

**THE FOOTBALL ASSOCIATION REGULATORY COMMISSION**

**[15<sup>th</sup>, 16<sup>th</sup> and 18<sup>th</sup> September 2014]**

**The Football Association**

**-v-**

**Benoit Assou-Ekotto**

**The Commission:**

Peter Griffiths QC [Chairman]

Alan Hardy [Football Panel Member]

Stuart Ripley [Football Panel Member]

**Appearances :**

**The Football Association:**

Paul Greaney QC

Dario Giovannelli

**The Player:**

Jim Sturman QC

David Brown

James Severn

Benoit Assou-Ekotto

*[In Attendance: Robert Marsh, Judicial Services Manager]*

## The Charges :

1. That Benoit Assou-Ekotto, at approximately 5.01pm on Saturday, 28<sup>th</sup> December 2013, some hours after Nicolas Anelka had performed a “quenelle” gesture [which the FA contended and contends was improper, and/or abusive, and/or indecent, and/or insulting] during the West Bromwich Albion / West Ham Premier League match broadcast live in this country and in France] was in breach of FA Rule E.3[1] in that he posted the following comment on his “Twitter” account, in French, namely, [translated]: **“Nicolas Anelka: I congratulate you on your beautiful shoulder quenelle”**.
2. That the above breach of FA Rule E.3[1] was an “Aggravated Breach” within the meaning of FA Rule E.3[2] in that “it included a reference to ethnic origin, and/or race, and/or religion or belief”

## Preliminary Matter:

Prior to the Hearing the Parties had requested a “Directions Hearing” to resolve certain matters then in dispute. This took place on Monday, 1<sup>st</sup> September 2014. The matters then in dispute were resolved by agreement; in particular the Football Association agreed not to seek to have the Anelka Regulatory Commission Judgement introduced into evidence in Benoit Assou-Ekotto’s case. The Chairman confirmed and emphasised that the Commission hearing Benoit Assou-Ekotto’s case would determine all issues on the evidence adduced before it, and on nothing else, and would not be bound in any way by the decision in the Anelka case.

## **The Case for The Football Association :**

The Football Association contended:

1. That Nicolas Anelka [Anelka] performed the “quenelle” gesture in front of millions of television viewers in this country and in France.
2. That this behaviour on the part of Anelka was improper, and/or abusive, and/or indecent, and/or insulting within the meaning of Rule E. 3[1].
3. That the “quenelle” gesture had long been associated with the controversial French comedian and “political activist” Dieudonne M’bala M’bala [Dieudonne]
4. That Dieudonne himself and the “quenelle” gesture [which the Football Association contended was very much Dieudonne’s trademark and was regularly used and promoted by him] had, certainly by December 2013, become so associated with anti-Semitism that its use would, and did, [considered objectively] “include a reference to ethnic origin and/or race, and/or religion or belief” within the meaning of Rule E.3[2].
5. That in congratulating Anelka on his public use of the “quenelle” gesture on his Twitter account Benoit Assou-Ekotto thereby committed not only a breach of FA Rule E.3[1] but also the “Aggravated Breach” Rule E.3[2].

## **The Case for Benoit Assou-Ekotto [“The Player”]:**

It was contended on behalf of the Player:

1. That although there was no dispute that Anelka performed the “quenelle” gesture at the material time, Anelka, in performing this gesture in the circumstances in which he did so, did not contravene FA Rule E.[1] in that this behaviour on his part was not improper and/or abusive and/or indecent and/or insulting.
2. That the “quenelle” gesture was not in itself an anti-Semitic gesture----it entirely depended on the context in which it was used.
3. That although some of Dieudonne’s comic routines and sketches could be considered by some as being anti-Semitic [and that some of Dieudonne’s friends and associates may have had anti-Semitic views], he himself was not an anti-Semitic person and the focus of his humour was very widely spread indeed and certainly not focussed exclusively on the Jewish faith, religion or history.
4. That although there was no dispute that the “quenelle” gesture had become, certainly by December 2013, closely associated with Dieudonne and his comic routines and sketches, the “quenelle” gesture performed by Anelka on a football pitch at the material time, devoid as it was, it was argued, of any additional anti-Semitic feature or context, could not be said to have included “a reference to ethnic origin, and/or race, and/or religion and belief” within the meaning of Rule E.3 [2].

