

IN THE MATTER OF AN FA REGULATORY COMMISSION  
AND  
IN THE MATTER OF A CHARGE AGAINST JEFFERSON LERMA

Mr David Phillips QC, Mr Lawrence Selby, Ms Faye White.  
27 & 28 April 2021, 26 May 2021

BETWEEN –

THE FA

Complainant

and

JEFFERSON LERMA

Respondent

WRITTEN REASONS

**INTRODUCTION**

1. The FA has charged Jefferson Lerma with misconduct contrary to FA Rule 3. The allegation is that towards the end of Sheffield Wednesday FC’s home match against AFC Bournemouth on 3 November 2020 Mr Lerma committed an act of violence by biting Joshua Windass. The charge letter is dated 21 December 2020. Mr Lerma has denied the charge.
2. The Regulatory Commission conducted a personal hearing on 27 & 28 April 2021 remotely by Microsoft Teams. The lay witnesses gave evidence on 27 April 2021: the expert witnesses and closing submissions were heard on 28 April 2021. The FA was represented by Mr Yousif Elagab. Mr Lerma was represented by Mr Nick De Marco QC. Mr De Marco had set out Mr Lerma’s case in the Reply. Both parties submitted short skeleton arguments in addition to their oral submissions.

**THE INCIDENT**

3. In his witness statement dated 27 November 2020 Mr Windass described the incident in the following terms.
  1. In the second half of the match... I was marking...Lerma. It is the first time that I have played against him and I do not recall a previous altercation with him during the match either.
  2. I was marking [Lerma] for a freekick when I saw him move his mouth towards my shoulder and then felt him bite me on my shoulder. It felt like a nip. I shouted to the Referee immediately that [Lerma] had just bitten me.
  3. After I had shouted to the Referee that [Lerma] had bitten me I then pushed

- [Lerma] and then the freekick was taken. [Lerma] fell to the ground to win a penalty and I said to [Lerma] that he was a pussy and I laughed at him.
4. Despite wearing two layers of clothing the bite left a red mark on my shoulder which was visible even though I have a sleeve tattoo. The mark looked like a red rash. After the game, I showed the mark to Andy Hughes, First Team Coach, and couple of the other lads. I did not receive any treatment for the bite but it did still feel numb the day after, similar to what you feel after you have had an injection.
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4. Mr Lerma denies that the alleged incident took place. In his witness statement dated 6 January 2021 (which is substantially the same as his Observations dated 25 November 2020) Mr Lerma says the following.
    - 2.2 As far as I am aware, Mr Windass and I have never played together or been opponents in a football match prior to the Match, nor have I ever met him on any other occasion.
    - 2.3 I was booked in the first half of the Match but do not recall any incidents between me and Mr Windass until towards the end of the Match.
    - 2.4 In the 82<sup>nd</sup> minute of the Match we were awarded a free kick on the right-hand side of the pitch, level with the edge of the Sheffield Wednesday penalty area. I positioned myself just to the left of the penalty spot with the intention of running forward to attack the ball as it was crossed into the penalty area. This is a standard movement that we practice frequently in training.
    - 2.5 Whilst waiting for the free kick to be taken, Mr Windass attempted to try and block any move that I made in a forward direction using the full force of his body, as well as wrapping his arms around my waist, making it impossible for me to move freely. His movements were similar to those that I have experienced from other defending players in many games previously.
    - 2.6 Mr Windass was using considerable force, and therefore in an effort to try and free myself and make a movement towards the goal I tucked my head into his arm and pushed against him using the full force of my upper body to try and free myself from his grasp.
    - 2.7 Although this freed me for a moment, Mr Windass continued to push and jostle in whatever way he could to block my route to goal, with the end result being that I was knocked to the ground.
    - 2.8 At no point during this movement, or at any stage during the Match, did I bite Mr Windass. It is probable that I made contact with him as we were jostling but his allegation of a bite is completely untrue. This is not something I would do, on or off the pitch.
    - 2.9 Mr Windass continued to defend against me in a similar manner throughout the remaining period of the Match, during which there was no animosity between us. He was substituted shortly before the end of the Match.
    - 2.10 At the conclusion of the Match we both approached and acknowledged each other in a perfectly normal fashion. Surely if there had been an incident of this nature, there would have been a completely different scenario as is seen many times in matches when tempers have boiled over.
  - 3.1 Both in training and in matches I wear mouthguards to protect the upper and lower sets of my teeth, which makes it impossible for me to effect any kind of bite at all.

