

IN THE MATTER OF THE FOOTBALL ASSOCIATION
REGULATORY COMMISSION

Case ID: FTMC/23/0014

BETWEEN:

THE FOOTBALL ASSOCIATION

and

NOTTINGHAM FOREST FOOTBALL CLUB

DECISION AND REASONS

Regulatory Commission constitution (personal hearing)

HH Clement Goldstone KC (Chair) (Independent Specialist Panel Member)

Abdul S. Iqbal KC (Independent Legal Panel Member)

Stuart Ripley (Independent Football Panel Member)

Paddy McCormack (Judicial Services Manager) acted as Secretary to the Commission.

The FA

Yousif Elagab (Counsel representing The FA)

Rebecca Turner (Head of Regulatory Legal – Observing)

Ted Powell (Regulatory Solicitor, Premier League – Observing)

Nottingham Forest FC

Michael Rawlinson (Counsel representing Nottingham Forest FC)

George Pennington (Head of Legal – Nottingham Forest FC)

Taymour Roushdi (Head of Football Administration – Nottingham Forest FC)

Introduction

1. On Thursday 27th June 2024, an independent Regulatory Commission sat at the IDRC in order to determine a charge laid by The FA against Nottingham Forest Football Club [NFFC] alleging a breach of FA Rule E3.1 in respect of comments posted on X [formerly Twitter] following a Premier League fixture between Everton FC and NFFC at Goodison Park on Sunday 21st April 24. The charge reads as follows – “it is alleged that your comments posted to X from account @NFFC at 3.37pm on 21st April 2024 constitute improper conduct in that they imply bias and/or question the integrity of the Match Official[s] and/or the Video Assistant Referee and/or bring the game into disrepute, contrary to FA Rule E3.1”. The offending post is set out at paragraph 6 below.
2. Prior to the commencement of the hearing, the Commission suggested and the parties agreed that, in order to preserve the integrity of any Rule K arbitration proceedings [to which reference is made below] which had, by letter before action, been intimated by NFFC, the decision of the Commission would not be communicated to the parties pending the outcome or earlier resolution of any such proceedings. On 19th August 2024, The FA were informed by NFFC that the pending Rule K arbitration proceedings had been compromised. Accordingly, on 21st August 2024, at the Commission’s request, The FA notified NFFC of the outcome of the hearing, namely that the charge had been found proved, and we provide herein our decision and the reasons therefor.

Background

3. On Sunday 21st April 2024, the Premier League season for 2023-2024 was drawing to a close. There were a number of teams who were in danger of relegation, including NFFC, Everton FC and Luton Town FC. It was, therefore, a very important fixture for all three clubs.

4. On Friday 19th April 2024, a telephone conversation took place between ex-Premier League referee, Mark Clattenburg [MC], an advisor engaged by NFFC to provide advisory services in relation to the officiating of Club matches and Howard Webb [HW], the Chief Refereeing Officer of Professional Game Match Officials Ltd [PGMOL]. Neither of these potential witnesses to the conversation was called to give evidence at the hearing, and we made it clear at the outset that in those circumstances, it would not be appropriate for either party to the proceedings to seek to rely upon parts of the conversation which were disputed. The accounts, to which we will make no further reference in the course of this decision, are set out between pages 73 and 80 of the Hearing Bundle. It is, however, common ground that in the course of that conversation, whatever its primary purpose may have been, MC drew HW's attention to the fact that the appointed Video Assistant Referee [VAR] for the fixture was to be Stuart Attwell [SA], a self-confessed supporter of Luton Town FC. It is also common ground that no representations or requests were made to HW by MC that SA should be replaced for the fixture.

5. The match between Everton and NFFC kicked off at 13.30 on Sunday 21st April 2024. It ended, at 15.30, in a 2-0 defeat for NFFC. It would, even in the best of circumstances, have been a difficult result for the supporters and those connected with the running and management of NFFC to stomach, as it pushed NFFC closer to the relegation zone, but it was a result which was fraught with controversy because of a series of refereeing decisions which went against NFFC in relation to 3 disputed penalty appeals, none of which was allowed, and none of which was the subject of review by the VAR. The times of these decisions were set out in paragraph 2.1.1 of NFFC's response [dated 2nd May 2024] to The FA's 'request for observations' dated 22nd April 2024. These documents appear between pages 15-25 of the Hearing Bundle.

