<u>IN THE MATTER OF AN APPEAL FROM</u>

<u>THE DECISION OF A REGULATORY COMMISSION</u>

<u>OF THE FOOTBALL ASSOCIATION</u>

BETWEEN:

The Football Association

Appellant

-and-

Huw Lake

Respondent

Appeal Board: HH Clement Goldstone KC (Chair) – Independent Specialist Panel Member
Udo Onwere – Independent Football Panel Member
Francis Benali – Independent Football Panel member

WRITTEN DECISION OF THE APPEAL BOARD

Introduction

1. On Wednesday 15th May 2024, an Appeal Board of the Football Association heard an appeal brought by the FA [‘the Appellant’] against the sanction imposed by a Regulatory Commission of the FA on 25th March 2024 in respect of 2476 breaches of FA Rule E8.1 in relation to bets placed by Huw Lake [‘the Respondent’] between April 2018 and September 2023.

2. The Regulatory Commission imposed the following sanctions:

   A] an immediate suspension from all football and football-related activity for a period of 12 months, of which 3 months was to be served immediately and the remainder suspended until the end of the 2024-25 season.

   B] a fine of £1500 and

   C] a contribution of £500 towards the costs of the proceedings.

   The appeal was brought against A] alone above.

3. This was an appeal which proceeded on the basis of the written papers which were before the Commission, supplemented by the Appellant’s notice of appeal and the Respondent’s response to the notice of appeal, and the Commission’s written reasons dated 2nd April 2024.

4. Before hearing the appeal, we had to determine a preliminary point raised by the respondent [at paragraphs 4-9 of the Response] to the effect that the notice of appeal was fatally flawed because it did not comply with para 7.2 of the Disciplinary Regulations which require the notice of appeal to contain not only the grounds of appeal but also ‘the reasons why it would be substantially unfair not to alter the original decision’. As the notice of appeal did not contain specific reference to the reasons relied upon by the respondent to show that it would be substantially unfair not to allow the appeal – although they could easily be inferred – and as the requirement was mandatory, we directed the appellant to file a supplemental or amended notice of appeal, if so advised, and gave the respondent an opportunity to respond thereto. Both parties took advantage of the opportunity afforded, and we have considered their further written submissions, dated 13th May and 14th May respectively. We reject any suggestion implicit in the respondent’s solicitor’s email dated 13th May, that the chair did not have the power to make the direction which he did and have reminded ourselves of the provisions of Regulation 14 which are self-explanatory. For the avoidance of doubt, the direction was necessary ‘for the proper conduct of the proceedings’ and gave rise to no prejudice as far as the respondent was concerned. We are wholly satisfied that if there was any deficiency in the original notice of appeal [as to which we make no finding], it was rectified by the

appellant's further submissions. Accordingly, we now proceed to address the merits of the appeal.

5. Before we set out the facts of the charges, we remind ourselves of the very limited circumstances in which we can entertain an appeal by the charging authority, in this case the FA, against the level or type of penalty or sanction imposed.

6. By Regulation C1.1 of the Disciplinary Regulations, the grounds of appeal available to the FA are that the Regulatory Commission
   i. Misinterpreted or failed to comply with the Rules and/or regulations of the Association relevant to its decision; and or
   ii. Came to a decision which no reasonable such body could have come; and/or
   iii. Imposed a penalty, award or sanction that was so unduly lenient as to be unreasonable.

7. This was therefore an appeal under subsections [ii] – the 'unreasonable' provision and [iii] – the 'unduly lenient' provision.

8. We remind ourselves also that an appeal is by way of review on documents only and does not involve a rehearing of the evidence considered by the Regulatory Commission, although both the FA and the respondent are entitled and invited to, as they did, make written submissions to the Appeal Board in their notice of appeal and response thereto respectively.

