IN THE MATTER OF AN APPEAL

FROM THE DECISION OF A REGULATORY

COMMISSION OF THE FOOTBALL ASSOCIATION

BETWEEN:

THE FOOTBALL ASSOCIATION

Appellant

-and-

JOHN YEMS

Respondent

Appeal Board:	Christopher Quinlan KC (Chair) – Independent Judicial Panel Chair Abdul Shaffaq Iqbal KC – Independent Legal Panel Member Ifeanyi Odogwu – Independent Legal Panel Member Michael O'Connor – Lead Judicial Services Officer (Secretary)
Attendees:	*John Yems* John Yems – Respondent Craig Harris – Respondent's Counsel Lindsay Gordon – The LMA - Observer *Football Association* Kate Gallafent KC – Representing The FA Amina Graham – Head of Regulatory Legal James Williamson – Integrity Investigator - Observer
Date:	28 March 2023
Venue:	Video conference call

WRITTEN REASONS OF THE APPEAL BOARD

1. This is the decision of an Independent Appeal Board. It is not the decision of The Football Association. The Appeal Board was appointed by its Chair in his capacity as the Independent Judicial Panel Chair. Each member is a senior legal practitioner in independent practice, with extensive relevant experience.

2. The Appeal Board repeats and endorses the following comments made by the Regulatory Commission in *The FA v Suarez*[1] :

   "[t]*he use by a footballer of insulting words, which include reference to another's player's colour, is wholly unacceptable. It is wrong in principle. It is also wrong because footballers… are looked up to and admired by a great many football fans, especially young fans. If professional footballers use racially insulting language on a football pitch, this is likely to have a corrosive effect on young football fans, some of whom are the professional footballers of the future. It also has a potentially damaging effect on the wider football community and society generally. Every professional footballer should be able to play competitive football in the knowledge that references to the colour of his skin will not be tolerated. The same goes for all levels of football. Those who are victims of misconduct of this nature should know that, if they complain and their complaint is upheld, the FA will impose an appropriate penalty which reflects the gravity of this type of misconduct*".

3. Those comments apply equally to managers and other persons, who occupy positions of trust and responsibility in the football community. Such persons are not only themselves direct role models to future generations of people who wish to be involved in the coaching and management of football, but also have the ability to shape the ethos and culture of a whole club. Any acts or omissions by persons in positions of responsibility that contribute to a discriminatory or divisive culture will inevitably harm the promotion of equality, diversity, and inclusivity in the football community.

[1] 30 December 2011, §441.

A. INTRODUCTION

4. The Appeal Board ("the Board") was appointed under the Terms of Reference for the Composition and Operation of the Judicial Panel to determine an appeal brought by The Football Association ("the Appellant").

5. On 27 July 2022 John Yems ("the Respondent"), a professional football manager, was charged with misconduct in respect of sixteen alleged breaches of FA Rule E3.2 and one alleged breach of FA Rule E4 arising from the period when he was manager of Crawley Town Football Club ("the Club") between 2019 and 2022. The FA Rule E4 charge was subsequently withdrawn by The FA, leaving sixteen alleged FA Rule E3.2 breaches. It was alleged that each breach amounted to an Aggravated Breach as each includes a reference to ethnic origin and/or colour and/or race and/or nationality and/or religion or belief and/or gender.

6. By a decision dated 25 November 2022, following a three-day hearing, a Regulatory Commission ("the Commission") found eleven charges proven (the "Liability Decision"). The Respondent admitted another charge.

7. Following a further hearing on 6 January 2023 the Commission determined that the Respondent should be suspended from all football and football related activities for the balance of the current season and the next season, which suspension would run up to and including 1 June 2024. It also required him to undertake an education programme, forfeit his hearing fee and pay the Commission's costs. The Commission's reasons were set out in a written decision dated 9 January 2023 (the "Sanction Decision").

8. The FA appealed the Sanction Decision on the grounds that the Commission came to a decision to which no reasonable body could have come and/or that the sanction imposed was accordingly unduly lenient so as to be unreasonable. The Respondent resisted the appeal.

9. The appeal was heard by *Teams* video conference on 28 March 2023. At the conclusion of the hearing, the Board reserved its decision. This document constitutes our decision and the written reasons for it. It is unanimous and each member contributed to it. The Board has considered the entirety of the materials that the parties put before it.

B. COMMISSION'S DECISIONS

(1) Liability Decision

10. This is a summary. The full facts of the proven misconduct are set out in the Liability Decision.

11. The Respondent is a professional football manager. As well as holding positions at a number of English clubs (including Millwall, Exeter City, Torquay United and Bournemouth), he has worked all over the world, including in Saudi Arabia and the United States.

12. At the relevant time the Respondent was the manager of Crawley Town FC. He joined the Club as manager in December 2019. He was suspended in April 2022 following the allegations which led to these proceedings. Formal charges were brought by The FA, in respect of sixteen alleged breaches of FA Rule E3.2 and one alleged breach of FA Rule E4 between 2019 and 2022. Each FA Rule E3.2 breach was alleged to amount to an Aggravated Breach on the grounds that it included a reference to "*ethnic origin and/or colour and/or race and/or nationality and/or religion or belief and/or gender*". As stated in paragraph 5, The FA subsequently withdrew one of those seventeen charges.

13. The Commission heard evidence from five players, who it described as "*impressive witnesses*"[2], and "*none of them seemed to be exaggerating, let alone telling deliberate*

[2] Liability Decision, §9.

falsehoods"[3] (§9). The Commission also heard from the Club Chaplain and an FA Investigator who were, again, also found to be truthful witnesses[4].

