IN THE MATTER OF THE APPEAL BOARD OF THE

FOOTBALL ASSOCIATION

BETWEEN:

WALE ODEDOYIN

Appellant

-and-

LONDON FA

Respondent

DECISION OF THE APPEAL BOARD

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1. The matter was heard by Microsoft Teams video conference on 6 October 2022. The Appeal Board comprised:

    a. Richard McLean, Independent Judicial Panel Member;

    b. Greg Fee, Independent Football Panel Member; and

    c. Shaun Turner, Independent Football Panel Member.

2. Conrad Gibbons, Judicial Services Officer of The FA, acted as Secretary to the Appeal Board.

3. There was no attendance from any party so the hearing was determined on the basis of the papers provided. Both parties had indicated they would not be in attendance prior to the hearing.

4. The Appeal Board had before it:

    a. The Notice and the supporting materials of the Appellant;

    b. The Respondent's Response with supporting documents;

    c. The results letter and written reasons

    d. An application, on the part of the Appellant, to adduce new evidence, together with that new evidence;

    e. The papers of first instance; and

    f. The Appellant's offence history.

Background

5. The Appellant was charged by the CFA as follows:

    a. FA Rule E3 – Improper Conduct (including foul and abusive language).

    b. FA Rule E3.2 – Improper Conduct – aggravated by a persons Ethnic Origin, Colour, Race, Nationality, Faith, Gender, Gender Reassignment, Sexual Orientation or Disability.

6. The charges arose from an incident during a match between the Appellant's club Tower Hamlets against Sheppey United on 7 August 2021. The Appellant was alleged to have referred to an opposition player as a "gay pussy" or words to that effect.

7. The Appellant had denied the charges by response to the notification of charges dated 16 September 2021.

8. The matter before the CFA was subject to several delays. On 16 November 2021, the day before the Commission was to sit to consider the case, the Commission was notified of a request by the Metropolitan Police to postpone the hearing pending a decision by the Crown Prosecution Service regarding criminal proceedings against the Appellant arising from the same incident. The matter was as a result adjourned until the conclusion of criminal proceedings.

9. On 20 July 2022 the Commission was provided with a police email dated 8 July 2022 indicating that the Appellant had been 'charged' (it transpired he had actually been convicted) with an offence under s.4A of the Public Order Act and was awaiting sentence. On 26 July 2022 the Commission was provided with a Memorandum of Conviction confirming that on 23 June 2022, following a plea of "not guilty" the Appellant had been convicted of using threatening, abusive or insulting words with intent to cause harassment, alarm or distress contrary to Section 4A(1) and (5) of the Public Order Act 1986. The Appellant's sentence was a community order of 120 hours, compensation of £500, a victim surcharge of £95 and costs of £620.

10. The charges were considered by a Commission in a non-personal hearing on 1 September 2022. The Commission found the charges proven following the criminal conviction arising from the same facts. The Commission took into account Reg 24 of the FA Rules which provides that the results of criminal proceedings shall be presumed to be correct. The Commission determined that it was satisfied that, since the criminal proceedings faced by the Appellant were based on a charge substantially the same as that brought by the FA and arising from the same incident, it was able to find the charge proved on the basis of that conviction.

11. The Commission applied the following sanction to the Appellant:

“(a) The Participant will be suspended from all football for 11 matches.
(b) He will undertake an online FA Educational Course within four months of the date of this sanction, failing which he will be immediately suspended until such time as he completes the course.
(c) The Club will have 7 disciplinary points added to their record.”

12. The Commission decided not to impose a fine on the Appellant as part of its sanction, determining that as the Appellant had to pay £1,215 following his conviction, a further financial penalty would be oppressive and unnecessary.

13. In determining sanction the Commission took into account the Appellant’s prior offences of threatening a match official (27 February 2019) and violent and threatening behaviour (April 2021). The Commission determined that neither of these prior offences had direct relevance to the present charge such that they served as aggravating features.