9. In short, the fact that the members of this Board might individually or collectively have imposed a heavier penalty if they had been in the shoes of the members of the Regulatory Commission does not entitle them to do so at this stage, unless the FA can show that the Commission's decision fell outside the wide band of reasonableness and was based on an assessment of culpability which no reasonable tribunal, properly directing itself to the facts, could have made.

<u>The Facts</u>

10. The Respondent is aged 61 years. He has been employed by Swansea City FC [SCFC] since December 2004, and as its player liaison officer since 2007; it is clear from the numerous references which were considered by the Commission that he is very highly regarded and respected by those who have or have had connections with SCFC throughout the period of his employment. Sadly, between April 2018 and September 2023, he placed no fewer than 2476 football-related bets, of which, most significantly and seriously, 130 were on SCFC to lose. During this period, he staked a total of nearly £92000, of which he lost slightly less than 10%.

11. As a result, he was charged by letter dated 28th November 2023 with misconduct under FA Rule E1.2 in respect of breaches of Rule E8.1 [each bet constituting a separate breach], the relevant part of which prohibits a 'participant at Step 4 and above', of whom the respondent is one, from betting on the result, progress, conduct or any other aspect of, or occurrence in a football match or competition.

12. For the purposes of this decision, it is not necessary to set out the extent of the respondent's betting on a season-by-season basis. For the avoidance of doubt, they are helpfully set out in detail in paragraph 4 of the Commission's written reasons.

13. The respondent admitted the breaches in full at an early stage. At the hearing, there was specific argument about only one of the bets – referred to as [redacted] and said to have involved the use of inside information. We will refer in brief to that bet, and the commission's conclusions in relation to it, later in this decision.

Sanction Guidelines

14. It is appropriate at this stage to set out, by reference to the FA's Sanction Guidelines, the various types of bet which are prohibited in ascending order of seriousness, and the sanction guidelines themselves, which clearly envisage consideration where appropriate of a financial penalty as well as a 'sports sanction':
    i. Bet placed on any aspect of any football match, anywhere in the world, but not involving participant's club competitions

       Sanction – warning/fine; suspension 'n/a'

    ii. Bet placed on participant's competition but not involving his club [including spot bet]

        Sanction – fine; suspension n/a where participant has no

        connection with the club bet on.

    iii. Bet placed on own team to win

         Sanction – fine; suspension 0-6 months to be determined by

         factors below

    iv. Bet placed on own team to lose

        Sanction – fine; suspension 6 months – life to be determined

        by factors below*

15. The remaining types of bets, and the potential sanctions, involve 'particular occurrences' within a match and do not fall to be considered here.

16. The Guidelines continue : *The factors to be considered when determining appropriate sanctions will include the following:
    i. Overall perception of impact of bet[s] on fixture/game integrity;
    ii. Player played or did not play;
    iii. Number of bets;
    iv. Size of bets;
    v. Facts and circumstances surrounding pattern of betting;
    vi. Actual stake and amount possible to win;
    vii. Personal circumstances;
    viii. Previous record [any previous breach of betting rules will be considered as a highly aggravating factor]
    ix. Experience of the participant;
    x. Assistance to the process and acceptance of the charge.

17. Whilst the Guidelines are not intended to override the discretion of Regulatory Commissions to impose such sanctions as they consider appropriate having regard to the particular facts and circumstances of a case, the Guidelines state clearly that 'in the interests of consistency it is anticipated that the guidelines will be applied unless the applicable case has some particular characteristic[s] which justifies a greater or lesser sanction'.

18. They continue: 'The assessment of the seriousness of the offence will need to take account of the factors set out above'.

19. The Commission's first decision therefore was to decide what the guideline for this offending, taken in totality, was, as to both fine and, if appropriate, sports sanction.

20. Having identified the guideline, its next decision was to decide whether there were factors which merited an increase to or reduction from the 'entry point' [which we understand to mean the lower end of the 'sanction range'].