The Aftermath

6. These decisions led to a prompt response by and on behalf of NFFC in the form of the post, posted at 15.37, which forms the basis of the charge. It stated:

“3 extremely poor decisions- 3 penalties not given – which we simply cannot accept.

We warned the PGMOL that the VAR is a Luton fan before the game, but they didn't change him. Our patience has been tested multiple times.

NFFC will now consider its options”

The Law

7. The authorities to which we have been referred, in the course of both written and oral submissions, are encapsulated by the decision of the independent Regulatory Commission in *FA -v- Lampard* [31st May 2022] at paragraphs 16-21, and reiterated subsequently in *Arteta -v- FA* [7th December 2023] make it abundantly clear – and this is accepted by the parties - that the test which we have to apply in order to determine whether, on the balance of probabilities, a breach of FA Rule E3.1 has been established, can be stated in these terms:

Would the ‘reasonable bystander’ armed with some general knowledge of the sport which might be attributable to a follower of Premier League football, conclude that the post in question was improper and, as such, amounted to misconduct, whether by implying bias, attacking the integrity of a match official, or match officials generally, or whether they bring the game into disrepute?

8. A further and alternative way of putting the same test is by asking whether, objectively considered as above, the post ‘crosses the line’ between legitimate, if forcefully expressed, criticism and that criticism which [i] might damage the wider interests of football, [ii] might damage the image of the game or [iii] in some other way, bring the game into disrepute or otherwise not be in the best interests of the game [see *FA -v- Arteta* paragraph 76 c) at page 32 of the Commission’s written decision and reasons].

9. Whilst there is no dispute between the parties as to the basic test to be applied, there is considerable dispute between the parties as to:

[i] what knowledge can be attributed to the ‘reasonable bystander’,

[ii] the extent to which post-match acquired knowledge and communications can affect the stance of the reasonable bystander, and

[iii] the extent to which there is room for a subjective approach in determining the answer to the ultimate question.

10. We therefore propose to set out first, post-match developments and second, the extent to which the view of the reasonable bystander can be affected by post-match developments and third, the extent of any knowledge which can be imputed to the reasonable bystander and extent to which the view of the reasonable bystander can be affected by post-match developments.

11. On the day following the match, two further posts were posted by NFFC on X at 3.22 pm and 5.50pm respectively:

Post 2

Nottingham Forest has today submitted a formal request to the PGMOL to release into the public domain the audio

recordings between officials during yesterday's match against Everton at Goodison Park.

The club has requested this be shared for three key match incidents – Ashley Young's challenge on Giovanni Reyna [24th minute], Ashley Young's handball [44th minute] and Ashley Young's challenge on Callum Hudson-Odoi [56th minute].

We firmly advocate for the broader football community and supporters to have access to the audio and transcript for full transparency, ensuring the integrity of our sport is upheld.

Post 3

Following yesterday's match at Everton, NFFC issued a statement highlighting our concern at the perception of the PGMOL appointment of VAR for the game. This was an issue we raised with PGMOL prior to the fixture because of the fear of the side show which would ensure if anything went wrong with officiating in the game. That fear has materialised, as the correctness of three important decisions against the Club have [sic] been called into doubt.

This is not about individuals but rather how the integrity of the game is seen. We know match officials do not allow outside factors to influence their decision-making and that all referees are required to declare their 'allegiances' to PGMOL to avoid any perceived conflict or harm to the game's reputation or integrity.

However, it is clear PGMOL must amend its rule on allegiances to account for contextual rivalries in the league table, not just local rivalries. This is currently not within the criteria but should be. Mere reliance on match

officials to recuse themselves if contextual rivalries exist invites conjecture, as some have recused themselves where others have not.

NFFC stands by its request for greater transparency around PGMOL appointments to further protect the game's reputation, as intended in PGMOL's existing approach to allegiances.