14. The Commission did conclude that the following aggravating features were present:

“- The charge itself was aggravated by reference to a protected characteristic, in this case sexual orientation
- There had been no acknowledgement of fault
- There had been no co-operation with the proceedings, other than the indication of “not guilty” in September 2021
- The incident had resulted in a criminal conviction”

15. The Commission determined that the sole mitigating feature was that the “*incident involving the use of these words appeared to be momentary”*.

16. The Appellant appeals by notice of appeal dated 6 September 2022. The appeal was on one ground, namely that pursuant to Reg 2.4 the CFA imposed a penalty, award, order or sanction that was excessive. The notice of appeal focused on two of the aggravating factors, providing reasoning why the Appellant considered the Commission had erred in respect of these factors. These were:

    a. *“There had been no acknowledgement of fault”* – the Appellant cited an email he says he sent to Tower Hamlets Football Club on 22 July 2022 where he stated he would like to change his plea to accept the charges placed upon him. The Appellant stated this was an acknowledgment of fault on his part.

    b. *“There had been no cooperation with the proceedings, other than the indication of “not guilty” in September 2021”* – the Appellant cited again the email dated 22 July 2022 changing his “not guilty” plea, in addition to an email chain between the Appellant and Carl Long of the London FA which the Appellant says demonstrates cooperation with proceedings.

c. Additionally the Appellant reiterated his view that he disagreed that the London FA had received no response by 1 August 2022 as requested. He stated he had emailed Tower Hamlets Football Club on 22 July 2022, was not made aware that the email had not been passed on to the CFA, and that he believed he had included Carl Long in the email.

Admissibility of new evidence

17. The Appellant made an application under Reg 10 of the Disciplinary Regulations for leave to present new evidence. The new evidence in question was the aforementioned email the Appellant says he sent to the Tower Hamlets Football Club Secretary on 22 July 2022, in addition to the email chain between the Appellant and Carl Long dating between 27 September 2021 and 17 November 2021.

18. The determination of the admissibility of the new evidence was in the Appeal Board's view of critical importance to the determination of matters, and accordingly was managed as a preliminary point.

19. Regulation 10 of the Disciplinary Regulations sets out the test for new evidence:

"The Appeal Board shall hear new evidence only where it has given leave that it may be presented. An application for leave to present new evidence must be made in the Notice of Appeal or the Response. Such application must set out the nature and the relevance of the new evidence, and why it was not presented at the original hearing. Save in exceptional circumstances, the Appeal Board shall not grant leave to present new evidence unless satisfied with the reason given as to why it was not, or could not have been, presented at the original hearing and that such evidence is relevant. The Appeal Board's decision shall be final. Where leave to present new evidence has been granted, in all cases the other party will be given an opportunity to respond."

20. The Appeal Board were mindful that it can only be in "exceptional circumstances" that new evidence be admitted and that it must be relevant evidence. It follows that there had to be some assessment of the quality of the new evidence presented together with a question as to how it might impact on the fairness of the original decision making.

21. The Appeal Board first considered the Appellant's email of 22 July 2022 to Tower Hamlets Football Club and did not grant the Appellant leave to present this new evidence for the following reasons:

    a. The Appeal Board first asked itself whether the email of 22 July 2022 was capable of belief, considering this relevant to the issue. It determined that, despite reservations with the overall quality of this evidence, it was capable of belief. The Appeal Board noted that the email had no sent date or time, and considered this unfortunate in a case with an Appellant attempting to establish that he had sent an email on the date he claimed. However, the Appeal Board noted the content of the email, weighed this together with the other evidence

and case chronology, and found on the balance of probabilities that the email had been sent on the date claimed by the Appellant.

b. The Appeal Board next considered whether the 22 July 2022 email may afford a ground for allowing the appeal. It considered that the email potentially did. The content of the email provided a basis to refute the Commission's finding that there had been no cooperation with proceedings other than the indication of "not guilty" in September 2021.