## THE CHARGE

5. The charge reads as follows –

### Charge

You are hereby charged with misconduct for a breach of FA Rule E3 in respect of the above fixture.

It is alleged that in or around the 83<sup>rd</sup> minute of the fixture, you committed an act of violent conduct in biting Mr. Joshua Windass of Sheffield Wednesday FC.

Please note that The Football Association has designated this as a Non-Standard Case due to the unusual and/or violent nature of the alleged behaviour.

6. The relevant FA Rules provide –

### **E. MISCONDUCT**

Save for where otherwise set out in these Rules, procedural matters concerning Misconduct shall be dealt with in accordance with the Association's Disciplinary Regulations.

**E1** The Association may act against a Participant in respect of any Misconduct, which is defined as being a breach of the following:

...  
**E1.2** the Rules and regulations of The Association and in particular Rules E3 to E28 below;

....

### **GENERAL BEHAVIOUR**

**E3 E3.1** 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.

7. The verb *to bite* is not defined in the FA Rules. Mr Elagab submitted that a bite took place when someone gripped with their teeth over an object: a bite required contact with the teeth. Mr De Marco submitted that a bite was the intentional use of teeth to cut, pierce, grip or wound someone or something. There is little, if any, difference between the two. We consider that *to bite* should be given its ordinary meaning. Biting requires a conscious act that goes beyond merely pressing closed teeth against something/one. It requires a deliberate act in which teeth are closed over someone/thing. Piercing the surface is not necessary – a bite that does not pierce is nevertheless a bite, albeit a less serious bite. No physical injury is required, although in practice some injury will almost always be the consequence of a bite.

## THE BURDEN & STANDARD OF PROOF

8. It is common ground that the burden of proof lies on the FA. In the Reply Mr De

Marco submitted that although the standard of proof was on the balance of probabilities, the seriousness of the charge meant that *clear and convincing* evidence was required before the Commission could properly find it to have been proved. In support of that submission Mr De Marco referred us to paragraph 16 of the decision of the Regulatory Commission in FA v Beardsley. Mr Elagab agreed that because of the seriousness of the allegation cogent evidence was required before we could find it proved.

9. Again, there is little between the parties' choice of words. The phrase *clear and convincing* was used in Beardsley because those are words used in Regulation 24, which was the regulation that was relevant to that case. In his closing submissions Mr De Marco agreed that the requirement for clear and convincing evidence meant no more than that the evidence must be cogent. We agree.

## THE EVIDENCE

10. In addition to the written and oral evidence that we describe below the FA supplied two short video recordings of the incident – “Clip 1” and “Clip 2”. Those recordings were viewed and considered by the Commission before the hearing, and on numerous occasions during the hearing and in the course of closing submissions. The FA also referred us to video recordings of incidents involving Parkinson, Suarez and Defoe.
11. The FA served and relied upon the following written witness statements/expert's reports, each of which the Commission has read and considered –
  - Josh Windass.
  - Andy Hughes (Sheffield Wednesday coach).
  - Jeremy Simpson (referee).
  - Michael Salisbury (fourth official).
  - Dr Ravinder Varaich.

Messrs Windass, Hughes and Dr Varaich gave oral evidence and were cross-examined.

12. Messrs Simpson, Salisbury and Hughes confirmed that Mr Windass had reported both on the pitch and in the changing room that he had been bitten by Mr Lerma. The complaint on the pitch can be seen in the video recording. Mr Windass confirmed his witness statement and gave additional evidence. He agreed with Mr De Marco that at the time of the bite he was looking away from Mr Lerma and

therefore did not see the bite. He had no doubt that he had been bitten and described feeling the bite, which he described as being like a nip – he felt as though he had been bitten. The bite caused a red mark that stayed for a couple of days: the surface of the skin was not broken.

