

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

BETWEEN

THE FOOTBALL ASSOCIATION

and

MR KEITH MILLEN

WRITTEN REASONS AND DECISION OF THE INDEPENDENT REGULATORY COMMISSION
FOLLOWING A PAPER HEARING ON 26 OCTOBER 2023

1. These are the written reasons for a decision made by an Independent Regulatory Commission (the “Commission”) which sat via videoconference on 26 October 2023.
2. The Commission members were Ms Laura McCallum (acting as Chair and Independent Legal Panel Member), Mr Peter Powell (Independent Football Panel Member) and Mr Peter Fletcher (Independent Football Panel Member).

3. Mr Michael O'Connor of the FA Judicial Services Department acted as Secretary to the Commission.
4. The following is a summary of the principal issues and matters considered by the Commission. It does not purport to contain reference to all the issues or matters considered, and the absence in these reasons of reference to any particular point or submission made by any party should not be read as implying that it was not taken into consideration. For the avoidance of doubt, all the evidence and materials provided to the Commission was taken into consideration during our deliberations.

The Charge

5. On 17 October 2023, Keith Millen, the First Team Manager of Gillingham FC, was charged with a breach of FA Rule E3.1 in that it was alleged that in or around the 28th minute of a fixture between Walsall FC and Gillingham on 14 October 2023, Mr Millen's behaviour was improper (the "Charge").
6. The FA designated the matter as a Non-Standard Case due to the unusual nature of the reported incident.
7. The FA in bringing the Charge relied on the following evidence:
 - a. Match Referee Report dated 14 October 2023
 - b. Video clip of the alleged incident.

8. The Report of the Match Referee stated the following:

"I have to report that I, as the Referee sent off Keith Miller of Gillingham FC, under Law 12 section: Delaying the restart of play by the opposing team... In the 28th minute, the ball leaves the field of play by the Gillingham FC technical area, Gillingham FC No 22 picks up the ball and then drops the ball to avoid being cautioned for delaying the restart of play. Walsall FC no 10 leaves the field of play to pick up the ball to take a quick throw in but Keith Miller, Gillingham FC Manager, sticks his right leg out and trips the Walsall FC No. 10, preventing Walsall FC taking a quick throw in, therefore interferes with play and is correctly dismissed from the technical area, as per the laws of the game."

9. FA Rule E3 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 of, or combination of, violent conduct, serious foul play, threatening, abusive, indecent or insulting words or behaviour."

10. The burden is on the FA to prove the Charge on the balance of probabilities, namely that it is more likely than not that Mr Millen acted in an improper manner.

11. The FA Rules and Regulations do not provide a definition of "improper". It is a matter for the Commission as to what conduct falls into the ordinary understanding of the word "improper".

Denial of the Charge

12. Mr Millen denied the Charge but did not request an opportunity to attend a Commission for a personal hearing. Written submissions were lodged in defence of the Charge.

13. Mr Millen relied on the following evidence:

- a. Witness statement from Mr Millen dated 20 October 2023
- b. Separate video clip (different angle) of the alleged incident
- c. Various screenshots from the video clip of the alleged incident

14. It was stressed by Mr Millen that the fact he was dismissed from the field of play is not determinative of the question whether or not he acted improperly, or even if he acted as the referee believed at the time to warrant dismissal. It was at the Commission's discretion to find that Mr Millen did not violate the rule within the Charge, even if the dismissal was justified.

15. In his submissions, Mr Millen refuted the position that he had "tripped" the player in question to delay the restart of play. The incident took place in the 28th minute of the match and the score was 0-0. The atmosphere was low-key and the match had been uneventful thus far. The technical area was calm with no heated discussions. There was no reason for Mr Millen to have acted in a manner to trip a player, performing his role, whilst he was running towards a ball and the technical area.

16. Mr Millen was completely calm seconds before the incident. Referencing the video footage, he described his hands as being behind his back as the ball approaches the technical area. He referred to his extensive experience as a manager and/or coach and his natural reaction to catch, control, or stop a ball as it leaves the field of play. An action, Mr Millen contends, you routinely see managers and coaches doing.