21. Having decided, as it did, that the totality of the breaches and the circumstances thereof, merited an immediate 'ban' [used deliberately instead of 'suspension' for obvious reasons], it was then the task of the Commission to consider whether the penalty [fine and/or ban] should be suspended in whole or in part pursuant to the provisions and principles set out in Regulations 43 and 44 of the FA Disciplinary regulations

22. If, as a general rule, the 'sentencing exercise' is undertaken in this way, it is transparent, open to scrutiny, and unlikely to be capable of criticism or potential review as one which has led to the imposition of a penalty or sanction which is unduly lenient [or severe] within the meaning of the FA Disciplinary Regulations.

23. With that approach in mind, we now turn to consider the Commission's decision, the FA's argument, the Respondent's position and, finally, our conclusions.

The Regulatory Commission's decision

24. We note at the outset that this was an experienced Commission well-versed in the application of the FA Disciplinary Regulations and their application. We have therefore reflected long and hard [as we would have done in any event] before concluding that its decision is unsustainable, in part, for the reasons set out below.

25. The written reasons of the Commission are helpfully set out under the following headings:
    1. Introduction
    2. The charge
    3. The response
    4. The rules
    5. The FA's evidence
    6. Statements and report provided by HL [Huw Lake]
    7. Written submissions
    8. The FA's submissions
    9. MW's submissions
    10. The Commission's decision

Bearing in mind the detail of their reasons and the limited parameters of any appeal [see para 5 above], we do not propose to comment on any findings of fact or over and above those which it is necessary to discuss in order to address the issues raised by the Appeal, both in relation to the length of the ban and the decision to suspend it in part.

The FA's position

26. In summary, it is the FA's position, as set out in its Notice of Appeal, that, having regard to the totality of the breaches and the length of time over which they occurred and, in particular, the fact that 130 of the bets fell into the most serious category, warranting a ban [for any one breach] of between 6 months and life, a 12 month ban, even allowing for the mitigation open to HL, was 'Wednesbury' unreasonable and therefore so unduly lenient as to be unreasonable. They contend that the Commission should not have taken account of the internal disciplinary measures already taken by SCFC, which had suspended HL when the breaches first came to light in September 2023, or alternatively that the Commission attached too much weight to it. They make a specific criticism of the Commission for failing to make a specific finding in relation to what is described as [redacted] placed by HL in February 2022 and which arguably involved the use of inside information – a significantly aggravating factor. All these matters have, it is submitted, a direct bearing on the length of suspension which should have been imposed which, in all

the circumstances, was far too near the 'entry point' of 6 months to have an adequate punitive or deterrent effect.

27. In relation to the decision to suspend the majority of the ban, the FA relies upon three specific factors in order to argue that the Commission has misapplied the provisions of Disciplinary Regulation 44: first, it has used mitigation which was taken into account in deciding the length of the ban in deciding also whether the ban should be suspended, leading to the imposition of a sanction that is so unduly lenient as to be unreasonable; second, it has used a speculative assumption about HL's future employment prospects, for which there was no evidential basis in reaching that conclusion, which is thus flawed to the extent of being unreasonable, and third, and in any event, it placed undue weight on the risk of the respondent losing his job [and finding it difficult to find alternative employment], having regard to the extent to which he had knowingly and seriously breached the rules over a prolonged period of time.

The Respondent's position

28. The Respondent's position is set out in its Response. As to the length of suspension, emphasis is placed on the Commission's discretion, the width of which is stressed in the Guidelines on the imposition of sanctions, the very careful and thorough approach which the Commission took in evaluating all the material and evidence placed before it, and the very high 'bar' which must be negotiated by the FA before the 12 month ban can be said either to be Wednesbury unreasonable, or so unduly lenient as to be unreasonable.

29. As to it is submitted that far from failing to make a finding on the Commission did so, and that the complaint of the FA marks a distinct shift from the 'neutral' position which they adopted at the hearing to the contention now advanced – albeit that it is acknowledged by the FA that a specific finding in relation to this breach that it involved the use of inside information was unlikely to make a difference to the overall penalty having regard to the size of the bet involved.