14. The Respondent admitted Charge 16. That charge reflected the allegation that in the Club's changing rooms, he used words to the effect that "*all black women are aggressive*".

15. In respect of the eleven charges it found proved the Commission's core factual findings were summarised in the Appellant's written submissions and not disputed by the Respondent. In summary, those factual findings in respect of each charge are as follows.

16. Charge 1:

    a. During their game of darts, the Respondent said that two black players would be "*more used to blowpipes than a game of darts*" – a comment that the Commission found was "*undoubtedly racist and insulting*"[5] (§54). The evidence of a player was that the Respondent asked the players why they were playing darts "*when people like them normally blow sharp objects through their mouths*", with him appearing to compare the players to Zulu warriors and making gestures as if he were using a blowpipe[6].

17. Charge 2:

    a. The Respondent deliberately mispronounced the second half of the name of the famous actor, Arnold Schwarzenegger, by "*exaggeratedly mispronounce[ing] the end of his name to sound like 'nigger'*"[7].

18. Charges 3 and 14:

[3] Ibid.
[4] Ibid.
[5] Ibid, §54
[6] Ibid, §11.
[7] Ibid, §11, §55.

a. The Respondent repeatedly asked two players whether they ate jerk chicken for dinner, notwithstanding the fact that at least one of the players in question had made it clear to him that he was "*African, not Jamaican*" and that "*Africans do not eat jerk chicken*"[8].
b. The Commission found that this constituted racial stereotyping.

19. Charges 4, 5, 8 and 9:

a. The Respondent repeatedly made comments which likened a non-White player to a terrorist or suicide bomber.
b. By Charge 4, the Commission found that the Respondent refused to provide the player with a vest on the basis that "[his] *people blow up stuff with vests*"[9].
c. By Charge 5, the Commission found in or around September or October 2020, in the canteen at the Club training ground, after a player suggested that he would one day play for Iraq against England, the Respondent said he would not attend the match because the player's "*people will blow the stadium up*" and that all he would hear is "*Allah Akbar all day*".
d. By Charges 8 and 9, the Commission found that the Respondent repeatedly made comments about a player carrying a bomb in his bag and sleeping next to an AK47. The Commission described those comments as "*misplaced joke*[s]"[10].

20. Charges 10 and 11:

a. During a team meeting in March 2022 where the team were eating pizza provided by a sponsor, the Respondent asked a non-white player whether he was "*unhappy about there being no curry pizza*" – a comment the Respondent was said to regret, and to have apologised for. The Commission found it amounted to "*Asian stereotyping*"[11] (§63).

[8] Ibid, §56.
[9] Ibid, §57.
[10] Ibid, §61, 62.
[11] Ibid, §63.

b. The Commission also found that in the second half of the 2021/22 season the Respondent described the same player as a "*curry muncher*" (§64), which it described as an "*offensive name*"[12].

21. Charge 13:

a. At the start of the 2021/22 season the Respondent commented on the darkness of a player's skin upon his return to the Club, after a period representing his national team, Grenada[13]. The player in question alleged that, having made the comment, the Respondent put a hand over his mouth and noted that he "*should not say that*"[14].

22. The Commission made the following further factual findings relevant to this appeal:

a. "…*we are confident that Mr Yems as a person is not a racist. Nor did Mr Yems ever intend to make racist remarks. Nevertheless, it is how what he said from time to time would be perceived by those to whom it was addressed which is what matters rather than his subjective intent*"[15].

b. The Respondent was of "*jocular disposition*"[16] described himself as "'*old school' and someone who is not concerned with the niceties of political correctness. It is fair to say that he has no appreciation that much of the sort of language which might have been in common usage some 40 or 50 years ago has no place in modern society"*[17].

c. Further,

"There was a considerable weight of evidence to the effect that Mr Yems was in the habit of, in his perception, cracking jokes which were perceived as racist by those who were the butt of the jokes. Probably, Mr Yems gave no thought at all to the effect of his language on those at whom the 'jokes' were aimed.

[12] Ibid, §64.
[13] Ibid, §66.
[14] Ibid, §16.
[15] Ibid, §50.
[16] Ibid, §51.
[17] Ibid.

Nor did he give any thought at all as to the likely reaction of others to the language he used."[18]

(2) <u>Sanction Decision</u>

23. Relevant to the issues on this appeal, under the heading "*Discussion*" the Commission said:

"We regard this as an extremely serious case. We have accepted that Mr Yems is not a conscious racist. If he were, an extremely lengthy, even permanent suspension would be appropriate. Nevertheless, Mr Yems's 'banter' undoubtedly came across to the victims and others as offensive, racist and islamaphobic [sic]. *Mr Yems simply paid no regard to the distress which his misplaced jocularity was causing."*[19]

24. In paragraph 11 the Commission found the following aggravating factors:
    a. The comments in question represented a "*sustained course of conduct involving remarks made in public*".
    b. The Respondent was "*in a position of trust and power as a manager of young players upon whom the effect of the way he talked was so distressing*".

25. Against that, by way of mitigation, in paragraph 12 the Commission:
    a. Recorded that the Respondent *"is not some conscious racist".*
    b. Acknowledged the effect on him and his family of an "*unjustified allegation, and attendant publicity, of racial segregation at the club*".