Given the widespread and ongoing concerns, not merely of the fans, players and managers of this Club but of many others and the pundits too, over VAR decisions throughout this season any move which boosts confidence in the system should be properly considered.

12. On 24th April 2024, HW conceded that in the opinion of PGMOL, the third non-penalty decision was a mistake and that a penalty should have been awarded and/or the VAR should have intervened to advise as much. The Independent Key Match Incidents Panel of the Premier League confirmed this opinion on 29th April 2024.

The Argument

13. Based on those pieces of evidence, and their timing, it is submitted by Mr Rawlinson on behalf of NFFC that we should, in reaching our decision, have proper regard to the context of and the intention behind the post, taken as a whole.
14. Mr Rawlinson submits that it is clear from the tenor of the second and third posts on 22nd April 2024, and subsequent correspondence which passed between

NFFC and The FA which stated clearly that there was no intention to imply bias, that NFFC was seeking to do no more than to start a debate about the potential difficulty of having as VAR someone whose position might, because of his support for a team which could be affected by the result of the match in question be compromised, and that the potential for unconscious or perceived/apparent bias was an issue that needed to be addressed in the wider interests of the game. There was ample opportunity for NFFC to have levelled an accusation of bias against the VAR had they been so minded.

15. He submitted – as he had to in order for his argument to be sustainable – that the knowledge of the reasonable bystander would include not only knowledge of the limitations of the VAR system and that decisions had ‘gone wrong’ in the past without any scope for retrospective correction, but also knowledge that there was a debate or discussion to be had about the propriety or otherwise of someone who might be perceived as having an interest in the outcome of a particular fixture, being allowed to act as VAR thereat.
16. He submitted further that whilst the ‘reasonable bystander’ might conclude that the comments contained in the first post implied ‘unconscious’, ‘apparent’ or ‘perceived’ bias in terms of a potential conflict of interest, the comments did not amount to a personal criticism or convey any suggestion of a deliberate intention to avoid the award of a penalty, which might be consistent with actual bias. Accordingly, he submitted there was no basis on which an imputation of actual bias could be found, and

invited us to conclude that, having regard to all the evidence, bearing in mind the burden and standard of proving the breach of FA Rule E3.1, we could not be satisfied on a balance of probabilities that the first post contained an implication of actual bias by the VAR, and/or in any other respect crossed the line between what was acceptable, if strongly-worded criticism, and that which fell on the 'wrong side of the line', namely words which, viewed as a whole:

- [i] might damage the wider interests of football
- [ii] might damage the image of the game, or
- [iii] in some other way bring the game into disrepute or otherwise not be in the best interests of the game

17. Mr Elagab, on behalf of The FA, submitted [i] that the authorities make it clear that there is no room for a subjective component to the 'reasonable bystander' test [see, in particular, paragraph 51 of the decision in Arteta] and [ii] that on a balance of probabilities, the reasonable bystander would conclude that the first post left room for one conclusion only – namely that its author was implying that the VAR was biased.
18. We do not consider it necessary to summarise the entirety of his arguments because, as he was at pains to emphasise to us, the point in his submission is essentially a simple one, devoid of complexity.
19. We have considered these competing oral submissions [and the written submissions which preceded them] with

care, although we neither pretend nor need to spell them out in detail in providing the reasons for our decision. In reaching our conclusions, we have been uninfluenced by the rather dramatic and regrettable way in which some broadcasters were apparently keen to 'blow up' an already highly sensitive situation out of all proportion.

Conclusion

20. Having done so, we are wholly satisfied that, upon the basis of the authorities to which we have been referred, the test for determining whether a breach of FA Rule E3.1 has been made out is an objective one, and, because the test is objective, such a determination cannot be assisted by the gloss which NFFC, by virtue of subsequent posts, seek to put on any objective interpretation of the first post which may be adverse to its interests. So, whereas the first post has to be considered in its entirety in order to ascertain its meaning from an objective viewpoint, it is to be considered in isolation from those which followed it, unless such consideration is necessary to inform the mind of the 'reasonable bystander'. Any other conclusion would enable a club [or individual] to make a statement [whether by social media post, text or interview] which was clearly, on any objective basis, in contravention of the rule and, having seen the reaction to it, seek to exonerate itself by seeking to explain what it 'really' meant.

