, the Commission were satisfied that the Player was a very different man from the teenager who had posted the offensive material, and accordingly The FA's assertion was indeed fair and correct.
11. Those representing the Parties in this case were united in their opinion that cases of this kind are far from easy to sanction. That is an opinion shared by the Commission.

Guidelines Relevant to Sanction

12. The sanction guidelines applicable to a breach of FA Rule E3 in the 2011/2012 season (the "2012 guidelines"), were different from those now in place for the current season (the "2021 guidelines").
13. The current 2021 guidelines provide 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 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.”

SPECIFIC PROVISIONS CONCERNING MINORS

Where an Aggravated Breach of Rule E3.1 is committed in youth football by a Player aged under 12, no disciplinary charge will be brought. In such cases, the Player will be subject to an education programme, the details of which will be provided to the Player by The Association. Where an Aggravated Breach of Rule E3.1 is committed in youth football by a Player aged 12-15 (inclusive), a Regulatory Commission shall

impose a suspension of at least 6 Matches on that Player. The Regulatory Commission may increase the suspension where aggravating factors are present. A minimum of 1 Match shall come into effect immediately, however the Regulatory Commission may suspend such number of the remaining Matches on terms and for such period as it considers appropriate.”

14. During the course of the Hearing the Commission asked Ms Turner whether it was the FA’s case that the ‘Exceptions to the Standard Minimum’ provision applicable to an adult Participant, was also relevant to a minor. Ms Turner confirmed that the special provision for minors should read as if reference had been made to the applicability of the exemption provision (providing for a reduction from the standard minimum of 6 matches to one of 3 matches). The fact that the minor’s provision did not presently contain such a reference was described to be a “deficiency” in the drafting. The FA have indicated an intention to amend the provision to bring greater clarity to the guidance.

15. Accordingly, the minimum sanction that could be imposed upon the Player pursuant to the current guidance was one of a suspension from playing of 1 game, with a further 2 games suspended.

16. The guidelines relevant to a Commission’s consideration in 2012 were as follows.

“In the event of any breach of Rule E 3(1) including a reference to any one or more of a person’s ethnic origin, colour, race, nationality, faith, gender, sexual orientation, or disability (an “aggravating factor”), a Regulatory Commission shall consider the imposition of an increased sanction, taking into account the following entry points:

For a first offence, a sanction that is double that which the Regulatory Commission would have applied had the aggravating factor not been present.

These entry points are intended to guide the Regulatory Commission and are not mandatory.

The Regulatory Commission shall have the discretion to impose a sanction greater or less than the entry point, according to the aggravating or mitigating factors present in each case”

The Player’s Case on the Guidelines

17. Mr Cusack in his oral submissions to the Commission highlighted the fact that the current 2021 guidelines are more onerous than those applicable at the time when the tweet was posted, namely during the currency of the 2012 guidelines. In particular, the historic provisions did not require the imposition of an obligatory sporting sanction of a minimum length.
18. The Player called upon the legal principle of *lex mitior* in support of his case, namely the requirement that where there are differences between the penalty in force at the time of the commission of the offence, and that subsequently enacted, the application of the penalty provisions that are more favorable to the person being punished should be applied.
19. It was the Player’s case that he should be sanctioned in accordance with the Regulatory provisions in existence at the time the tweet was posted, namely the Regulations and guidance applicable to the 2011/2012 season.

The FA’s Case on the Guidelines

20. Whilst accepting that the offence was committed at the point of breach in 2012, The FA sought to persuade the Commission that the Player fell to be sanctioned in accordance with the current guidance.
21. The FA’s principal point in support of that contention as advanced by Ms Turner in her submissions, was that the 2012 guidelines did not amount to a ‘lesser penalty’ than those currently in effect. By way of example to illustrate that contention, The FA noted that a non-aggravated breach of FA Rule E3 for abusive and/or insulting language on

the field of play (for an adult) would have ordinarily attracted a suspension of two matches. Guidance as to that on-field sanction starting point was contained in the 2012 provisions. Whilst noting that the historic guidance made no reference to sanctioning entry points for off field conduct or the offence directly relevant to Mr Bola, Ms Turner observed that a similar level of starting point was appropriate for off field offences as those committed on the field of play.