26. The Commission concluded:

"We decided that Mr Yems should be suspended from all football and football related activities for the balance of the current season and next season. The suspension should

[18] Ibid, §52.
[19] §10.

run up to and include 1 June 2024. In arriving at the decision we took into account the approximate number of matches which a League 2 club would play over this time."[20]

C. GROUNDS OF APPEAL

27. Pursuant to Regulation 1 of the Football Association's ("FA") Disciplinary Regulations – Appeals 2022/23 ("the Appeal Regulations"), The FA may appeal against a decision of a Regulatory Commission on the grounds that it:
    a. misinterpreted or failed to comply with the Rules and/or Regulations of the Association that are relevant to its decision; and/or
    b. came to a decision to which no reasonable such body could have come; and/or
    c. imposed a penalty, award, order or sanction that was so unduly lenient as to be unreasonable.

28. The FA submitted that the Commission came to a decision to which no reasonable such body could have come and/or imposed a sanction that was so unduly lenient as to be unreasonable.

29. In support thereof The FA relied essentially upon four reasons:
    a. First, the Commission failed to identify, have regard to and apply existing precedents on the correct *legal test* to be adopted in determining the charges ("**Reason 1**")
    b. Secondly, the Commission wrongly directed itself that it was necessary or appropriate to determine whether the Respondent was a racist ("**Reason 2**").
    c. Thirdly, since these were not social media offences the Commission erred in concluding that the Respondent's lack of intent was a mitigating factor ("**Reason 3**").
    d. Alternatively, if the Respondent's knowledge of the racist nature of his comments was relevant, on the facts of this case no reasonable body could

[20] §13.

have concluded that he was not aware of the nature of his comments ("**Reason 4**").

30. Ms Gallafent KC expanded upon those reasons in writing and in oral submissions before the Board.

D. RESPONSE

31. In his written[21] and oral submissions Mr Harris resisted the appeal. The fundamental submission was that the sanction was not lenient, let alone unduly so. It was contended that since before the Commission The FA submitted that the appropriate sanction was a suspension of "*at least two years*" the FA could not now properly argue that the sanction was unduly lenient.

32. Summarising the response to the four reasons, in respect of Reason 1, it was submitted that it is clear from the Liability Decision that the Commission applied the correct objective legal test. It was submitted that Reason 2 added nothing to Reason 1.

33. In respect of Reason 3 it was submitted that:

> "….*Whether described as a positive mitigating factor, or merely a factor to be taken into account in favour of the Respondent – as compared to the Participant who engages in knowing, racist conduct with hostile intent or in respect of whom no finding as to their character/motive/intent can be reached – the absence of such intent is clearly a factor that is relevant to the sanctioning stage.*"[22]

34. In respect of Reason 4, Mr Harris submitted:

[21] Dated 17 February 2023, corrected 20 February 2023.
[22] Ibid, §41.

"*A fundamental misunderstanding upon which this case was first reported by the press (whether purposefully to garner readership, or not), thus causing outrage in some quarters and, now, an appeal formulated in line with the commentary of those who were so outraged (without justification or, seemingly, having ever read the full Written Reasons for each of the* [Commission's] *decisions, less still had them explained by the FA), is that in describing the Respondent as not being a "conscious racist" in the Sanction Decision, the* [Commission] *was declaring that he and/or his words and behaviour were not racist*."[23]

35. Further, both in respect of Reason 4 and more generally, the Respondent complained that the Appellant was going, and was inviting the Board wrongly to go, behind the Commission's factual findings in the Liability Decision. Mr Harris submitted that the Commission's observations in paragraphs 50-52 of the Liability Decision were "*wholly unobjectionable*"[24]. Mr Harris submitted:

"The [Commission] *having described someone as not being 'consciously racist' does not mean that they are not racist, less still that the words and behaviour they are found to have used were not racist."*[25]

36. He said such was demonstrated in the Sanction Decision[26] where the Commission said that even though it did not consider the Respondent to be "*some conscious racist*"[27], "*overt racism, even if not deliberate, has no place in football or any other walk of life"*[28].

E. JURISDICTION AND RELATED ISSUES

(1) Extension of Time

[23] Ibid, §14.
[24] Ibid, §12.
[25] Ibid, §15.
[26] He incorrectly describes it as the Liability Decision in §16 of his written submissions.
[27] Sanction Decision, §12
[28] Ibid.

37. On 18 January 2023 – one day out of time – The FA gave notice of its intention to appeal the Sanction Decision. The notice was accompanied by the Extension of Time ("EoT") Application by which The FA requested a retrospective extension of the time limit by which such notice was required.

38. In the EoT Application, The FA apologised for its delay in giving notice and invited the Board Chair in his capacity as Judicial Panel Chair ("JPC") to grant the application. The FA relied on: (i) the importance of the case; (ii) the absence of any prejudice to the Respondent; (iii) the size and complexity of the proceedings below; and (iv) the limited period of delay (where The FA had given notice less than 24 hours after the date by which compliance was required under the relevant regulations).

39. The EoT was opposed. On 19 January 2023, the Respondent's counsel argued that the JPC did not have the power to extend time under the relevant regulations, which were said to apply only to "extant appeals" and were therefore said not to permit a retrospective extension of time as sought by the EoT Application. He also opposed the application on the merits.

40. In a decision communicated to the parties on 21 January 2023, the JPC granted the EoT Application (the "EoT Decision). The JPC:
    a. Rejected the submission that he did not have jurisdiction under the relevant regulation (Regulation 14 of Part C of the Disciplinary Regulations (Non-Fast Track Appeals)).
    b. Ruled that in any event, Regulations 6 and 7 of the General Provisions of the Disciplinary Regulations (which, again, are set out further below) permitted the JPC to consider, and grant, the EoT Application absent any serious and irremediable prejudice to the Respondent.
    c. The discretion vested in him to extend time was not limited or qualified. In that respect, the JPC recognised that the burden was upon the FA to satisfy him that he should exercise that discretion in its favour.

d. While no substantive explanation was offered for the delay, the JPC was nonetheless prepared to grant the EoT Application in circumstances where: (i) the delay was "*very short*"; (ii) the case was "important and significant" and involved the "*FA's largest and most extensive prosecution for a course of discriminatory and racist conduct*"; and (iii) the Respondent suffered no prejudice as a result of the delay.
e. The JPC expressly did not consider the merits of the intended appeal.