### **The Commission's Decision :**

1. The Commission found both charges proved to the required standard.
2. In announcing its decision the Commission stated:

“Even though we have found that there was an aggravated breach of FA Rule E3 we are satisfied that when the Player sent the tweet on the 28<sup>th</sup> December 2013 congratulating Anelka, in his mind he believed he was congratulating Anelka on what he perceived to be an anti-establishment gesture as opposed to one associated with anti-Semitism. But we are also satisfied of two further factors relevant to his culpability:

- 1) That he was certainly aware before he sent the tweet that the “quenelle” gesture was very much associated with Dieudonne; and
- 2) That he had, by then, acquired at least some knowledge of the controversies surrounding Dieudonne in the Autumn of 2013 and that these had included, rightly or wrongly, allegations concerning anti-Semitism.”

### **The Sanction Imposed by the Commission :**

1. The Player to serve a suspension of 3 first team matches.
2. The Player to be fined £50,000
3. The Player to attend an FA education programme in accordance with FA Rule E3(9).
4. The Player to pay the full costs of the Hearing.

## The Commission's Reasons :

1. Shortly after the commencement of the Hearing and during the Football Association's Opening Statement the Chairman of the Commission sought clarification from Mr Sturman QC, acting for the Player, whether the "**Legal Test**" set out at "paragraph 9" of Mr Greaney QC's "Opening" was agreed. Mr Sturman confirmed that it was.
2. "Paragraph 9" read as follows: "The test for breach of Rule E.3[1] is objective. The question is simply whether the conduct is abusive or insulting etc. This is a matter for the Commission to decide, having regard to all the relevant facts and circumstances of the case. It is not necessary that the Player intended his conduct to be abusive or insulting etc in order for a breach of Rule E.3[1] to be proved. In applying the objective test and asking itself whether, in its assessment, the conduct is abusive or insulting etc, it is necessary to view the matter in context, taking account of all relevant facts and circumstances. As for whether a breach of Rule E.3[1] is aggravated, the wording of Rule E.3[2] is clear. It is a question of fact whether a breach of Rule E.3[1] includes a reference to the protected characteristics. No question of subjective intention arises here either".
3. The Commission had no difficulty in concluding on the whole of the evidence [inter alia, various "Dieudonne" performance video clips adduced by the Football Association and from Professor Hand, the Football Association's expert witness] that Anelka, in performing the "quenelle" gesture [which, loosely described, portrays an object being inserted deep into the anus], breached FA Rule E.3[1]. The gesture he performed in front of millions of television viewers in this country and in France was, in the opinion of the Commission, certainly "improper, and/or abusive, and/or indecent, and/or insulting" ---probably all of them.
4. Accordingly, in publically congratulating Anelka for such conduct [by posting his tweet at 5.01pm on the 28<sup>th</sup> December 2013 to his [almost] 200,000 "followers," the Player thereby himself breached FA Rule E.3[1].

5. The main focus of the Hearing [and principal issue for the Commission] was whether the breach of Rule E.3[1] was aggravated within the meaning of FA Rule E.3[2]. It fell upon the Football Association to prove on the balance of probability that the breach of FA Rule E.3[1] “included a reference to ethnic origin, and/or race and/or religion or belief” within the meaning of FA Rule E.3[2].
6. The Football Association sought to prove this firstly by adducing evidence bearing on the history of the “quenelle” gesture, how it came to be invented by Dieudonne in about 2005 and how, over the years it became more and more associated with Dieudonne both as a person and with his performances. It was contended by the Football Association [and this was accepted by the Commission on the evidence] that well before December 2013 the “quenelle” had come to be readily and closely associated with Dieudonne. [This was confirmed, were confirmation needed, by what the Player himself sent digitally to Dieudonne in November 2013---- the image contained at pages 197 and 199 of the Football Association’s Folder].
7. Secondly, the Football Association sought to establish that Dieudonne moved more and more to the right politically as the years passed and, in tandem with this, that his performances, [a number of which were introduced into evidence by the Football Association] became increasingly anti-Semitic in content. The Commission was informed by Professor Hand [and accepted] that since 2006 Dieudonne had been fined seven times [amounting to some 120,000 euros] for defamatory remarks made “against Jews or Holocaust commemoration” and that on a number of occasions his performances had been banned [or sought to be banned] for anti-Semitic reasons. We place on record that a considerable amount of further, predominantly factual, information concerning Dieudonne and his activities and associates was provided to the Commission by Professor Hand in evidence which was not the subject of dispute. What was disputed on behalf of the Player were Professor Hand’s opinions and conclusions to which we will refer later in these Reasons.
8. Thirdly [and crucially] the Football Association sought to establish that by the summer of 2013 and certainly by December 2013 the “quenelle” gesture had become so bound up with Dieudonne and

anti-Semitism that it was impossible to divorce its meaning from anti-semitic connotations so that when it was performed by Anelka on the football pitch on the 28<sup>th</sup> December 2013 “it included a reference to ethnic origin, and/or race, and/or religion or belief”.