22. Application of the 2012 guidelines, said The FA, could therefore provide for a doubling of a two match suspension by reason of the 'aggravating factor', thereby resulting in a potential four-match suspension; that would be a greater sanction than the minimum applicable sanction provided for under the current guidelines.
23. The FA further alerted the Commission to the fact that the 2012 guidelines made no provisions for Participants aged between 12-15 years who commit an aggravated breach. It was argued that the current guidelines make specific, and more favourable, reference to the approach to be taken in the case of a young participant.

The Commission's Finding regarding the Relevant Guidelines

24. The Commission concluded that the Player should be sanctioned in accordance with the 2012 guidance.
25. It was common ground between the Parties that the principal of *lex mitior* should apply in the consideration of this case.
26. The current 2021 guidance provides for a mandatory suspension from playing. As detailed herein above, the proper interpretation of the current guidance results in a conclusion that the minimum sanction a Commission could impose on a player in Marc Bola's position was an immediate one match suspension from playing with a further two matches suspended.
27. In contrast, the 2012 guidance made no provision for a mandatory sanction and

specifically provided that the sanction to be imposed was at the discretion of the Commission.

28. The Commission concluded that the absence of a mandatory provision in the 2012 guidance, together with the ability of the Commission to act at their discretion, could only be properly interpreted as being a less severe penalty regime than that which is currently in place. Fairness and correct procedure demand that the Player be sanctioned in accordance with the historic 2012 guidance.

The Player's Further Submissions on Sanction

29. At heart of the Player's submissions was the fact that the Player posted the offending tweet when he was a very young man and that the sentiment expressed in the offensive tweet in no way reflects the mature player now to be sanctioned. The Player observed that the post was the "polar opposite" to his present attitude to life and other individuals. The Commission accepted that was the case.

30. Mr Cusack pointed to the apology made, the lack of media training and the fact that the tweet had been promptly deleted.

31. Karen Nelson, the Middlesbrough FC Secretary, noted in her written statement before the Commission that the Player had been embarrassed and concerned upon having been informed of the content of his historic account.

32. The Commission were invited to impose a non-playing sanction.

33. In further support of that submission, the Player relied upon the circumstances relating to a recent incident in which another professional player had apparently posted a similarly offensive tweet in markedly similar circumstances to that of the Player the subject of this Hearing.

34. Mr Cusack observed that the other professional player had not been charged, had attended an educational course and received a warning as to his conduct from The FA.

The FA's Further Submissions on Sanction

35. It was The FA's contention that the Commission should impose a sporting sanction of an immediate one match suspension with two games suspended: namely the minimum sanction available under the current guidelines. In arriving at that submission, it is right to note that The FA had regard to the particular mitigating factors available to the Player.
36. In seeking to distinguish the potentially comparative case of the other professional player referred to by those representing Mr Bola, The FA pointed to the fact that a decision had been taken by The FA not to charge that player and that there were, it was said, several features of that case that distinguished it from Marc Bola. The Commission sought to explore that alleged distinction but were left troubled that they had not been provided with a clear understanding as to why it was that the FA were able to suggest that the two cases were of no comparative assistance. That was not a criticism of Ms Turner in her able efforts to assist the Commission with her oral submissions, but perhaps better reflected the fact that the reasoning as to why The FA had acted as they did in that other case, was not entirely clear to others looking in on that decision.