41. The Respondent challenged the EoT decision.

(2) <u>Challenge to the EoT Decision</u>

42. By written submissions dated 17 February 2023 (corrected 20 February 2023) the Respondent contended:
    a. The JPC's EoT decision was made *ultra vires* and is rendered inconsequential, such that the Appeal Board has no jurisdiction over this matter; and/or
    b. The JPC (even if empowered to do so) erred in permitting the FA to appeal out of time in the circumstances of this case, such that the JPC's decision should be revisited and overturned, with the effect that the appeal be stayed.

43. He further submitted that since the JPC was the Board Chair he should not consider the merits of his own decision to grant the EoT decision. On that basis, the Respondent argued that the JPC should recuse himself as it would not be appropriate for him to reconsider the arguments set out in those Submissions. This would be correct were there power to review the EoT decision which, for reasons set out below, there is not.

44. The FA submitted that there was no merit in either submission. It also suggested that if there is any doubt about the proper construction of the relevant regulations, the proper course was for a separate panel to consider the issue of whether the Respondent has a right of appeal of the JPC's decision.

45. In a decision communicated to the parties on 13 March 2023, the Board announced:

a. *"For reasons we shall explain in our written reasons the Appeal Board will remain as presently constituted."*

46. These are the reasons foreshadowed on 13 March 2023.

47. The FA's Disciplinary Regulations include the General Provisions in Part A, as well as Part C (Appeals: Non-Fast Track). The General Provisions in Part A are divided into two sections: section one (Regulations 2 – 25) "All Panels" and section two (Regulations 26 – 66) "Regulatory Commissions". Regulation 2 expressly applies section 1 to "Appeal Boards".

48. Regulation 4 of the General Provisions provides that the "*bodies subject to these General Provisions are not courts of law and are disciplinary, rather than arbitral, bodies. In the interests of achieving a just and fair result, procedural and technical considerations must take second place to the paramount object of being just and fair to all parties*".

49. Regulations 6 and 7 provide that the bodies that are subject to the General Provisions shall "*have the power to regulate their own procedure*" (Regulation 6) and that, without limitation to that, "*any breach of procedure by The Association, or a failure by the Association to follow any direction given (including any time limit), shall not invalidate the proceedings or its outcome unless the breach is such as to seriously and irremediably prejudice the position of the Participant Charged*".

50. As to the appeals provisions at Section C, Regulation 5.1 provides that a party intending to appeal the decision of a Regulatory Commission must give notice of that intention within 7-days of the 'Notification Date'. Regulation 14 provides:

"14. The chairman of an Appeal Board (or the Judicial Panel Chair (or their nominee) if an Appeal Board has not yet been convened) may upon the application of a party or

otherwise, give any instructions considered necessary for the proper conduct of these proceedings, including but not limited to:

14.1. extending or reducing any time limit;

14.2. amending or dispensing with any procedural steps set out in these Regulations;

14.3. instructing that a transcript be made of the proceedings;

14.4. ordering parties to attend a preliminary hearing;

14.5. ordering a party to provide written submissions.

The decision of the chairman of the Appeal Board shall be final."

51. At the time the JPC's EoT decision was made, an Appeal Board had not been convened. Therefore, the appropriate person to consider the EoT application was the JPC. The JPC makes the decision *in lieu* of an Appeal Board Chairman. As Regulation 14 makes clear the decision to extend or reduce any time limit, whether made by the Appeal Board chairman or JPC, is final. Therefore, properly construed, Regulation 14 does not provide an appeal route from the JPC's EoT decision. Absent the possibility of further challenge to the EoT Decision, there was no basis for the JPC's recusal; and the Respondent did not suggest any.

52. Since it has been raised and it may have future relevance, it is appropriate to address the *vires* argument. The Respondent contended that Regulation 14.1 cannot be exercised retrospectively, namely to permit notice to be given under Regulation 5.1 where the time for such notice has already elapsed. The Board rejects that submission for these reasons:

    a. Regulation 14.1 applies to "*any time limit*". Were an Appeal Board chairman or the JPC unable to grant a retrospective extension of time, one would expect that to be stated expressly in the Regulations.

    b. It is wrong to suggest that such a construction would prevent any finality in proceedings before The FA's disciplinary bodies. The length of any delay will, almost invariably, be a relevant consideration in deciding whether and how to exercise the power in Regulation 14.1. The longer the period of delay, the more likely it is that the Respondent will have suffered serious or irremediable prejudice for the purpose of Regulations 6 and 7 of the General Regulations.

The Appeal Board chair/JPC will necessarily balance the importance of finality in the proceedings with questions of substantive justice and fairness.

c. The Non-Fast Track Appeal Regulations in Part C must be construed and applied compatibly with the General Regulations in Part A. Those caution against an overly rigid interpretation of the Disciplinary Regulations, noting that the bodies that are subject to the Regulations are not courts of law and that "*procedural and technical considerations must take second place to the paramount object of being just and fair to all parties*" (Regulation 4).

d. An interpretation of Regulation 14 which precluded the JPC or chairman of the Appeal Board from granting a retrospective extension of time in any circumstances where the proceedings would otherwise be final does not sit comfortably with that clear interpretative guidance; nor with the provisions of Regulation 7, which clearly states that "*any breach of procedure by The Association, or a failure by the Association to follow any direction given (including any time limit), shall not invalidate the proceedings*", absent any serious or irremediable prejudice to the participant.