30. As far as the decision to suspend the operation of 9 months of the 12 month ban until the end of the 2024-5 season is concerned, the respondent submits that the Commission acknowledged the requirement set out in Regulation 44 to find 'a clear and compelling reason[s]' before setting out what those clear and compelling reasons were – namely that it was unlikely that SCFC would keep the respondent on paid suspension for a further 12 months and that there was a real risk that he would lose his job and struggle to find another one. The commission clearly had regard to the overall seriousness of the breaches because it had declined to suspend the ban in full. The respondent addresses the FA's point about what is said to be speculation in the absence of evidence about the Respondent's future work prospects with SCFC in para 36 of the Response. Conceding that there was no evidence from SCFC

in this regard, it submits that 'it would be naïve to expect such evidence to be available given the fact that there is an obvious overlap into employment law as an employer would be reluctant and possibly ill-advised to make such a comment before internal proceedings have been conducted', and in any event, there was evidence from the respondent himself as to his concerns in this regard, which it was open to the Commission to accept and act upon. The Response did not address the FA's point about the same mitigation [as to not having placed a bet for several months and having taken advantage of all support which had been offered] being used twice – once in the determination of the sanction and again in its consideration of the requirements of Regulation 44. No doubt this was an oversight and is not taken by the Appeal Board as a concession.

Conclusion

31. There are, in effect, two important points for our consideration: first, whether the length of the ban fell within the bounds of reasonableness; second, whether it was open to the Commission, acting within the bounds of reasonableness, to suspend the ban at all, even in part. Each point involves more than a simple recitation and evaluation of the points of aggravation and mitigation – there are points of principle in general to consider and a specific point raised in relation to the facts of this case – namely [redacted] and the approach to be adopted thereto.

32. We will deal with [redacted] point first. It is clear from the notice of appeal and the response thereto that there are different recollections about what was said. It seems to us that, given the nature of this hearing, absent at least a transcript of the hearing, it would be quite inappropriate for us to 'second-guess' what was in the minds of the parties' advocates when the nuts and bolts of this breach were being discussed, or indeed precisely what was and was not said at the hearing. Furthermore, it is clear to us that whether or not the Commission's conclusion accorded with that contended for by the FA, it addressed this point with sufficient clarity to persuade us that it did not regard this breach, in the grand scheme of things, as specifically aggravating in its own right, and was part of a bigger picture of breaches which warranted, on the face of them, a ban of between 6 months and life.

33. Second, we deal with the point of principle about whether or not it is right for a Commission to take account of action taken by an employer Club in determining length or suspension of a ban. We have no doubt that it is wholly correct for a Commission to do so. We would go so far as to express the view that a failure to do so would itself be unreasonable and contrary to the rules of natural justice. Commissions are regularly faced with cases where employer Clubs have or have not taken action against a player charged with breaches of FA rules and are well-used to dealing with the issue. It should not be disregarded by a Commission on the basis

that it [or the hypothetical case of a post-breach injury] is a collateral matter. It is highly relevant and pertinent and will, we are confident, continue to be given the weight it merits on a case-by-case approach.

34. Having addressed those two points, we now turn to the Commission's decision as to the length of ban.

35. We have read the parties' submissions, which were summarised by the Commission in its written reasons at paragraphs 24-28, as well as in their Notice of Appeal and Response respectively. In our judgment, the Commission took into account matters by way of aggravation and mitigation which it was both entitled and, in regard to some matters, bound having regard to the Regulations to do. We do not think that we can be expected to dissect the weight given to the various factors in order to decide whether too much [or too little] weight was given, here or there. In this case, it is clear that the Commission decided that the appropriate length of time for which the respondent should be banned from football-related activity was 18 months; having regard to the 6 months for which he had been suspended by SCFC, they reduced that to 12 months. In our judgment, whether or not it is a shorter period than we would have imposed [as to which we express no view], it cannot be said to be 'Wednesbury' unreasonable, in the sense that it took account of material which it should not have, or failed to take account of material which it should have. Nor in our judgment can it, in any event, be said to unduly lenient to the extent of being unreasonable.