21. We note in passing that, in any event, there is a Guidance Document provided by The FA entitled "Essential information for Managers, Owners and

Directors: 2023/24 Level – Professional and Semi-Professional” which is designed to help Clubs and their officials on how to address their concerns about the performance of Match Officials, and which states as follows:

“What happens if I make comments about the match officials in my pre or post-match conference?

Managers should be aware that the FA sets standards in relation to public comments made by Participants.

This means that the following types of public comments by Managers, Players or Club Officials may lead to disciplinary charges.

- Implication of bias: any comment which implies or alleges bias on the part of a Match Official
- Questioning Integrity: any comment which questions the integrity of a Match Official
- Detriment to the game: the concepts of ‘disrepute’ and ‘best interests of the game’ are inherently broad and cannot be precisely defined. Charges may be brought where comments cause, and/or may cause, damage to the wider interests of football and/or the image of the Game”.

22. Nowhere in the guidance which that document provides is there any hint of a subjective approach being adopted in the determination of a charge. Indeed, in its response to The FA, dated 2nd May 2024, to which further reference

is made below, NFFC acknowledged that *'The FA must apply the objective reasonable bystander test...'*

23. Having concluded that the test for us to apply is an objective one, we must now approach the interpretation of the post from the standpoint of the 'reasonable bystander', who is 'armed with some general knowledge of the game'. We have no difficulty in concluding that the reasonable bystander is well aware of the problems which have been caused by VAR in its technical operation, and the inability to correct errors retrospectively – this has led to much frustration amongst all concerned caused by delays and basic errors. As pointed out above, however, that is not what this case – or this post - was about. We have considered at length whether this justifiable concern extends to questions – or a 'discussion to be had' [see paragraph 15 above] about the propriety or otherwise of someone who might be perceived as having an interest in the outcome of a particular fixture being allowed, or selected to act as VAR thereat. In our judgment, quite simply there was no evidence before us that this is an issue which has been a topic of such [or indeed any] discussion within the ambit of the reasonable bystander. We note that the days have long passed when the place of residence of match officials [then called 'referees'] appeared after their names in a football programme. Evidence of that kind – or evidence that the 'propriety question' was being asked sufficiently frequently to enable us to say that a reasonable bystander would regard it as an issue – might have driven us to a different conclusion. However, the suggestion that it should be the subject of a healthy discussion [which was the highest that Mr Rawlinson could put it] does not lead us to the conclusion that the

reasonable bystander can be said to have knowledge of it, as an issue, let alone a problem.

24. Accordingly, we reject his submission that the reasonable bystander can be armed with this necessary knowledge for us to take into account in determining his/her characteristics. Indeed, although this did not feature during the hearing, but was part of the related case brought by The FA against Nuno Espirito Santo, the Head Coach of NFFC, we note from the TalkSport recording which included a long discussion about the issues with VAR, and the extent to which they were a concern to football supporters up and down the country, there was no suggestion whatsoever that the known or believed 'footballing loyalty' of VARs was a topic of discussion, or on the radar of supporters.

25. We return therefore to the wording of the first post, ignoring, as the objective test requires us to do, what are said by Mr Rawlinson to be NFFC's attempts in the two subsequent posts to put it into an innocent and acceptable context. In our judgment, those posts can be relevant only to mitigation, if we accept [and we return to this point later in our reasons] that they were a genuine attempt to put the first post into such a context. The first and offending post in our judgment was far more than a complaint borne out of frustration at the fact that NFFC had been on the receiving end of two doubtful decisions and one decision which was subsequently admitted on behalf of PGMOL to be wrong. The sentence 'We warned the PGMOL that the VAR is a Luton fan before the game but they didn't change him' is said by Mr Rawlinson to be

almost incidental and has been taken out of all proportion.