53. The FA is correct: the rigid, inflexible construction upon which the Respondent's vires challenge is premised is completely at odds with any proper reading of Regulation 14 and the Disciplinary Regulations as a whole.

54. Accordingly, the Board concluded that the discretionary powers pursuant to Regulation 14.1 can be exercised retrospectively by the Chair of the Appeal Board or the JPC (or the JPC's nominee) in appropriate cases.

F. DECISION

(1) Approach to FA Rule E3 Cases

(a) Liability

55. Under FA Rule E1, The FA may act against a Participant in respect of any '*Misconduct*', which includes any breach of Rules E3 and E4.

56. FA Rule E3.1 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 any one, or a combination of, violent conduct, serious foul play, threatening, abusive, indecent or insulting words or behaviour*".

57. FA Rule E3.2 defines an 'Aggravated Breach' as one including:

"…a reference whether express or implied, to any one or more of the following: - ***ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability***" (emphasis added).

58. FA Rule E4 provides that a Participant "shall not carry out any act of victimisation as defined in the Equality Act 2010, or any act of discrimination by reason of ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation, disability, age, pregnancy, maternity status or civil partnership, unless otherwise permitted by law and the Rules or Regulations of the Association".

59. The correct approach to such cases is not controversial. The test for breach of Rule E3.1 is objective. The question is simply whether the words and/or behaviour are objectively abusive or insulting. This is a matter for the Regulatory Commission to decide, having regard to all the relevant facts and circumstances of the case. It is not necessary to prove that the alleged offender subjectively intended his words or behaviour to be threatening, abusive, indecent or insulting.

60. Further, in respect of an 'Aggravated Breach' contrary to Rule E3.2 it is a question of fact whether a breach of Rule E3.1 includes a reference to a protected characteristic. That too is to be answered objectively and no question of subjective intention arises.

61. When determining liability in a case involving an 'Aggravated Breach' the Regulatory Commission (or indeed Appeal Board) is not required to determine whether the Participant is or is not, for example, a racist. It is not uncommon for Commissions to express such an opinion. It is not required to do so. Nor often will it be well placed to do so as it would require Commissions to engage in an exercise of assessing and judging an individual's personal beliefs or prejudices. Further, to do so risks leading the Commission into serious error, in respect of the correct approach to liability or sanction or both. Instead of expressing such views, Commissions must at the liability stage focus solely on whether, assessed objectively, each of the ingredients of the Rule E3.2 breach is proved so as to establish liability. The relevance or otherwise of intention, or 'state of mind', when determining sanction is addressed below.

62. In this context it is convenient to consider here **Reasons 1 and 2** together. With respect to Ms Gallafent, it is difficult to discern any real difference between the two reasons. The Commission did not set out in terms in the Liability Decision that it had applied a subjective liability test. However, the final sentence in paragraph 50 reads:

"…*it is how what* [the Respondent] *said from time to time would be perceived by those to whom it was addressed which is what matters rather than his subjective intent".*

63. The above construction as to the subjective perception of any person who is the victim of any FA Rule E3.1 misconduct, when considering whether that misconduct also amounts to an "Aggravated breach" within FA rule E3.2, is not the correct liability test to be applied.

64. All that falls to be factually decided as to liability in an E3.2 'Aggravated Breach' case is:

    a. What was said and/or the behaviour displayed;
    b. Whether that which was said and/or the behaviour displayed was objectively (one or more of) violent conduct, serious foul play, threatening, abusive, indecent or insulting; and if it was

c. Objectively did the words and/or behaviour include a reference to any one or more of the protected characteristics (ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability).

65. However, the Commission stated at the end of the quoted sentence from paragraph 50 of the Liability Decision this: "*rather than his subjective intent".* It is therefore clear that the Commission appreciated that the correct liability test was objective and not subjective.

66. As for the express findings which give rise to **Reason 2**, the Commission did express the view that the Respondent was "*as a person not a racist"*[29] and that he did not "*intend to make racist remarks*"[30]. Neither was a necessary consideration for assessment of liability because neither is an ingredient of an 'Aggravated Breach' (see above at paragraph 64). However, those findings do not support the argument that the Commission misdirected itself as to the liability test.

67. First, there is the expressive reference in paragraph 50 of the Liability Decision to it not being a matter of "*subjective intent*". Second, the fact the Commission found that the Respondent did not subjectively intend to make racist comments, but nonetheless still found liability proved in respect of 11 of the contested charges, supports the conclusion that the Commission applied the correct objective test. Had the Commission employed the incorrect subjective test and/or considered proof of intention a prerequisite it would not (bearing in mind the Commission's factual findings as to the lack of subjective intent on the part of John Yems) have found any of the charges proved.

68. However, the reasonableness of those factual findings and the impact on sanction are different points, considered below.

[29] Liability Decision, §50,
[30] Ibid.

(b) <u>Sanction</u>

69. Under Regulation 47 of the Disciplinary Regulations, where an 'Aggravated Breach' is found proven, a Regulatory Commission shall apply The FA's sanction guidelines for Aggravated Breaches, set out in Appendix 1 to Part A: Section One: General Provisions ("Appendix 1").

70. Appendix 1 provides that a finding of an 'Aggravated Breach' against a manager will attract an immediate suspension of between 6 matches and 12 matches, taking into account any aggravating or mitigating factors. A 6-match ban "*shall operate as a standard minimum punishment*" but 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.

