

**IN THE MATTER OF AN APPEAL BOARD HEARING**

**BETWEEN**

**MR MILO HANIFAN**

**and**

**KENT FA**

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**WRITTEN REASONS AND DECISION OF THE APPEAL BOARD HEARING HELD ON 13  
FEBRUARY 2024**

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- 1) These are the written reasons for a decision made by an Appeal Board (the “Board”) which sat via videoconference on 13 February 2024.
- 2) The Appeal Board was appointed to determine an appeal brought by Mr Milo Hanifan (the “Appellant”) against a decision imposed by a Commission appointed by the Kent FA (the “Respondent”). The members of the Appeal Board were Ms Laura McCallum (acting as Chair and Independent Legal Panel Member), Mr Bob Purkiss (Independent Football Panel Member) and Mr Martin Hill (Independent Football/Safeguarding Panel Member).
- 3) Mr Shane Comb of the Wiltshire FA acted as Secretary to the Appeal Board.
- 4) The following is a summary of the principal issues and matters considered by the Appeal Board. 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 Appeal Board by both parties was taken into consideration during our deliberations.

### Background

- 5) By letter dated 13 October 2023, the Kent FA charged the Appellant with a breach of FA Rule E3 which relates to improper conduct including foul and abusive language (the “Charge”) at a match against FC Bickley on 03 September 2023 (the “Match”). Further, it was alleged that the Appellant’s conduct was aggravated under FA Rule E3.2 because the breach included a reference to a protected characteristic, namely sexual orientation. It was alleged that the Appellant made comments including “*why do you like it up the bum*” and/or “*get up you faggot*” and/or “*poof*” and/or “*why are you grassing to the lino, you queer*”, or similar comments.
- 6) The Kent FA, in bringing the Charge, relied on the extraordinary incident report forms of the Match Officials along with a variety of statements from those who attended the Match including the individual to which the comments were directed.
- 7) The Club Secretary of the Appellant’s Club denied the Charge and opted for a correspondence hearing.
- 8) The Appellant submitted a written statement for consideration. In that statement, the Appellant admitted to saying “*Why? Do you like it up the bum?*” however it was stressed that this was under the caveat that he was responding to an opponent player asking him “*Are you a poof?*” The Appellant asserted that the context in which he made the comment was important and the phrase was used as a defence mechanism to humour what the Appellant saw as a homophobic accusation towards him. The Appellant accepted that the language use referred to “sexual activity” but it was not offensive nor was there a reference to sexual orientation.
- 9) In its Determination, the Commission noted that whilst the Appellant admitted to using the aforementioned words, he did so only as a “defence mechanism” to comments from an opponent player. The Commission considered that the admission itself (regardless of the reason for the words) was enough to satisfy the elements of the Charge against the Appellant and therefore found it proven. In determining sanction, the Commission

considered the Appellant's disciplinary record as well as the FA's sanctioning guidelines which recommends a suspension, for such offences, in the range of 6-12 matches. The Commission imposed a suspension of 7 matches and ordered the Appellant to undertake a course of education.

### The Appeal

10) The Appellant lodged an appeal against the decision of the Commission. The Appellant did so on three grounds:

- a) The Commission failed to give the Appellant a fair hearing;
- b) The Commission came to a decision which no reasonable body could have come to; and
- c) The Commission imposed a penalty, award, order or sanction that was excessive.

11) The Appellant's appeal case may be summarised as follows:

a) Failed to provide the Appellant with a fair hearing

The Appellant submitted that he was not given a fair hearing and he was not given an opportunity to opt for a personal hearing as his club had taken control of the defence of the case. They had opted for a paper hearing, without the Appellant's knowledge or consent.

Had the Appellant been aware that he could have had a personal hearing he would have wanted the opportunity to address the Commission personally.

The Appellant contended that had he been able to attend a personal hearing, the Commission would have likely been swayed by his evidence and would have given less weight to that of the opponent player who had also provided evidence as to the events during the Match.

b) Came to a decision to which no reasonable body could have come to

The Appellant argued that the Commission erred in finding the Charge proven and that statements in support of the Appellant, including the Appellant's own statement, were to some extent not credible. The Appellant found this particularly dissatisfactory when, in his view, the Commission had been persuaded by certain elements of the opponent player's evidence/statement.