13. Mr Hughes said that he had not paid much attention to the report made by Mr Windass – he was more interested in the fact that his team had won the match. Mr Hughes saw the mark in the changing room. He described the mark as being tiny – like a love bite. So far as Mr Hughes were concerned there was a lot of things going on at the time. It did not occur to Mr Hughes to take a photograph of the bite or to recommend that Mr Windass should obtain medical attention.
14. In her report Dr Varaich was not able to express an opinion whether Mr Lerma had an open bite. The photographic evidence provided by Dr Kouble, however, demonstrated that Mr Lerma did not have an open bite. It became common ground between Drs Varaich and Kouble that Mr Lerma would have been able to bite Mr Windass while wearing the mouthguard. In paragraph 20 of her report Dr Varaich concluded that “with the mouthguard and clothing it is unlikely that the skin would have been broken, however the bite could elicit pain and redness of the area from the trauma.”
15. In her oral evidence Dr Varaich made clear that she was a dentist who since 2006 has had experience giving medicolegal evidence in personal injury cases. She was not an odontologist. She acknowledged that Dr Kouble was an odontologist with extensive experience of bites. Dr Varaich confirmed that, as she had written in her report, the mouthguard would not have prevented Mr Lerma from biting Mr Windass. She explained that the wear on Mr Lerma’s mouthguard confirmed that he did not have an open bite that would have prevented his front teeth from meeting when his mouth was closed. Dr Varaich felt that she did not feel competent to comment on the video evidence. She told us that she had considerable experience of mouthguards, which provided protection for the teeth and thus gave patients confidence that their teeth would not be injured. Dr Varaich declined to comment on Mr Hughes’ description of what looked to him like a love bite but observed that bites could vary in force and could cause varying degrees of injury, some of which would be visible for only a short period of time.

16. Mr Lerma served and relied upon the following written witness statements/expert's reports which, again, the Commission has read and considered –

- Jefferson Lerma, himself.
- Dr Craig Roberts (Bournemouth head of sports medicine).
- Jason Tindall (Bournemouth first team manager).
- Dental Clinic, Valencia.
- Dr Roland Kouble.

Mr Lerma, and Drs Roberts and Kouble gave oral evidence and were cross-examined.

17. Mr Lerma forcefully denied that he had intentionally bitten Mr Windass. Referring to Clip 1, he explained that before the free kick was taken he had tried to move forward in the penalty area. He was prevented from doing so by Mr Windass, who repeatedly pushed and shoved him back. Mr Lerma explained that he reacted by pushing Mr Windass back. While doing so his torso came into contact with Mr Windass' torso. The force of the jostling was such that Mr Windass' head came forward alongside Mr Lerma's right side. Similarly, Mr Lerma's head came forward against Mr Windass' right shoulder. Mr Lerma described the movement of his head as being a natural reaction to the pushing and shoving. Having viewed Clip 1 Mr Lerma explained that his forehead had come into contact with the top of Mr Windass' shoulder. He maintained that this video recording showed that there was no bite. Mr Lerma repeatedly denied that he had bitten Mr Windass: the first that he had known of the allegation of the bite was when he returned to the dressing room after the match. Mr Lerma reiterated what he had said in his written response to the allegation dated 25 November 2020, namely that it was impossible for him to bite while wearing the mouthguard. He said that he could not chew while wearing the mouthguard and always removed it before eating.

18. Mr Tindall's witness statement described Mr Lerma, who he has known since 2018, as a well-liked and respected member of the team. Mr Tindall considered him to be a courageous and committed player but one who knew where to draw the line. In paragraph 2.3 of his witness statement Mr Tindall said –

I was surprised to hear...such allegation.... It was completely out of character and not an action I have ever seen or heard the Player do or attempt in all of the years that I've known him.