26. We disagree. In our judgment, a 'reasonable bystander' armed with some general knowledge of the sport, as clarified above, would inevitably conclude that the decisions which 'went against' NFFC were clearly linked to the VAR being a Luton fan and, as such, inevitably involved an implication of actual bias on his part against NFFC, and we so find on a balance of probabilities. It follows, in our judgment, that as the integrity of a match official has been called in to question in this way, this was improper conduct, and thus, we find the charge proved.
27. Having found that the post involved an implication of actual bias, as opposed to unconscious, perceived or apparent bias, it is not necessary for us to decide whether an implication of bias which fell into one of the other three categories identified above would have been sufficient to establish a breach of FA Rule E3.1 against NFFC.
28. In addition, although a finding is not strictly necessary on this point, we consider on a balance of probabilities that the means of communication of this publication, by the use of an X post [or tweet] which it was realised [if not intended] would 'go viral', that the game was brought into disrepute as a result. The fact that it was, in our view, an extremely ill-informed accusation to make [because Everton FC, as fellow-strugglers in the battle against relegation, had just as much reason to be upset as NFFC about the appointment of a Luton Town supporter as

VAR] is irrelevant. There were ways in which NFFC's concerns about VAR and grievances, such as they were, could have been aired, through an appropriate forum, or by sending an email to The FA's Integrity Department, as advised by The FA in the Guidance Document referred to above, but NFFC chose to air them in a way which they knew would generate massive publicity, even if they were later to rue their choice of words and the way in which their grievances were received.

29. For the sake of completeness, we now address the impact and relevance of the subsequent posts, as explained by NFFC in correspondence to The FA dated 2nd May 2024, at pages 21-25 of the Hearing Bundle.

30. We note [paragraph 2.1.4] that NFFC acknowledged that the original post had not been prepared with sufficient care, nor had it been properly contextualised and that [paragraph 2.2.3] there was a failure to develop a series of comments into a coherent statement. This does not really advance matters further, whatever the test to be applied.

31. In relation to the third post, NFFC stated as follows: '...the Club regrets that the Comments were not prepared with sufficient care, in particular by not introducing its context and in doing so, allowed protagonists...to react and exploit it as he [sic] did. The comments were assembled in a highly charged moment and in the context of the penalty appeals referred to above. The controversial part of the comments were [sic]

intended to be developed into a legitimate criticism of PGMOL's selection processes, and how this allows the integrity of the game to be brought into question'. They went on to repeat that the third statement [or post] represented the true meaning of the comments.

32. We have already rejected the submission by Mr Rawlinson to the effect that it is not possible to divorce the subjective intention of the Club from the overall context. Furthermore, in the absence of careful thought and attention being given to the content of the first post, it ill lies in the mouth of NFFC to state, after the event, what was really intended by the 'collective reaction and input' [paragraph 2.2.1].
33. Although we are prepared to accept that NFFC regretted in the days that followed the imputation of actual bias to the VAR in the first post, we consider that the lack of a cool head and a directing mind to the contents of the first post meant that no thought at all was given to the impression which such a post could create, and that it was borne out of irresponsibility and a lack of accountability. On any objective analysis, the Commission is satisfied that the first post imputed actual bias on the part of the VAR.
34. The 'apology' [although the word was never used by NFFC at any stage in correspondence] was in effect a damage-limitation exercise undertaken by NFFC, in our judgment, in the forlorn hope of avoiding subsequent proceedings.

35. The parties have already been notified that the Sanctions hearing will take place on Friday, 27th September 2024. It is currently anticipated that it will take place in person, but that was due in part at least to the fact that the sanctions hearings in the related cases against Nuno Espirito Santo and Neco Williams were to take place on the same date. Those hearings have now been concluded, so the parties will need to consider whether a personal hearing is still required, or whether it should proceed as a virtual hearing and confirm their preferred position by 4pm on Wednesday 11th September 2024, following which the Commission will inform the parties of the form which the sanctions hearing will take.

HH CLEMENT GOLDSTONE KC – CHAIR

ABDUL IQBAL KC

STUART RIPLEY

3rd September 2024