71. The Regulations define specific and exhaustive circumstances in which the Regulatory Commission may decide that the standard minimum would be excessive. They include where the offence was committed in writing only, or using a communication device, and 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 the Participant "*could not reasonably have known that any such offence would be caused*".

72. A Regulatory Commission may impose any one or more of the other penalties provided for by paragraph 41 of Part A to the Disciplinary Regulations, which includes a suspension from all or any specified football activity permanently or for a stated period or number of Matches. Any Participant who is found to have committed an Aggravated Breach shall be made subject to an education programme, the details of which will be provided to the Participant by The FA.

73. Appendix 1 expressly addresses the factors to which a Regulatory Commission shall have regard when determining the appropriate sanction, which include "*the circumstances and seriousness of the incident*". Relevant aggravating factors include, but are expressly not limited to:

a. Repeated use of discriminatory language or conduct during commission of the offence.
b. The public nature of any offence.
c. The profile of the Participant, including whether "*they hold a position of responsibility within their Club or organisation*"; and
d. The relative ages of the Participant and the victim(s) at the time of the offence.

74. Relevant mitigating factors include but are not expressly limited to:
    a. Early admissions ("*at the earliest opportunity where the factual conduct forming the basis for the charge would be capable of being disputed*");
    b. The demonstration of genuine remorse; and
    c. The inexperience of a Participant by reference to their age or background at the time of the offence.

75. Second or further offences are to be treated with the utmost seriousness, with a presumption that the sanction will be higher than the top end of the sanction range (i.e. more than 12 Matches) and with an immediate suspension of no fewer than 7 Matches. Again, the Regulatory Commission is entitled to take into account all aggravating and mitigating factors in determining sanction.

(2) <u>Reason 3</u>

76. The FA is correct in its submission that (1) whether a person is or is not "*some conscious racist*" or (2) their intent in making the comments or conduct the subject of any charge, is not included in either the aggravating or mitigating factors list in Appendix 1. However, as noted above (paragraphs 73 and 74) Appendix 1 states in the express terms that the factors listed are not exhaustive:

    "In so doing, the Regulatory Commission shall give consideration to any aggravating and mitigating factors, ***to include but not limited to…"*** (emphasis added)

77. The FA also made the valid point that by contrast, as noted above (paragraph 71), the issue of intent is identified as a relevant factor in the exception to the "Standard Minimum" case where the offence was committed in writing only or via the use of a communication device. In such a case a Regulatory Commission may reduce the otherwise standard minimum punishment where it is satisfied there was no genuine intent on the part of the Participant charged to be discriminatory or offensive in any way and they could not reasonably have known that any such offence would be caused. The FA's position was that the express inclusion of the issue of intent as (effectively) a mitigating factor in the context of written / social media offences strongly militated against it being a mitigating factor in circumstances other than those written / social media offences.

78. That provision was included in the Disciplinary Regulations following the decision of *Bernardo Silva*[31] (11 November 2019). As in that case, it usually applies where the Participant is ignorant of any adverse connotations of their comment and therefore could not have intended for it to be offensive. A further example is *Edison Cavani*[32] (31 December 2020).

79. There is some force in The FA's submission. However, The FA put it no higher than "*strongly militated against (lack of intent) being a mitigating factor in circumstances other than those written / social media offences*". Bearing in mind the objective liability test, in the vast majority of cases Regulatory Commissions will have no difficulty concluding, on the balance of probabilities, that the Participant subjectively intended the E3.2 misconduct to be abusive or insulting (or any of the other limbs of E3.1 that apply to that charge). In rare cases, however, if the Regulatory Commission could not so conclude (for example due to cogent evidence that the Participant did not subjectively fully appreciate the nature of the misconduct and therefore did not subjectively intend the E3.2 misconduct to be abusive or insulting) then it could amount to mitigation. The degree of mitigation would be for the Regulatory Commission to evaluate.

[31] 11 November 2019.
[32] 31 December 2020.

80. Further, the Board can foresee circumstances where the Participant's state of mind would constitute an aggravating factor. For example, a case of a Participant who commits a Rule E3.2 breach with clear hostile, racist intent. That person's culpability will be greater than (for example) an isolated comment made by a person from a different linguistic and cultural background who is oblivious to the objective meaning of such a comment in British society. The fact that is not expressly stated (either) in Appendix 1 does not *ipso facto* prohibit that line of reasoning. The degree of aggravation will be for the Regulatory Commission to evaluate on a case-by-case basis.

81. Accordingly, the Board considers that the *subjective intent* of a Participant *may* have relevance to the *culpability* of that Participant for the proved misconduct as regards sanction. As ever, each case will turn on its own facts. The level of culpability must be assessed by Commissions by an assessment of the overall conduct of the Participant. That assessment will include all the relevant Appendix 1 aggravating and mitigating factors. It will, in appropriate cases, also be relevant to consider the subjective intent of the Participant who is guilty of Aggravated misconduct in breach of FA Rule E3.2.

82. If The FA wishes it, it is free to amend the Regulation to legislate in the terms it considers appropriate.

83. Therefore, rather than rule that the Commission erred in concluding that the Respondent's lack of intent was a mitigating factor, the Board considers the appropriate course to analyse the reasonableness of that conclusion.

(3) <u>Reason 4</u>

84. The Board does not repeat or adopt the adjective Ms Gallafent employed in submissions when describing in robust terms the Commission's use of the phrase "conscious *racist*". With respect to the Commission, understanding what it means is not without its challenges. Having wrestled with it, its purpose was to indicate that

the Commission concluded the Respondent was not aware that his comments were, objectively, racist.

