

**IN THE MATTER OF THE FOOTBALL ASSOCIATION
REGULATORY COMMISSION**

DANIEL PODENCE

WRITTEN REASONS

Disciplinary Commission: Ifeanyi Odogwu (Chairperson)
 Stuart Ripley
 Marvin Robinson

Secretary Conrad Gibbons

Date: 4 May 2023

Introduction

1. This is the decision and written reasons of the Regulatory Commission considering the personal hearing of Daniel Podence (“DP”), a professional football player registered to Wolverhampton Wanderers FC (WWFC). He was charged with misconduct following a match against Nottingham Forest FC (NFFC) where it was alleged that in or around the 90th minute, DP spat at a NFFC player.
2. This is a summary document of our decision and is not intended to be a record of all submissions and evidence adduced. We are unanimous on our decision and reasons.

Background

3. On 1 April 2023, a Premier League fixture took place between NFFC and WWFC. In or around the 90th minute, NFFC players Brennan Johnson and Morgan Gibbs-White made allegations to the referee, Chris Kavanagh, that DP had spat at Mr Johnson.

4. Mr Kavanagh did not see the alleged spit. The incident was reviewed by VAR who completed a check and could not establish that DP had spat at Mr Johnson. No action was taken on the field of play.

The FA's Case

5. By charge letter 5 April 2023, the FA alleged DP "spat at Mr Brennan Johnson", contrary to law 12 of the FIFA Laws of the Game.
6. Mr Johnson provided a statement, dated 3 April 2023, where he said "DP first of all gestured to spit at me. On this occasion I do not think any spit came from his mouth. I can certainly confirm that I did not feel anything and I did not react [...] Soon after, DP did actually spit at me. I felt the contact on the side of my face. I put my hand there in response. I went immediately to the referee and told him that he had spat at me."
7. The FA obtained a statement from Mr Gibbs-White, dated 03 April 2023, which described, "I was very close to both Brennan and DP. I saw DP pretend to spit at Brennan. Very shortly afterwards, I saw DP actually spit at Brennan. I confirm that I saw the spit on the second occasion."
8. The FA also relied on camera footage from the fixture which provided several angles and playback speed options of the incident.

DP's Case

9. DP denied the Charge. He admitted pretending to spit towards Mr Johnson on two occasions. He denied spitting.
10. In his statement dated 14 April 2023, he stated Mr Johnson started speaking to him in an insulting and offensive way. DP was annoyed by this and reacted instinctively by pretending to spit towards Mr Johnson. He made that gesture twice before then walking away. DP said, "at no point did I actually spit at Mr Johnson and no saliva left my mouth".

11. DP also relied on the camera footage of the incident, as well as Mr Johnson's post-match interviews.

The Rules

12. Part E of the Rules is headed "*Misconduct*". By Rule 1 the Football Association ('FA') may act against a participant in respect of any "*Misconduct*" which is defined as including a breach of "*the Laws of the Game*".
13. Law 12 of the FIFA Laws of the Game provides that a player will be sent off the field of play for spitting at an opponent or any person.

The Hearing

14. At the hearing, the FA were represented by Yousif Elagab. Mr Johnson and Mr Kavanagh both attended remotely via video conference as witnesses for the FA. DP attended the hearing in person and was represented by Craig Harris (instructed by Centrefield LLP).
15. Mr Gibbs-White had been due to attend the hearing remotely as a witness, but the FA were ultimately unable to contact him. No submissions were advanced by the FA as to adjourning the hearing to accommodate Mr Gibbs-White's attendance.
16. DP sought to rely on correspondence from a witness who claimed to be a NFCC season ticket holder and had provided an unsolicited letter to DP's solicitors. The individual said he did not see DP spit, however, he refused to participate as a witness, and would not provide his seat details. In subsequent correspondence, the individual stated, "*that I cannot put my hand upon my heart and say definitively that there was no spitting*". DP's application to admit the individual's correspondence into the Hearing Bundle was allowed, however it provided very little (if any) probative value given the limited information as to the identity of the individual, inconsistencies with video footage, and because it was untested.
17. The Commission heard evidence from all attending witnesses. Mr Johnson and Mr Kavanagh were questioned by Mr Harris, and DP was questioned by Mr. Elagab.