It was contended that the Appellant was not the aggressor in the exchange nor was he abusive/offensive in using the language he did. The Appellant stated that his sexual orientation had been challenged and he responded accordingly. The Appellant avers that the language was not homophobic abuse and that the Commission had conscribed to "*a long standing and hurtful homophobic stereotype.*"

By finding the Charge proven, it was argued that the Commission had erred in assuming that the Appellant's statement was an admission of guilt. The Appellant contended that the statement was not an admission of guilt but in fact, "*a demonstration of empathy towards the fight against homophobic abuse in football.*"

The Appellants stressed on numerous occasions during the appeal hearing that the statement he made was not homophobic.

c) Imposed a penalty, award, order or sanction that was excessive

The Appellant argued that, notwithstanding grounds one and two, the sanction imposed was excessive in any event on the basis that the Commission failed to give appropriate weight to the Appellant's mitigating factors and gave too much weight to the aggravating factors. The Appellant outlined his mitigating factors as (1) the Appellant assisted with the investigation where possible; (2) the Appellant was honest and understood the severity of the accusation and has directly consulted a LGBTQ charity to seek confirmation that his actions were not homophobic; and (3) the Appellant has never been accused of using such language before and has previously supported a family member who was subjected to homophobic abuse.

12) The Respondent's case, in defence of the Appeal, can be summarised as follows:

a) Failed to provide the Appellant with a fair hearing

The Respondent contended that an administrative error outside of the Participant's control does not equate to the Respondent failing to provide the Appellant with a fair hearing. The Charge was considered by the Commission with reference to the information supplied by the Appellant's club which included a detailed written statement from the Appellant himself.

b) Came to a decision that no reasonable body could have come to

The Respondent submitted that the decision of the Commission was not unreasonable and argued that there was a "realistic expectation" that the words used would be considered offensive in relation to sexual orientation.

Further, the Respondent contended that just because the Appellant may hold an alternative view of the evidence does not constitute that the Commission's decision was so unreasonable that no other body could have reached the same view. The Commission was entitled to arrive at the decision based on the information that had been submitted by the Appellant and the Appellant's Club.

Additionally, the Respondent noted the Appellant's arguments that the admission was not one of guilt and that he was empathetic towards the ongoing efforts to eradicate homophobia from football. He was not himself homophobic and neither were the words that he used. The Respondent stressed that the Charge didn't require a finding of homophobia. It made no reference to the individual's beliefs. The Commission only had to satisfy themselves as to whether the words used (and the subsequent Charge raised) could be said to be aggravated by reference to a protected characteristic. In this case, the Respondent argued that the very fact that the words were used, in the context in which they were spoken, satisfied this element.

c) Imposed a penalty, award, order or sanction that was excessive

The Respondent submitted that the Charge if found proven has a sanction range of between 6-12 matches with a standard minimum of 6 matches. The immediate suspension of 7 matches was thus on the lower end of the sanction range and as such, cannot be said to be excessive.

### Decision of the Appeal Board

- 13) The Appeal Board reminded itself of the limitations on an appeal before it. It is not permitted to effectively rehear the matter and provide the Appellant with a '*second bite of the cherry*'. The Appeal takes the form of a review of the original decision, based on the documents that were originally before the Commission. The Appeal Board's remit is restricted and its powers limited.
- 14) The Appeal Board carefully considered both the written and verbal submissions lodged by both parties in determining the appeal.
- 15) On the question of a fair hearing, the Appeal Board noted the Appellant's assertion that he did not get the opportunity to opt for a personal hearing.

The Commission noted that the Appellant's club had largely handled this matter on behalf of the Appellant. The Appellant admitted during the appeal hearing that he had been notified of the Charge and that he had provided the written statement in support of his case. The Appellant also admitted that he had adopted a laissez-faire attitude to the Charge in the first instance as he didn't think the words he used would be taken seriously, and certainly not to the extent that a panel would find the Charge proven.