17. Mr Millen submits that, whilst the ball rolls towards the technical area (and advertising boards), his attention is focused on the movement of the ball. At this point, he puts his leg out to stop the ball by trapping it. Mr Millen accepts, from the footage, that an opposition player is approaching the ball at the same time as Mr Millen 'traps' it with his foot. However, Mr Millen's position is that, on the day, he was not aware of the opposition player until a split second before his leg connected with the ball, and this was due to his focus being entirely on the movement of the ball.

18. He contended that the Referee had been deceived by the simulation of the player, and that Mr Millen's leg had simply strayed in a reflex reaction to the movement of the ball (which was rolling further away from the field of play), an act which would (i) not result in dismissal, (ii) not result in a charge and (iii) not be improper. Mr Millen was attempting to stop the ball which is an action carried out routinely by managers. Mr Millen denied that there had been any contact with the player but if there had been, such contact was merely accidental and not improper.

19. It was submitted that on the video evidence (different angle) provided by Mr Millen, and associated still images, the FA cannot discharge its burden of proof. The FA's video footage does not provide a full picture or give the correct impression when viewing it initially or at full speed.

The FA's Response to Mr Millen's Submissions

20. The FA described the incident as involving an opposition player running towards the touchline and attempting to pick up the ball. At the same time, Mr Millen "swung" his leg out of the technical area towards the ball and the opposition player. The opposition player is then seen falling to the ground.

21. It is the FA's case that the action of Mr Millen putting his leg out of the technical area, towards an opposition player who was clearly approaching to collect the ball was improper. It cannot be acceptable for a technical area occupant to impede the ball or a player in such a manner, whether deliberate or otherwise.

22. On an analysis of both sets of footage, the FA submits that the opposition player approached from the left-hand side of Mr Millen and remains in front of Mr Millen on the field of play and the touchline throughout the event. It would be unfathomable to suggest that Mr Millen was entirely unaware of the approaching player. The FA continues its analysis of the footage and states that at the point Mr Millen swings his leg out of the technical area, the opposition player is immediately in front of him crouched down with his arms outstretched in a position to pick up the ball. It is put to the Commission that "*it is clear that the direct result of Mr Millen*

swinging his leg out in this way towards the ball and the player would be to impede both. To do so is therefore not “faultless” behaviour on Mr Millen’s part.”

23. The FA stress that they have not charged Mr Millen with a “knowing trip” of the opposition player. The charge is one of improper conduct which does not require an intentional trip for a finding that Mr Millen acted in an improper manner. They have not relied solely on the observations of the Referee in bringing the charge. The FA contend that whether contact was made with the opposition player is immaterial to a finding that the action was improper. Mr Millen admits and is clear that his intent was to move his foot towards the ball. The FA’s position is that to swing his leg in this way, when there was an opposition player approaching at speed to retrieve the ball, was improper.

Further Submissions in Response to the FA

24. Mr Millen requested a right to reply to the FA’s written submissions on the basis that when the Charge was first served on Mr Millen, it was reasonable to presume that Mr Millen was being charged on the basis of the Referee’s report as there was no further information provided to the contrary. It was submitted that it was “wholly unfair” that the FA should serve its case, without any specificity as to exactly what is alleged, causing Mr Millen to have to reply so as to “cover all bases” in terms of how the FA’s case may be put, only for the FA to then lodge further submissions that are included in the evidential bundle for immediate transmission to the Commission without Mr Millen, or his representative, ever having seen said submissions, or had the chance to reply to them. The Commission considered this

a reasonable request, and upon receiving no objection from the FA, allowed Mr Millen to lodge further brief submissions in response to the FA.

25. Mr Millen states that at the time of his initial submissions, there was little indication as to how the FA put its case, beyond that which is described in the Referee report which implied that Mr Millen had intentionally tripped an opposition player in the circumstances therein described (see paragraph 8 above), thus resulting in the dismissal decision. However, following Mr Millen's response, the FA in their written submissions contend that the action of Mr Millen putting his leg out of the technical area, towards an opposition player who was clearly approaching to collect the ball was improper.