19. Dr Roberts has been Bournemouth's Head of Sports Medicine since 2015. He had had past experience of bites in rugby matches when in South Africa, but had no such experience since moving to England. He agreed that he was not a dentist and was not a bite expert. He did not see the incident. Dr Roberts expressed surprise that no photograph had been taken of the alleged bite mark.
20. A report had been written by Mr Lerma's dentist in Valencia. She described Mr Lerma's dental history. She expressed the opinion that Mr Lerma had an open bite such that it would have been impossible for him to have bitten Mr Windass while wearing the mouthguard. Both Drs Varaich and Kouble agreed that, as a matter of fact, that opinion was wrong.
21. Dr Kouble's report contained the following passages –
- Given sufficient force a bite can still be inflicted with mouthguards and leave a much more faint bruise possible made up of two diffuse opposing arcs of bruising. I can clearly see that there is no anterior open bite as described by Mr Lerma's dentist and in fact the opposing mouthguards do contact anteriorly when biting together.
- In my clinical experience I have encountered problems with resin build-ups that repeatedly fracture and have found that patients lose confidence in biting with them and would tend to "guard" from biting down hard if there was a risk in damaging them.
- From my assessment of the video footage I can clearly see that Mr Lerma's head flexes forwards towards the right shoulder of Mr Windass but Mr Lerma's upper body is positioned upright. There is no recoil away by Mr Windass during this contact and in fact he pushes forward into Mr Lerma. The relative positions of the players to one another and response by Mr Windass are in contrast to other incidents I have reviewed both historical football incidents and criminal cases I have seen where each of the victims clearly recoil and react to the pain of the inflicted bites. There is a delayed response with a tap to the right shoulder by Mr Windass which may be an acknowledgement of some contact. The upright position of Mr Lerma's upper body is in contrast to other incidents I have viewed where I have always seen the biter lunging forward with their upper torso whilst bending and leaning their head forward.
- ...the action of flexing forward also has the effect of closing the mouth and I cannot exclude the possibility that contact was made during the two players pushing/jostling against one another where the skin may have been nipped. This does not mean that I believe that that this was an intentional bite, which I do not, but could possibly be an unintentional consequence of the jostling.... Furthermore the contact time is very limited in comparison to other videos of actual bites I have seen inflicted which I do not believe is consistent with an intentional bite.
- I have read Dr Varaich's report and agree with her that it is possible to inflict a bite while wearing the mouthguards....

22. In his oral evidence Dr Kouble said that although Mr Lerma would have been able to bite while wearing the mouthguard its presence meant that he would have had to have opened his mouth more widely than if he had not been wearing a mouthguard. Looking at Clip 1 Dr Kouble did not see any wide opening of Mr Lerma's mouth. Nor, looking at the same recording, could Dr Kouble see the sharp withdrawal by Mr Windass that would be expected if there had been an intentional bite. Dr Kouble said that because Mr Lerma's head could be seen to flex forward he would have found it difficult to open his mouth sufficiently wide to enable him to bite. Dr Kouble's conclusion from the video recordings was that there was no evidence of an intentional bite. By contrast, there might be evidence of an unintentional nip.
23. Dr Kouble told us that in 20 years' experience this was the only bite case in which he had not been provided with a photograph of the bite. Dr Kouble confirmed that, as he had set out in his report, Mr Lerma had been able to bite while wearing the mouthguard, and that in his opinion Mr Lerma's assertion to the contrary in his witness statement was not correct. He agreed with Mr Elagab that it was not possible to see Mr Lerma's mouth clearly in the video recordings but that he could be seen to be bending his head so as to make a bite more difficult. Dr Kouble expressed the opinion that the video recordings did not show a bite, and made the observation that both players' heads could be seen to be coming forward as part of the jostling. When pressed by Mr Elagab Dr Kouble reiterated that he did not believe that the video recordings showed time for a bite, as distinct from an involuntary nip. He repeated that Mr Windass' reaction was not consistent with that of a person who had just been bitten. Dr Kouble said a person such as Mr Lerma who had chronic problems with his teeth would be unlikely to bite someone in the manner that was alleged. Dr Kouble reiterated the conclusion reached in his report that the video recordings were not consistent with an intentional bite.