The Appeal Board were of the view that, having considered the submissions in relation to this ground, it could not be said that the Appellant was not given a fair hearing by the Commission. Any perception that the Appellant failed to be treated fairly cannot be said to be at the fault of the Commission. The Appellant was aware that there were disciplinary proceedings ongoing. He must have known that there was a risk (even if that risk was small) that he may or may not have been found guilty of the Charge. The Appellant, if he so desired, could have taken more of an interest in his case and ensured that he had received all necessary information so that he was fully informed and able to direct how his case should be dealt with. Such steps could have been taken via his club secretary and/or directly with the County FA.

- 16) With regards the second ground of appeal in that the Commission reached a decision that no reasonable body could have come to - the Appeal Board was not persuaded that the Appellant met the high bar in this regard.

The Appeal Board reminded itself of the test where this ground of appeal is concerned – the Wednesbury Test. The Wednesbury test is that a reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no person acting reasonably could have made it. The test is a different (and stricter) test than merely showing that the decision was unreasonable. The fact that a Commission came to a different decision, or did come to a different decision in a case with similar circumstances, is not the test.

The Appeal Board analysed both the wording of the Charge as well as FA Rule E3.1 and E3.2. The Charge stated that:

*"It is alleged that Mr. Milo Hanifan used abusive and/or indecent and/or insulting words or behaviour contrary to FA Rule E3.1, and it is further alleged that this is an aggravated breach as defined by FA Rule E3.2 because it includes a reference to sexual orientation. This refers to the comment(s) " why do you like it up the bum" and/or "get up you faggot" and/or "poof" and/or "why are you grassing to the lino, you queer", or similar."*

FA Rule E3.1 states:

*“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”*

FA Rule E3.2 states:

*“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 reassignment, sexual orientation or disability.”*

The Appellant admitted to asking his opponent *“do you like it up the bum?”* The Charge and the rules in which the Charge is formed do not require there to be a finding of homophobia. The Commission need only satisfy themselves that the Appellant’s actions were improper, or the words were indecent or insulting. Regardless of whether the phrase was in response to an improper/insulting/indecent question, it is still clearly improper to ask anyone on the field of play whether they *“like it up the bum?”*

Turning to the second element of the Charge, FA Rule E3.2 states that the breach will be considered aggravated if the breach includes a *“reference”* to one or more protected characteristics, in this case sexual orientation. All that is required to establish the breach is a mere reference. The context in which the admitted phrase was used, itself, establishes that there was a reference to sexual orientation.

Given the above, we cannot say with reference to the Wednesbury Test that no other body acting reasonably on the information before it, would have come to the same decision as the Commission did in this case.

- 17) Turning lastly to the third ground of appeal, the Appeal Board considered whether the sanction imposed was excessive. The Appellant was sanctioned with a seven-match suspension. The guidelines recommended a range of between six to twelve matches, with six being the absolute minimum. The Appellant submitted that the Commission had failed to consider the mitigating factors and applied too much weight to the aggravating factors. In his appeal, the Appellant outlined his mitigating factors as (1) the Appellant assisted with the investigation where possible; (2) the Appellant was honest and understood the severity of the accusation and has directly consulted a LGBTQ charity to seek confirmation that his actions were not homophobic; and (3) the Appellant has never been accused of using such language before and has previously supported a family member who was subjected to homophobic abuse. The Appeal Board noted that the Appellant, at first instance, failed to address this mitigation. His written statement was focused on the defence of his case rather than any plea in mitigation should the Charge be found proven. The Appeal Board found that the mitigation that was being put forward now was new information and not before the Commission at first instance. As such, and given this hearing is not a second bite at the cherry, the Appeal Board determined that the sanction imposed could not be said to be excessive particularly when viewed with the information before the Commission at first instance. The Appeal Board noted that the sanction was to the lower end of the scale and that the Commission appeared to have applied some credit for Mr Hanifan’s good disciplinary record.

- 18) To conclude, having considered the grounds of appeal, the Appeal Board unanimously finds the appeal dismissed for the reasons we have articulated. The seven-match suspension imposed on the Appellant stands.
- 19) The Appeal Board considered that it would not be appropriate to award costs in this matter but the appeal fee shall be forfeited.
- 20) The Appeal Board's decision is final and binding on all parties.

Appeal Board

Ms Laura McCallum (Chair)

Mr Martin Hill

Mr Bob Purkiss

19 February 2024