   The Appeal Board did not consider that the 22 July 2022 email contradicted the Commission's finding that there had been no acknowledgement of fault. The 22 July 2022 email stated "*Following the criminal case brought against myself and the conviction levied too, I am mindful that due to the burden of proof being higher in the criminal courts, a personal hearing via these civil proceedings is almost futile. Whilst, a number of key evidences garnered by the FA were not disclosed in the criminal court, I do not feel that they will add any weight to my original plea in light of the conviction in the criminal courts…"* The email later stated regarding the person to whom the Appellant was alleged to have referred to as a "gay pussy" or words to that effect "Whilst, *he may have been mistaken in what he thought he heard, how he felt certainly was not a mistake".*

   The Appeal Board considered that while this email provided an admission of the charges he faced, it did not contain an acknowledgment of fault as asserted by the Appellant. At best, the email was a heavily qualified acknowledgement.

c. The Appeal Board next considered whether the new evidence could have been presented at the original hearing, together with any explanation as to why it had not been. While the Appeal Board acknowledged the Appellant's position that he had sent the email to the Tower Hamlets Football Club Secretary and expected them to forward the email to the CFA, it considered that in the circumstances the evidence in support of the Appellant's position was insufficient. There was no evidence of the Appellant following up this email, of his receiving any response to it, and if not of him chasing a response. The Appeal Board was mindful of the Appellant's stated position that he had also sent the email to Carl Long of the London FA, but that Carl Long was not present among the email addressees. The Appeal Board was also mindful that the CFA had emailed the Appellant on multiple occasions in the run up to the Commission's sitting, on 12 July 2022 and on 27 July 2022.

   The email of 12 July 2022, which was sent to the Appellant's personal email address, stated *"…The club and participant now have until 5pm on the 19/7/22 to amend your plea (if required) and submit any additional documents pertaining to the charges. After this date, the commission will make a decision on the case."* Firstly, on the Appellant's own case he had missed this 19 July 2022 deadline and provided no reason for this failure. Secondly, it was

evidence of an open line of communication between the CFA and the Appellant in advance of his 22 July 2022 email.

The email of 27 July 2022, which was also sent to the Appellant's personal email address, requested dates to avoid. The Appeal Board considered that this email provided a prompt to query progress with Tower Hamlets FC, if the Appellant deemed that appropriate or desirable. Given the content of the Appellant's 22 July 2022 email, the Appeal Board also came to the view that the 27 July email may have caused the Appellant to query why a personal hearing appeared to be scheduled by the CFA.

In summary, the Appellant was not granted leave to present the new evidence of the email dated 22 July 2022 as the Appeal Board was satisfied that the evidence could have been presented at the original hearing. Additionally the Appeal Board was not satisfied as to the explanation it had not been. Finally, the Appeal Board did not regard the circumstances in respect of this new evidence as "exceptional".

22. The Appeal Board next considered the email chain between the Appellant and Carl Long of the London FA. The Appeal Board did grant leave to the Appellant to present this new evidence for the following reasons:

    a. The evidence was capable of belief. It was highly undesirable that the Appellant had presented an email "chain" which contained only the emails from Carl Long and not the Appellant's claimed responses to those emails. This was particularly the case given the Appellant's case regarding these emails was that his replies were cooperative and demonstrated willing. However, the Appellant was aided by the London FA not disputing his position on the content of the email chain.

    b. The Appeal Board next considered whether the email chain may afford a ground for allowing the appeal. It was considered that it potentially did in that it contradicted the Commission's finding that an aggravating factor had been no cooperation with proceedings other than the indication of "not guilty" in September 2021. The Appeal Board noted however that while it considered the new evidence afforded a ground for allowing the appeal in respect of it appearing to contradict an aggravating factor, it was unsure at this stage what impact this may have on the issue of sanction as a whole.

    c. The Appeal Board next considered whether the new evidence could have been presented at the original hearing. It reached the view that the Appellant had sent this information to the CFA over a period of time, and that this information was plainly relevant to the issue of cooperation.