9. Professor Hand gave important evidence of the events in France following the publication of a photograph at about the beginning of September 2013 of two military personnel making the “quenelle” gesture outside a Paris synagogue. The furore which followed, in which Dieudonne undoubtedly became enmeshed, is referred to in various sections of Professor Hand’s first report and was not the subject of significant challenge. Indeed some confirmation of these events and the fact that they became matters of public knowledge in France came from the Player’s own witnesses and from material concerning Dieudonne’s on-line petition which he ran during the months of September, October and into November 2013 [contained in the Player’s “Defence Bundle”].
10. Professor Hand’s opinion expressed in evidence was to the effect that the events in France between September and December 2013 significantly ratcheted-up the public’s perception of the association between the “quenelle” gesture and anti-Semitism; it was Professor Hand’s opinion that, certainly by December 2013, the former could not be innocently “untangled” or “dissociated” or “divorced” from the latter.
11. Professor Hand underwent very firm and searching [but entirely proper] cross-examination on behalf of the Player. He was particularly taken to task by Mr Sturman in respect of this passage in his first report [paragraph 47]: “More particularly, the controversy concerning Dieudonne is such that, by the end of December 2013, the majority of people in France would clearly connect the “quenelle” gesture to this controversy, meaning that the gesture by this point cannot be innocently untangled or dissociated from the anti-Semitic sentiment and provocation attached to Dieudonne and his entourage”.
12. Of course, taken literally, the “majority of people in France” means at least 51% of them. Professor Hand agreed that he had neither conducted nor could identify any empirical survey to back up this statement. He nevertheless maintained that the underlying point he



was making was both clear and valid. In respect of this matter Mr Sturman sought to take it further both in cross-examination and in his closing submissions. He referred to an on-line poll conducted by the French weekly news magazine *Le Point* [see Defence Bundle page 165]. The Commission did not consider that this particular poll undermined the thrust of Professor Hand's evidence----the Commission noted the terms of the actual "question" posed by the magazine to its readers and also that the result of the poll could be interpreted as meaning that over 20% of those who responded may well have been "offended".

13. Overall it was the Commission's unanimous view that Professor Hand was an impressive expert witness who gave balanced and erudite evidence upon which the Commission could safely rely. In arriving at this assessment the Commission directed itself on the limitations of expert evidence taking on board, as we were invited to do, all the submissions advanced in respect of this by Mr Sturman both in the submissions included in the Defence Bundle and in closing submissions.

14. The Commission carefully considered the Player's own evidence and that of his witnesses, the contents of his Defence Bundle and the detailed submissions advanced by Mr Sturman. Ultimately, however, the Commission unanimously concluded, on the whole of the evidence, that the Football Association's case in respect of aggravation was made out and that the breach of FA Rule E.3[1] did "include a reference to ethnic origin, and/or race, and/or religion or belief".

15. Turning to the **Sanction**, the Commission's findings as set out in paragraph 2 under the heading "**The Commission's Decision**" [see above] should be noted. Although the Commission was prepared to accept that the Player's "changes of account" and "non-recollection" of certain things he had done may well have arisen as a result of genuine and understandable errors on his part, we could not, and did not, accept that he had heard nothing of the events and controversies in France concerning Dieudonne and anti-Semitism in the autumn of 2013. He was, after all, a "follower" of Dieudonne on Twitter; on this point the Commission accepted that he only read a small number of the tweets he received from persons who "followed" him---because of

their sheer number—nevertheless, as a “follower” of Dieudonne he would certainly have read *some* of those posted by him [the Commission made no finding as to *which* of Dieudonne’s tweets the Player read because to do so would have amounted to speculation]. Further the Player, on his own admission, had travelled to France to see his family on a regular basis during this period.

16. The Commission was provided with relevant precedents which were considered. In arriving at its decision in respect of what Sanction to impose the Commission considered his previous good character, his good works and those matters advanced by Mr Sturman QC on his behalf [including the expansion of the Football Association’s evidence over time, and the delay]. Ultimately it was, and is, the Commission view that that the Player acted with utter foolishness and irresponsibility when he posted his tweet to his [almost] 200,000 “followers” congratulating Anelka on his “quenelle”. It amounted, on any view, to a serious breach of the Football Associations Rules.

22<sup>nd</sup> September 2013

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