#### **THE FA's CASE**

24. Mr Elagab argued the FA's case by reference to five reasons that demonstrated that Mr Lerma had bitten Mr Windass as alleged. We summarise them as follows – (1) the narrative of events; (2) the video recordings – Mr Lerma's head can be seen in location of the bite, Mr Windass reacted immediately complaining of a



bite and reacting as if bitten; (3) Dr Varaich had demonstrated that a bite was possible and that the Valencia dentist's opinion to the contrary was wrong; (4) Mr Windass has maintained that he was bitten, from the time of the incident to giving evidence; (5) the only explanation for Mr Windass' reaction is that he had been bitten – Mr Lerma's evidence of his forehead being on Mr Windass' upper shoulder does not provide a sufficient alternative explanation. Mr Elagab discounted the importance of the lack of a photograph of the bite. The injury, he said was not that serious, did not break the skin and was "not that bad". The absence of a photograph is understandable. Mr Elagab took us to video recordings and written reasons in a number of other cases. He criticised the Valencia dentist for what was a plainly inaccurate report; reminded us that Mr Lerma had never complained of pain in his teeth or reported their condition to Bournemouth's doctor, so was wholly capable of biting; and finally reminded us that Dr Kouble had accepted the possibility of a nip. If there was time for an unintentional nip there must have been time for a deliberate nip.

#### **Mr LERMA's CASE**

25. Mr De Marco dismissed Mr Elagab's five reasons. (1) goes nowhere; (2) the video recordings are no more than consistent with a bite – they do not prove one; (3) similarly the expert evidence does no more than show a bite to have been possible – it does not prove one; (4) reiterates (2); (5) there are conflicting descriptions of what took place – there is no cogent evidence to prove a bite. Mr De Marco questioned the relevance of video recordings from other cases relied on by Mr Elagab, but out of an abundance of caution proceeded to analyse and explain the recordings and written reasons.
26. Mr De Marco said that Mr Lerma cannot be criticised for the erroneous opinion of the Valencia dentist. He was perfectly entitled to rely upon an ostensibly reliable expert even though her opinion may subsequently have been discredited. Mr De Marco addressed us on the meaning of *to bite*. As we have said above, we agree that a bite must be intentional: an unintended closing of the teeth does not constitute the deliberate violent conduct required by the charge made against Mr Lerma.
27. Mr De Marco submitted that the video recordings were not conclusive. They show the tussle between the players. They show both players' heads going down.

But it cannot be seen with which part of Mr Windass' body Mr Lerma's head made contact; it cannot be seen that Mr Lerma intentionally bit Mr Windass; the possibility of an unintended opening and closing of the mouth cannot be excluded. Mr De Marco reminded us that although Dr Kouble had accepted that a bite was possible his reasoned opinion based on the video recordings was that there was no intentional bite.

28. Mr De Marco identified three factual explanations: (1) Mr Lerma bit Mr Windass; (2) Mr Lerma unintentionally nipped Mr Windass/Mr Windass wrongly but honestly believed that he had been bitten; (3) Mr Windass made up the allegation. As we have said in our summary of his submissions Mr De Marco rejected the option of a deliberate bite. He said it is more likely that Mr Windass had invented the incident than that he had been bitten. Although he did not have instructions to elect between (2) and (3) Mr De Marco emphasised that it was for the FA to prove its case and, accordingly, disprove the possibility of a genuine mistake, which would explain Mr Windass' reaction and evidence. The mark could have been caused by the players jostling each other.
29. Mr De Marco complained at the delay by the FA in investigating the matter, so that the witness statements had been taken some significant time after the event. He pointed out that Mr Windass' witness statement asserted that he had seen Mr Windass bite him when in evidence he had accepted that at the material time his head was facing the ground away from Mr Lerma. Mr Windass, Mr De Marco argued, was demonstrably unreliable. The fact that no photograph was taken, the fact that Mr Windass did not seek medical treatment, and his manner when giving evidence demonstrated that Mr Windass simply did not care.
30. Turning to Mr Lerma's evidence, Mr De Marco submitted that there was no good reason to disbelieve him. He cannot be criticised for the Valencia dentist's mistake. The fact that he said that he could not bite while wearing mouthguards was not dishonest – it simply reflected the fact Mr Lerma always removed them before eating. When provided with the agreed dental opinion that it was possible for him to bite while wearing mouthguards Mr Lerma accepted it, while maintaining that as a matter of fact he had not bitten Mr Windass.
31. Returning to Dr Kouble, Mr De Marco reminded us that his opinion as an eminent

odontologist was that there was insufficient evidence of a deliberate bite. Wearing the mouthguard did not make a bite impossible but it undoubtedly made it less likely. Mr Lerma's sensitive teeth made a bite less likely. Mr Lerma believed (as did the Valencia dentist) that he could not bite while wearing the mouthguard so he would not have attempted to do so. The requirement of opening his mouth wide means that if he had bitten Mr Windass Mr Lerma would have left a greater bruise/mark.