85. To examine the reasonableness of this finding is not to go behind the Commission's decision on liability. It found eleven Charges proved. There is no challenge to those findings; nor to its decision to find others not proven. This is not a challenge to the Commission's factual findings in respect of liability. Rather it is a challenge to a factual conclusion central to the Commission's decision on sanction. The finding that the Respondent was not a "*conscious racist"* or "*some conscious racist"* appeared in paragraphs 10 and 12 respectively of the Sanction Decision. That finding was consistent with the Liability Decision but quite separate from it.

86. Having examined the reasonableness of the Commission finding that the Respondent was not a "*conscious racist*" (or in other words he was not aware that his comments were objectively racist) it is, with respect, simply not sustainable. Indeed, that finding was, in the *Wednesbury* sense, unreasonable. The Board has reached that firm conclusion for the following reasons.

87. First, some of the words and expressions used were inherently and <u>obviously</u> racist. Examples of this are:
    a. To deliberately mispronounce the second half of the name of the famous actor, Arnold Schwarzenegger, by exaggeratedly mispronouncing the end of his name to sound like "*nigger*".
    b. Making a comparison between two black players and 'Zulu warriors' vis-à-vis the game of darts.
    c. Repeated inquiries as to whether players ate 'jerk chicken', notwithstanding the players' pointing out that the statements were stereotypical and racist and, in any event, they were "*African, not Jamaican*".
    d. Repeated comparison of a non-white player to terrorists.
    e. The use of offensive names referable to race, like "*curry muncher*".

88. One simply knows not how it can reasonably be said that any person who uses any of those deeply offensive expressions is not aware that his comments are, objectively, racist.

89. Secondly it goes further. Paragraph 31 of the Liability Decision records:

"In his witness statement he had explained how he might be viewed as an 'old school' football manager who might be 'robust and industrial' in his use of language; indeed, he fairly acknowledged that he had been less concerned about speaking in a politically correct manner than he should have been. He freely accepted that his use of language tended to conform with the norms of earlier years rather than the standards of today. He is aged 62."

90. In his witness statement prepared for the first instance hearing the Respondent said that in light of his own background he was "*conscious of the importance of peoples' racial and ethnic backgrounds and sensitivities that might surround them*"[33]. He continued therein that "*certain words might be considered inappropriate now, which were previously considered positively appropriate, before one even gets to the issue of language that was always inappropriate but was nonetheless accepted for many years, whereas now – rightly – it is not*"[34]. He added:

"Those sorts of societal changes and greater degrees of education...might well have left me with what would be considered an 'old fashioned' approach and turn of phrase, but I have never meant any offence by that."[35]

91. The Respondent thereby accepted that he was aware of the changed 'standards of today' with which some of his language might have been out of step. On that basis alone he must have appreciated that at the very least there was a risk that what he was saying was wholly unacceptable having regard to current social norms.

[33] §5.
[34] §7.
[35] §8.

92. It goes further. There was evidence before the Commission that the Respondent was aware of the inappropriate and racist nature of some of his comments:
    a. The Commission found that having commented on the darkness of a player's skin, the Respondent put his hand over his mouth and said that he should not have said that.
    b. The Commission also found that the Respondent knew he had upset a player by his 'curry pizza' remarks. To the Respondent's credit, he apologised to that player and contacted the club from which he was on loan to disclose the situation.

93. If the Respondent genuinely and subjectively did not consider himself to be in the wrong, he would not cover his mouth, apologise or identify his words as ones which should not be said.

94. If the Commission proceeded on the basis of the Respondent's case that he intended the remarks to be 'jokes' or 'banter' and that this was in some way exculpatory or meant that he was not a "*conscious racist*" then that was a wholly unreasonable assessment and an incorrect approach to adopt. Racism can take many forms and need not be deployed in a manner that is actively hostile or aggressive towards the victim.

95. All of that evidence and those findings are inconsistent with the conclusion that the Respondent was not aware that his comments were, **objectively**, racist and wholly offensive. That conclusion was not one to which a reasonable body could have come.

96. To address briefly an argument raised by the Respondent, The FA's approach on appeal does not offend *The FA v Louza*[36]. In contending that the seventeen-month suspension is unduly lenient, The FA is not changing its position from the one it adopted before the Commission, namely that the offending merited a suspension of "*at least 2 years".* That is not an assertion that a suspension for two years would be a

[36] 18 November 2022.

sufficient sanction. In any event it is no more than an expression of opinion, sanction being for the Commission. The FA's approach at the sanction stage is not inconsistent with the submission now that seventeen months suspension was an unduly lenient penalty.

97. It is not necessary for the Board to examine, still less determine, the speculative motive attributed by the Respondent to The FA for bringing the appeal. It should be recorded that The FA strongly refuted such assertions. The Board was concerned with examining the merits of the appeal.

98. The next issue which arises is what effect, if any, did that factual finding have on the sanction imposed. The Commission itself said this in the Sanction Decision:

"We have accepted that Mr Yems is not a conscious racist. If he were, an extremely lengthy, even permanent, suspension would be appropriate."[37]

99. The Commission thereby recognised that were he a 'conscious racist' that would have been a significantly aggravating factor, justifying a significantly longer suspension than it imposed. The Board concludes this was therefore an unreasonable factual finding which was material to the sanction imposed. It follows that it is appropriate for the Board to review the suspension imposed.

100. Regulation 21 of the Appeal Regulations provides:

"The Appeal Board shall have power to:
21.1 allow or dismiss the appeal;
21.2 exercise any power which the body against whose decision the appeal was made could have exercised, whether the effect is to increase or decrease any penalty, award, order or sanction originally imposed;
21.3 remit the matter for re-hearing;
21.4 order that any appeal fee be forfeited or returned as it considers appropriate;

[37] §10.