18. Mr Johnson maintained in evidence that he felt spit on his face after the second spitting motion, whilst “not an unbelievable amount, but some spit did hit my face”. When asked why he did not appear confident about DP spitting at him in his post-match interviews, Mr Johnson sought to correct things he may have misstated in his interviews. He also stated that he had been advised by his club not to speak about the incident. Mr Johnson accepted that Mr Gibbs-White appeared to be indicating to the Referee that the spit could be seen on Mr Johnson’s shirt, but was unable to say why he said this.
19. Mr Kavanagh confirmed that Mr Gibbs-White had indicated to him that Mr Johnson had been spat at by pointing to Mr Johnson’s shirt. He saw no evidence of a spit.
20. DP said that Mr Johnson had called him a “little prick”. He accepted that he was seeking to provoke Mr Johnson by making spitting gestures towards him. He did this to provoke some sort of reaction. He did not think Mr Johnson saw him the first time, so he did the pretend gesture again a second time. He denied spitting and was sure no saliva left his mouth.
21. In closing, the FA submitted that DP was in a provocative mood, and notwithstanding spittle cannot be seen in the video footage, it is more likely than not it occurred. The gesture was highly unusual. Mr Johnson’s reaction was instant and is consistent with him being spat at in the face. It was submitted that even if DP did not intend to deliberately spit, the gesture of pretending to spit by blowing his cheek with force was so reckless that if spittle did leave his mouth, however small, this was sufficient to meet the charge.
22. DP submitted that the FA’s submissions on recklessness was a contortion of the actual charge against DP. There was no possibility for the charge to be found proved unless the FA established DP deliberately spat at Mr Johnson. It was submitted that the post-match interviews were of importance, as well as DP’s consistent denial in the immediate aftermath and on social media after the fixture. It was submitted that the FA failed to present any compelling evidence to disprove VARs completed checks during the match.

The Findings

23. The burden of proving the allegation rests upon the FA. The standard of proof is the civil standard, namely the balance of probabilities.
24. In assessing the evidence, we were mindful of the issue to be determined in the case. The Commission did not accept the FA's closing submission on recklessness, namely that saliva leaving the mouth whilst DP was admittedly pretending to spit at Mr Johnson was sufficient to find the charge proved. Spitting is not a defined term in the Laws of the Game and therefore the Commission considered its plain ordinary meaning, namely intentionally ejecting saliva forcibly from one's mouth.
25. The FA had not charged DP (even as an Alternative Charge) for improperly feigning to spit in the face of an opponent, or recklessly causing his saliva to hit Mr Johnson. We considered reckless saliva contact could only reasonably be deemed misconduct if the action preceding it was charged as improper conduct. In this case, the FA had pinned their colours to the mast in their charge alleging DP "spat at" Mr Johnson. In our view, given its ordinary meaning, spitting requires a state of mind.
26. The determinative issue therefore was whether we were satisfied on the balance of probability that DP had intentionally spat at Mr Brennan as alleged.
27. After careful consideration by the Commission, we unanimously found the Charges not proved on the balance of probability. We came to this decision for the following reasons.
28. The video footage did not show any saliva leaving DP's mouth. This was significant in our view. The footage was extensive, with the incident being covered from a number of angles and different playback speeds.
29. We found DP to be a credible witness. His denial of spitting and his explanation of pretending to spit had been consistent from the immediate aftermath of the allegation being made on the pitch, to his statement, and his oral evidence.
30. Whilst the Commission considered the allegations were made in good faith, there were weaknesses in Mr Johnson's evidence. In his statement he made no mention of seeing the saliva leaving DP's mouth, as opposed to feeling the contact on the side of his face, However, when asked about this during his oral evidence, only then did he go into

surprising detail about how he was able to see the saliva leave DP's mouth and that he was able to distinguish the spit from something else such as sweat due to its characteristics. This account was not convincing.

31. We also had regard to Mr Johnson's comments in his post-match interview. Whilst the Commission fully acknowledges Mr Johnson may have received advice not to discuss the incident, and that he is a young player who of course may have been attempting to avoid controversy, when he was asked directly by a BBC journalist whether DP had spat at him, Mr Johnson was equivocal in his response, saying that he "saw a similar kind of motion come from him, but at the end of the day it didn't happen".
32. For reasons which did not appear clear to the Commission, Mr Gibbs-White did not attend as a witness as originally scheduled. This meant of course that whilst we were able to consider his statement, DP did not have the opportunity to test his evidence. We placed the weight we deemed appropriate on Mr Gibbs-White's evidence.
33. Of significance to the Commission was Mr Kavanagh's evidence about Mr Gibbs-White pointing to Mr Johnson's shirt but not being able to see any spit. This was supported by Mr Johnson's evidence and the video footage. Mr Gibbs-White's actions were not consistent with Mr Johnson's evidence that spit hit him in the face (rather than on his shirt). Mr Kavanagh confirmed that at no point did Mr Johnson correct Mr Gibbs-White nor did Mr Johnson show the referee his face or hands.
34. The charge was found not proved. The decision is subject to the right of appeal under the relevant FA Regulations.

Ifeanyi Odogwu (Chairperson)

Stuart Ripley

Marvin Robinson

17 May 2023