32. Looking at the totality of the evidence Mr De Marco submitted that it lacked the cogency to enable the Commission to find the charge proved.

## **DISCUSSION**

33. We must decide case on evidence that is before us. We consider that comparisons with other cases are of limited value. Looking at video recordings and reading written reasons from such cases illuminates the evidence that was available in those cases but is of little value to our evaluation of the evidence in this case. We are required to determine whether the totality of the evidence is sufficiently cogent to prove that Mr Lerma bit Mr Windass. That can be determined only by the evidence in this case. We are quite satisfied that the evidence before us enables us to reach a properly informed decision. We have considered the entirety of that material, and the totality of the submissions made by the parties even though we may not refer to them all in these Written Reasons.

### **The expert evidence**

34. It is, of course, significant that Drs Varaich and Kouble agreed that it was possible for Mr Lerma to bite while wearing the mouthguard. We note that Dr Kouble recognised that although in his opinion the video recordings did not show a bite they could have shown an unintentional nip. We agree with Mr Elagab that if there was sufficient time for an unintentional nip there must also have been time for an intentional bite. We also find that, although a possibility, an unintentional nip would require an unusual coordination of mouth and shoulder: we find it to be improbable.

### **The video evidence**

35. We consider the video recordings to show movement that is consistent with there being a bite, but that they are not conclusive of one. They are equivocal. We find, however, that the video recordings do not show Mr Lerma's forehead coming into

contact with Mr Windass' upper shoulder as described by Mr Lerma in his evidence. Further, we find that they do not show body and head alignment that we would have expected if Mr Lerma was simply pushing back against Mr Windass. The movement of Mr Lerma's head towards Mr Windass' shoulder is of a different character to the movement of Mr Windass' head alongside Mr Lerma's body. We find that the movement of Mr Lerma's head was not consistent with that of one player simply pushing back against another player.

### **The witness evidence**

36. Mr Windass made an unappealing witness – we agree with Mr De Marco that he gave every impression of simply not caring. Nevertheless, Mr Windass' evidence that he had been bitten was clear and credible. We find that Mr Windass believed that he had been bitten: we find that, contrary to Dr Kouble's opinion, Mr Windass' immediate reaction was consistent with a bite; he made an immediate complaint to the referee, which was audible on Clip 2, and which he repeated to his colleagues. We accept Mr Windass' evidence and that of Mr Hughes that Mr Windass had a mark in the area where he believed that he had been bitten. We have not had the benefit of photographs of the mark, which was plainly comparatively insignificant, but we find the presence and location of the mark to be consistent with the bite described by Mr Windass.
  
37. Much of Mr Lerma's evidence was uncontroversial. The wearing of the mouthguard and Mr Lerma's dental history are not in issue. We do not, however, accept Mr Lerma's evidence that his only contact with Mr Windass was when his forehead came into contact with Mr Windass' shoulder. The video recordings show a different character of contact, with Mr Lerma's face coming into contact with the area in which Mr Windass says that he was bitten. We find the movement of Mr Lerma's head to be distinct from the jostling between the two players: it was a deliberate downward motion.

### **Final analysis**

38. The expert evidence is not conclusive of the question whether Mr Lerma bit Mr Windass. The experts, however, agree that Mr Lerma did not have an open bite, and that it would have been possible for him to have bitten. The video recordings are similarly inconclusive. They are consistent with a bite, but are not conclusive of one. The issue whether Mr Lerma bit Mr Windass must therefore be resolved

by an analysis of the factual evidence.