26. Mr Millen stresses that the action of putting one's leg out of the technical area, alone, cannot be said to be improper as Mr Millen would never have been dismissed for that. The fact that one puts their leg out when a player was approaching would be entirely irrelevant if their coming together as a result (contact or not) was merely accidental.

27. It is refuted that Mr Millen swung his leg out when the opposition player was already in front of him, crouched down, retrieving the ball. The footage shows that this was a "dynamic, momentarily lived event", whereby Mr Millen puts his leg out almost at the same time as the opposition player arrives to retrieve the ball. Mr Millen then attempts to pull his leg back quickly as he becomes aware of the player's arrival.

28. Mr Millen advised the Commission that it must assess his conduct by an objective standard considering context and potentially Mr Millen's intention, before the Commission arrives at its decision. The Commission are referred to the case of *The FA v Wayne Hennessy, 2019* in that regard.

29. Mr Millen submits that the FA cannot prove, on the balance of probabilities, that Mr Millen either deliberately or recklessly impeded the player, and if he did less still that he did so by making contact. The question is thus whether "impeding the ball" (which Mr Millen contends he did to stop the ball rolling further out of play), with a leg out of the technical area, constitutes improper conduct. It is submitted by Mr Millen that it does not.

Commission Deliberations

30. As Mr Millen denied the charge, the Commission was tasked with (1) considering whether Mr Millen's conduct was "improper" as described within the Charge letter and thus a breach of Rule E3.1 and (2) in the event that we find the Charge proven, the appropriate sanction for such conduct.

31. The Commission deliberated at length on this matter. We considered the definition of "improper" (which is not defined by the FA). We agreed that our basic understanding of the word is to describe conduct that falls below an accepted standard or is lacking in decency. Whether or not the action amounts to a breach of FA Rule E3.1 because it was "improper" is to be decided objectively.

32. We repeatedly scrutinised the footage available to us to and adopted our own interpretation, in light of the conflicting views between the FA, Mr Millen, and indeed the Referee. Our own interpretation of the incident is as follows:-

Gillingham player #22 runs the ball out of play. He then picks the ball up and drops it. The ball then rolls towards the Gillingham technical area and to where Mr Millen is standing. As the ball rolls, Walsall player #10 runs towards it. Almost simultaneously, Mr Millen steps towards the front edge of his technical area and moves his leg in a kicking motion in the direction of the ball (in our opinion to stop it rolling further into the technical area). Walsall player #10 arrives at the ball with his arms outstretched intending to pick it up on or around the exact moment that Mr Millen's foot connects with the ball. Walsall player #10 then falls to the ground. We cannot say whether this is a result of Mr Millen connecting with Walsall player #10 or not. It is not clear from the footage whether Mr Millen's leg connected with Walsall player #10. He may or may not have connected with Walsall player #10's hand at the point of connecting with the ball. The contact cannot be determined with any degree of certainty from the footage available to the Commission.

33. The FA states, in their analysis of the footage, that at the point Mr Millen "swings" his leg out, Walsall player #10 is immediately in front of him, crouched down with his arms outstretched in a position to pick up the ball. We can understand when watching the footage at full speed, why one might adopt that interpretation, but when the footage is broken down, we do not consider that description to be accurate. Having analysed the footage together, it is the Commissions' view that Walsall player #10 is still to the left of Mr Millen, running towards the ball, when

Mr Millen begins to move his leg into motion. The Player is not immediately in front of Mr Millen and is not crouched down. It is not until Mr Millen connects with the ball that Walsall player #10 is immediately in front of him due to an outstretched motion from that player's hands. The motions of both individuals happen within a matter of 1-2 seconds, with the focus of both individuals being solely on the ball.

34. The Commission recognises that the FA does not raise this Charge on the basis of a "*knowing trip*" and that this is not a requirement to find the Charge proven. However, for completeness, and given the Referee's report which was included in the FA's evidential bundle, the Commission does not consider that the footage provides any evidence to suggest that Mr Millen intentionally tripped Walsall player #10, nor does it find any motive for same. The incident occurred during the 28th minute of the match. The score was 0-0. Mr Millen appears to be relatively calm within his technical area. From our consideration of the bundle and footage, we don't consider there to be any reason for Mr Millen to attempt to delay a throw-in by intentionally tripping an opposition player when fetching the ball.