36. We now turn to the question of suspension of the ban. Having decided that a sanction of 12 months was appropriate, the Commission continued as follows [paragraph 34 of its Written Reasons]:

    'it then moved on to consider the request to suspend, noting that Regulation 44 requires clear and compelling reasons for suspending the penalty. It noted that the 12 month suspension that it was imposing would mean that that HL would be suspended from his role for 18 months in total. It accepted that Swansea as an employer was unlikely to keep HL on paid suspension for a further 12 months and that there was a real risk that HL would lose his job and struggle to find another one. In all the circumstances of the case, the Commission decided that this was a clear and compelling reason for suspending the sanction. Given the seriousness of the offence, the Commission was not persuaded to suspend the whole of the sanction, but in light of the mitigating factors set out above, in particular the fact that HL had support and was no longer gambling, it was prepared to suspend 9 months of the sanction'.

37. In our judgment, this approach and reasoning is flawed in several respects: first, Regulation 44 requires a reason for suspension to be 'clear and compelling' – and we

note that the words are conjunctive and not disjunctive. They are not idly selected words and are included in the Regulation for a reason – namely to ensure that pleas to suspend a sanction are based on evidence, whether documentary or oral, and not on mere speculation. We do not consider it necessary to resort to the Oxford English Dictionary to drive us to the conclusion that, at least, the reason or, if more than one, the reasons relied upon must be cogent and persuasive, supported either by agreement or, save in the most obvious of cases, evidence.

38. It is acknowledged that the respondent's fear that he would lose his job and the Commission's finding that there was a real risk that he would lose his job and struggle to find another one were not supported any evidence from SCFC. We reject the reasoning put forward in the Response, referred to in paragraph 30 above. First, in our experience, it is by no means unusual for such evidence to be forthcoming where a person is at risk of losing his or her employment. We have in mind not simply a situation where a person is facing an immediate custodial sentence, but also where the imposition of a period of disqualification would put an employee in jeopardy of losing his/her employment. Second, there is no doubt from the contents of the statements in mitigation, which we have considered with care, that the respondent was very highly thought of by those who knew him and with whom he had worked at SCFC. Given the uniformly vague references in all the statements to the consequences of a further or long suspension, and the wholly unexplored possibility as to the length of time for which the respondent's position would or might have been kept open, we agree that the conclusion drawn by the Commission was based on unsubstantiated speculation and as such does not and cannot amount to a clear and compelling reason for suspension. To conclude that it does is, in our judgment, unreasonable and unsustainable.

39. Third, we have noted that the mitigation relied upon in determining the length of the sanction has in part been relied upon in addition as a 'clear and compelling reason' for suspension of the ban. We refer to para 36 above and para 34 of the Written Reasons. We do not think that it was open to the Commission to use the same mitigation twice, in the way in which it did,, but even if we are wrong about that, we are quite satisfied that mitigation which had been used to assist in setting the period of the sanction could not amount as well to a clear and compelling reason for its suspension.

40. We do not need in those circumstances to consider whether the Commission placed too much weight on the self-inflicted risk to the respondent's employment prospects in deciding to suspend the sanction in part.

41. In summary, and for the reasons stated above, we are unable, in all the circumstances, to distil from the entirety of the material before us any 'clear and compelling reason' to justify the partial suspension of the sanction imposed upon the respondent.

42. Accordingly, it follows that we find that the decision to suspend 9 months of the ban imposed upon the Respondent was unreasonable and/or so unduly lenient as to be unreasonable.

43. In those circumstances, the appeal is allowed, and we substitute for the sanction imposed by the Commission the sanction of a 12 month suspension to be served from 25th March 2024. There will be no order for costs.

<u>HH Clement Goldstone KC</u>

<u>Appeal Board Chair</u>

21 May 2024