39. Mr Windass believed that he had been bitten. He had a mark in the location of the believed bite that was consistent with having been made by a bite. The video recordings show that Mr Lerma's evidence that only his forehead came into contact with Mr Windass' shoulder to be wrong. Mr Lerma's body and head movement goes beyond that which can be explained by two players jostling one another. The head movement that Dr Kouble considers may have been an unintentional nip is equally capable of being an intentional nip or, put another way, a deliberate bite.
40. We consider that these findings of fact constitute cogent evidence that Mr Lerma bit Mr Windass. Our conclusion is that Mr Lerma did bite Mr Windass as alleged, and that the charge is therefore proved. We agree, however, with Mr Elagab that the bite was not serious, it did not break the skin and was "not that bad". Further, we find that it was not premeditated but was an opportunistic and spontaneous reaction to the pushing and jostling carried out by Mr Windass in order to prevent Mr Lerma moving forward to his intended position. Taking into account Mr Tindall's evidence, it was an out of character, spur of the moment act and one which, despite his denials, Mr Lerma probably regrets.

#### **TWITTER**

41. During the course of the hearing the Commission became aware of the fact that after giving evidence Mr Windass published a tweet saying "Fa hearings, absolutely shambolic questions when the evidence is on the screen.." The Commission considered that this publication was not part of the evidence before it, was not relevant to the issues and should be disregarded. The Commission therefore did not draw it to the attention of the parties or their legal advisors. The Commission gave the publication no further thought: it did not feature in its deliberations.

#### **SANCTION**

42. The parties have consented to the Commission determining sanction on the papers, without a further hearing. The FA relies upon its written submissions dated 11 May 2021. Mr Lerma relies upon Mr De Marco's written submissions dated 18 May.

43. The FA submits that having contested the charge no sanction credit should be given to Mr Lerma. On the contrary, Mr Lerma dishonestly asserted that it was impossible for him to bite while wearing a mouthguard. The incident is made the more serious by the fact of Covid-19. We were referred to sanctions imposed in other biting cases, although the FA realistically accepted that each case must turn on its individual facts. Nevertheless, biting is always serious and should be sanctioned as such. A significant penalty is therefore merited. The Commission should consider suspension for 6-10 matches, together with a financial penalty, and payment of the costs of the proceedings.
44. Mr De Marco reminded the Commission that this was Mr Lerma's first misconduct charge. He explained why the red cards recorded against Mr Lerma should not be taken into account. Mr De Marco submitted that following features militated in favour of a lesser sanction: (1) the level of force used; (2) the minor nature of the injury caused – *not that bad* as the FA had described it in its closing submissions on liability; (3) the fact that the incident had no impact on the game; (4) the length of time that these proceedings have taken; (5) the irrelevance of Covid-19 – Mr Windass had accepted that he had not been concerned by Covid-19 implications; (6) this was, as the Commission has already found, an unpremeditated spontaneous reaction to Mr Lerma being pushed and jostled. A 3 match suspension is appropriate.
45. We have already found (paragraph 40) that this incident “was not premeditated but was an opportunistic and spontaneous reaction to the pushing and jostling carried out by Mr Windass in order to prevent Mr Lerma moving forward to his intended position. Taking into account Mr Tindall's evidence, it was an out of character, spur of the moment act and one which, despite his denials, Mr Lerma probably regrets.” The FA accepted that it was *not that bad*. We take into account the further mitigation advanced by Mr De Marco and agree that this misconduct falls at the lower end of the scale.
46. Nevertheless, all biting incidents are significant in themselves. The circumstances and the lack of serious injury are mitigating features but intentional biting is unacceptable and calls for a clear sanction. We have concluded that Mr Lerma should be suspended from all domestic club football with immediate effect until such time as AFC Bournemouth has completed six First Team Competitive

Matches in approved competitions. In addition, a financial penalty is called for. Taking into account all the circumstances of this incident, and noting his net income, we consider that Mr Lerma should pay a fine of £40,000. Mr Lerma must also forfeit the £100 personal hearing fee and must pay the costs of the Commission proceedings, including the cost of the transcript.

A handwritten signature in black ink, appearing to be 'D. Phillips', written over a horizontal line.

David Phillips QC  
Lawrence Selby  
Faye White

26 May 2021