35. Moving on, the Commission accepts Mr Millen's explanation that he was trying to "trap" the ball to prevent it rolling further out of play and towards the advertising boards which sit directly behind the technical area. The Commission further accepts that it is common to see managers both in, and just outside, the technical area take action to stop balls coming out of play either with their hands or legs. We accept that it is a natural reaction for coaches and managers to do so.

36. The FA brings the Charge on the basis that the action of a manager putting his leg out of the technical area, whilst an opposition player is approaching, is improper. The Commission deliberated at length on this point. In determining the matter, we recognised that in some circumstances, and with reference to *The FA v Wayne Hennessy, 2019*, that the application of the objective test can often require taking account of subjective elements such as context, and intention where there is or could be more than one possible explanation for the conduct.

37. We considered that upon viewing the footage you could glean different interpretations of the incident, particularly so when you view the footage at full speed compared to a broken-down frame by frame analysis. We have already accepted Mr Millen's explanation that his intent was to trap the ball from rolling further from the field of play. We do not accept (but note that the FA is not relying on the fact) that there was a deliberate action to trip the player in order to delay the throw-in (as outlined in the Referee report). We do not believe there would be any motive for Mr Millen doing so and given the motion of the ball rolling towards Mr Millen and his technical area, we believe that on the balance of probabilities Mr Millen's explanation is more plausible.

38. Having accepted Mr Millen's explanation, we must ask ourselves whether as the FA contends the movement of Mr Millen's leg in this particular manner, to trap the ball, whilst an opposition player is approaching to fetch it is improper. For an action to be improper it must fall below accepted standards and/or lack in decency (that is our understanding of "improper").

39. We were in agreement that putting one's leg out of the technical area, in isolation, could not be said to be in line with the definition of improper. Indeed, we agreed that putting one's leg out of the technical area in order to stop a ball going out of play (as per the explanation of Mr Millen and to which we accept) cannot be said to be improper. It clearly does not fall below accepted standards when we see managers do it week in week out at football matches across the country. That leaves us with whether it is improper to do so when an opposition, or any player for that matter, is approaching. On this point, we consider circumstances and context to be key. Clearly it would be improper to stick one's leg out when you are knowingly aware of another person crossing your path and it is reasonably foreseeable that should you stick your leg out then that person is likely to fall over your leg, whether to their injury or not. However, did Mr Millen know or ought to have known that Walsall Player #10 was approaching? Mr Millen insists that he was not aware of Walsall Player #10 approaching. The FA contends that Mr Millen must have been aware of Walsall Player #10's approach and it would be "unfathomable" to suggest otherwise. However, from the footage available, it appears that Mr Millen is concentrating solely on the ball rather than the movements of the players in the immediate vicinity (in which there are three). On the evidence before us, we cannot say with any degree of certainty whether Mr Millen is aware, or ought to have been aware, of Walsall Player #10 approaching given the speed of events. Mr Millen insists he only became aware of Walsall Player #10's presence at the point of connection and given the lack of any further evidence to the contrary, we accept that position.

40. As such, if one is not aware of someone crossing their path because one's focus is on something else (in this case, the ball) then it might be said, in the circumstances, that you have been careless due to not carrying out a thorough check of your surroundings before sticking your leg out. However, keeping context in mind, when we consider (i) the speed of events, (ii) the movement of the ball, (iii) the natural and split reaction of managers/coaches to stop the ball coming further out of play (seen regularly at football matches across the country), and (iv) Mr Millen's own explanation of events, we do not consider that, in the event it can be said that Mr Millen was careless, that any such carelessness was to such an extent that it falls below an acceptable standard of care in that it would meet with the definition of improper. We have concluded that the incident was an unfortunate accident that was borne out of good intentions.

41. The FA must prove the charge it brings and as such, must prove that Mr Millen's conduct was improper. It must do that on a balance of probabilities. For the reasons already provided, and although we understand why the matter was investigated and the Charge served, we find that the FA has not discharged its burden of proof and therefore, the Charge against Mr Millen is dismissed.

Ms Laura McCallum

Mr Peter Powell

Mr Peter Fletcher

27 October 2023