23. The Appeal Board noted that the London FA had taken the opportunity to respond to the new evidence in its response dated 28 September 2022. The Response set out the CFA's

acceptance of the substance of the new evidence, and the CFA's position on how this new evidence may impact the case.

Decision on appeal

24. The Appeal Board considered the parties' submissions, documents, and the new evidence in the form of the email chain, in accordance with the principles set out above.

25. The Appeal Board noted that a finding of an aggravated breach as in the present case will attract a sanction range of between 6 and 12 matches. Further, that the lowest end of the sanction range of 6 matches, is a starting point when considering sanction, and that a Commission must have regard to the relevant aggravating and mitigating factors.

26. The Commission had relied upon its findings as to aggravating and mitigating factors in its written reasons. However, the Appeal Board noted that the Commission had not provided specific reasoning as to why it had arrived at a suspension of 11 matches, merely stating that the charge fell at the top end of the level of seriousness.

27. The Appeal Board considered the aggravating factors one by one:

    a. It considered that the first aggravating feature of "reference to a protected characteristic" was not an aggravating feature as such, as one of the charges was a breach of FA Rule E3.2, which concerns aggravation for reason of references (express or implied) to protected characteristics.

    b. It considered that the aggravating feature of "there had been no acknowledgement of fault" still stood. The Appellant was in essence relying on leave to present the 22 July 2022 email in order to challenge this finding. The Appeal Board had not granted the Appellant leave to present this new evidence. In any event, the Appeal Board was minded that the 22 July 2022 email would not have contradicted this finding of the Commission even if it had been allowed.

    c. It considered the aggravating feature of "there had been no cooperation with the proceedings, other than the indication of "not guilty" in September 2021". The Appeal Board considered that this aggravating feature was incorrect, given the CFA's own admission in its response that the Appellant had been "flexible in his attendance".

    d. The fourth aggravating feature of the events giving rise to the charges "resulting in a criminal conviction" was not considered to be an aggravating feature without further explanation, only indicative of the fact of the conviction.

28. The Appeal Board concurred with the Commission's finding that the momentary nature of the incident was a mitigating factor.

29. Considering the Commission decision in the round, the Appeal Board was satisfied that the sanction applied was manifestly unreasonable. This conclusion was reached with particular reference to three of the aggravating factors falling away given the Appeal Board's conclusion that the Commission came to a view that no reasonable such body could have come to. The Appeal Board concluded that aggravating factors (a) and (d) were not relevant aggravating factors, and aggravating factor (c) could not reasonably be sustained following the Appeal Board's decision to permit the email chain between the Appellant and Carl Long to be adduced.

30. In accordance with Reg 21.1 the Appeal Board allowed the appeal.

31. In accordance with Reg 21.2 the Appeal Board determined it should exercise its power to decrease the sanction imposed. The Appeal Board considered the Standard Sanctions and Guidelines for Aggravated Breaches contained within Appendix 1 of the Disciplinary Regulations, the circumstances and seriousness of the incident, together with the relevant aggravating and mitigating factors. It concluded that a suspension of 8 matches is appropriate in the circumstances.

32. The Appeal Board determined that the requirement for the Appellant to attend an FA Educational Course should be maintained, as provided for in Appendix 1 of the Disciplinary Regulations. Likewise the 7 penalty points issued to Tower Hamlets Football Club remains unchanged.

33. The Appeal Board therefore ordered:

    a. The 11 match suspension is reduced to 8 matches.
    b. All other aspects of the sanction imposed by the original Disciplinary Commission remain as originally imposed and on the same terms.
    c. No order as to costs.
    d. The appeal fee is to be returned.
    e. The decision is final and binding on all parties.

The Appeal Board
12 October 2022