21.5 make such further or other order as it considers appropriate, generally or for the purpose of giving effect to its decision.

21.6 order that any costs, or part thereof, incurred by the Appeal Board be paid by either party or be shared by both parties in a manner determined by the Appeal Board."

101. The FA did not invite the Board to remit the matter for sanction but instead to proceed to impose an appropriate sanction if the Board found the seventeen-month suspension to be unduly lenient. Remission would involve unnecessary cost and delay. The Board is empowered and properly placed to exercise any power which the Commission could have, including increasing the suspension if it is so unduly lenient as to be unreasonable. That is the next issue.

(4) <u>Sanction</u>

102. For a single E3.2 breach, the Regulations require a suspension of between 6 Matches and 12 Matches ("Sanction Range") in accordance with Appendix 1. There is provision to go beyond that if aggravating factors of significant number or weight are present. This is not a case where the exceptions to the Standard Minimum sanction of 6 Matches apply.

103. The Commission found as an aggravating factor that the comments in question did not occur on an isolated instance but represented a "*sustained course of conduct*"[38]. That is factually correct and it is right that Appendix 1 includes as an aggravating factor "*repeated use of discriminatory language or conduct during commission of the offence"*. In this case, sanction is being imposed for repeated *offending.* The recurring nature of the offending is integral to assessing its seriousness. This case involved twelve E3.2 breaches. It was a sustained course of offending and over an appreciable period of time, involving language which was inherently and obviously racist.

[38] Sanction Decision, §11.

104. Sanction in such a case is not a matter of simple arithmetic; for example, twelve multiplied by six (seventy-two matches) or twelve multiplied by twelve (one hundred and forty-four matches). Instead, it involves the imposition of a proportionate sanction which reflects the totality of the seriousness of the conduct. The gravity of the offending is assessed by reference to the Participant's culpability and the harm caused, with proper regard to any aggravating and mitigating factors. That is the approach the Board adopted in assessing whether the suspension was unduly lenient.

105. In accordance with Appendix 1 the Commission correctly identified the following aggravating factors:

a. The remarks were made in public[39].
b. The Respondent was in a position of trust and power as a manager of young players, which is two points: the Respondent's profile and the disparity in age between perpetrator and the victims[40].
c. "*The effect of the way* [the Respondent] *talked was so distressing*"[41] for the players.

106. Further the inherent gravity of some of the individual charges was aggravated by the fact they individually represented repeated use of discriminatory language, which is different from the repeated commission of different offences.

a. Charge 3 – reflected the Respondent "*repeatedly*"[42] asking a player if he ate jerk chicken.
b. Charge 8 – reflected the 10/15 times the Respondent asked the player if he carried a bomb in his bag[43].

[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Liability Decision, §56.
[43] Ibid, §61.

c. Charge 13 - reflected the Respondent "*constantly*"[44] asking a player if he was "*going back to Peckham to eat jerk chicken*".

107. In respect of mitigation, none of the specific factors listed in Appendix 1 applies. The Commission acknowledged the impact that the allegations had had on the Respondent and his family, especially in respect of a serious allegation which ultimately The FA did not pursue. It also had regard to the fact (as it found) the Respondent was "*not some conscious racist*" which the Board has found, for the reasons explained above, untenable. The Commission did not expressly regard as mitigation the Respondent's admission of one charge but that may well have been because such credit as it afforded was *de minimis* in the scale of things.

108. The Commission stated further:

"We read with interest the two previous decisions which were cited to us, but unsurprisingly the facts of those cases were very different. There are no close precedents for the present case. But, what is clear is that overt racism, even if not deliberate, has no place in football or indeed in any other walk of life."

109. The two previous decisions were *The FA v Peter Beardsley*[45] and *The FA v Lee Broster and Brett Adams*[46]. In the former Mr Beardsley was charged by The FA for three breaches of FA Rule E3.2. The sanctioning regime at the time was a mandatory five match minimum suspension. He was suspended from football for eight months.

110. In *The FA v Lee Broster and Brett Adams* both Participants worked as coaches with the youth team at Notts County FC. They were each charged with one breach of FA Rule E3.2. Mr Broster was charged with making a discriminatory comment to a player in a changing room, and Mr Adams for throwing a banana at a black player with

[44] Liability Decision, §22.
[45] 18 September 2019.
[46] 23 November 2015.

the words ‘fuck off’ on it. Mr Adams received a six month suspension (reduced to four months on appeal) and Mr Broster received a forty-two day suspension.

111. Those cases are factually very different from the present case. Both illustrate significant periods of suspension are appropriate, even for a single but serious Rule E3.2 breach.

112. In light of the factors set out in paragraphs 105-107 unanimously the Board concluded that the suspension of seventeen months was so unduly lenient as to be unreasonable. Accordingly, it quashes the suspension of seventeen months and substitutes a suspension from all football and football related activities for a period of three years. As with the suspension imposed by the Commission, this suspension will take effect on 6 January 2023. The Respondent is therefore suspended from all football and football related activities up to and including 5 January 2026.

113. There is no appeal against the Commission’s order that the Respondent undertake an education programme, forfeit his hearing fee and pay the Commission’s costs. Those orders remain undisturbed.

114. There is no order for costs.

F. SUMMARY

115. For the reasons set out, The FA’s appeal is allowed. The Respondent is suspended from 6 January 2023 from all football and football related activities for three years, namely up to and including 5 January 2026.

13 April 2023

Christopher Quinlan KC

Chair

Signed on behalf of the Appeal Board