The Commission's Conclusions on Sanction

37. The 2012 guidance does not provide for an entry point for the offence the subject of these proceedings. However, when read as a whole, the guidance necessarily provides that the Commission were not bound by any particular entry point and that they have a discretion to impose a sanction greater or less than any given the entry point, according to the aggravating or mitigating factors present in the particular case.
38. In short, the Commission were to arrive at a fair and proper sanction having regard to the careful exercise of their discretion in the particular circumstances of this Player's case. That is what the Commission did.
39. Central to the Commission's deliberations was the need to balance the Player's culpability in posting such a gravely offensive tweet which remained on his account for some time

thereafter, against the fact that he offended in his ill-informed teenage years some nine years ago. The age of the offender as he then was, the age of the offence, and the circumstances of the mature player now to be sanctioned, were all prominent considerations in arriving at a just disposal of this case on its own facts. Those important considerations call for a very different approach to the question of sanction.

40. The Player's culpability had also to be seen in the context that this was a use of language employed not in person, but rather in the form of the written word on a social media platform. That is a relevant and proper distinction to make, not least as such is now recognized in the implementation of current sanctioning guidelines. Further, the prominence of social media today and the corresponding education of players about it, speaks of a very different set of factual circumstances than those relevant for a teenage boy in 2012.

41. In addition, the Commission had regard to those factors which could properly be said to aggravate or further mitigate the offending of the Player.

42. In their written and oral submissions to the Commission, The FA did not point to any matters that they considered to be of a kind to aggravate the Player's offending.

43. The Commission concluded that there were no aggravating factors present in this case.

44. The Commission concluded that the following were factors that further mitigated the seriousness of the Player's offending in addition to those already identified.

(i) At the time he posted the tweet, the Player had not had any social media training or education. The impact and influence of social media platforms was less significant than is the case in the current day.

(ii) The Player was of good character. The Commission accepted that Mr Cusack was correct in his description that the Player was now a well-regarded and successful player.

(iii) The Player had demonstrated genuine remorse and had apologised for his conduct having promptly deleted the social media post. The Commission took full account of that which the Player said for himself about his attitude to that which he had done and how he now conducts his own professional and personal life.

(iv) The charge was admitted at the very first opportunity.

45. The Commission concluded that the justice of this case was met by the imposition of a non-playing sanction. Such approach was in no way designed to undermine the seriousness of the content of the tweet posted years ago. The message was correctly described by the Player's own representative as being "abhorrent". However, the particular circumstances of the Player at the time he posted the tweet, considered together with all the relevant mitigating factors available to him since the occasion of his vile indiscretion, were of a kind to lead the Commission to a conclusion that to impose a playing sanction would have been a disproportionate penalty in this case.

46. The Commission arrived at that conclusion confident that an objective observer looking in on the totality of the facts of this case, would share the view that to take such a course remained very much in the interests of the game and did not do an injustice to the collective effort of the Sport to tackle discrimination.

47. The Player is warned as to his future conduct. In addition, the Player is ordered to attend an education programme provided by The FA. The Commission recognises that such attendance would have been a mandatory part of any sanction imposed under current guidelines. Moreover, notwithstanding that the Player appeared before the Commission as a mature man with completely different attitudes than those expressed in one offensive teenage tweet, and as the Player recognised for himself in his evidence at the hearing, every person can benefit from continued exposure to education in such an important area of life.

48. In reaching their decision, the Commission did not take into account any comparative assistance that might potentially have been gained from the investigation into the conduct of the other professional player whose case had been compared by the

Player. Insufficient details of that other matter were available to make a meaningfully clear and safe comparison of the facts or disposal. However, it is worthy of note that the Commission's conclusion as to sanction in the present case does nothing to offend the sense of (more general) consistency in the approach to players who find themselves accountable for social media indiscretions committed many years ago when they were teenagers.

Summary of Sanction

49. The Player Marc Bola is;

(i) Warned as to his future conduct.

(ii) Ordered to attend a 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 implications of the 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.

50. The Player is ordered to pay the costs of the Commission.

Richard Smith QC (Chairman)

Gareth Farrelly

Udo Onwere

4th November 2021

(Updated 24th December 2021)