IN THE MATTER OF AN APPEAL FROM THE DECISION OF A FOOTBALL ASSOCIATION REGULATORY COMMISSION

BETWEEN:

NOTTINGHAM FOREST FOOTBALL CLUB

Appellant

and

THE FOOTBALL ASSOCIATION

Respondent

Rt Hon Lord Dyson (Chair)

Christopher Stoner KC

Lawrence Selby

DECISION AND REASONS

1. This is an appeal by Nottingham Forest Football Club ("NFFC") against a finding by a Regulatory Commission (His Honour Clement Goldstone KC, Abdul S. Iqbal KC and Stuart Ripley) of a breach of FA Rule E3.1 by NFFC and the imposition of a financial penalty of £750,000. The Football Association ("The FA") opposes NFFC's appeals both on liability and sanction. The Appeal Board is grateful to counsel for their helpful submissions.

2. FA Rule E3.1 provides:

   "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…"

The facts

3. The facts are set out in detail in the Decision and Reasons on liability given on 3 September 2024. They are largely uncontested. The proceedings concern a charge laid by The FA against NFFC alleging a breach of FA Rule E3.1 in respect of comments posted on X (formerly Twitter) following a Premier League fixture between Everton FC and NFFC on 21 April 2024. The comments were:

> *"Three extremely poor decisions – three penalties not given – which we simply cannot accept.*
> *We warned the PGMOL that the VAR is a Luton fan before the game but they didn't change him. Our patience has been tested multiple times.*
> *NFFC will now consider its options."*

4. The charge stated:

> *"It is alleged that your comments posted to X from account @NFFC at 3.37pm on 21 April 2024, constitute improper conduct in that they imply bias and/or question the integrity of the Match Official[s] and/or the Video Assistant Referee and/or bring the game into disrepute contrary to FA Rule E3.1."*

5. The background is that on Sunday 21 April 2024, the Premier League season for 2023-24 was drawing to a close. NFFC, Everton FC and Luton Town FC were all in danger of relegation.

6. On Friday 19 April, a telephone conversation took place between ex-Premier League referee, Mark Clattenburg, an adviser engaged by NFFC to provide services in relation to the officiating of NFFC matches and Howard Webb, the Chief Refereeing Officer of Professional Game Match Officials Ltd (PGMOL). The Commission said[1] that it was common ground that, in the course of the conversation, Mr Clattenburg drew Mr Webb's attention to the fact that the appointed Video Assistant Referee (VAR) for the Everton FC fixture was to be Stuart Attwell, a "self-confessed" supporter of Luton Town FC. No request was made to Mr Webb that Mr Attwell should be replaced as VAR for the fixture. Since neither Mr Clattenburg nor Mr Webb

[1] Para 4

gave evidence, the Commission made no findings on the parts of the conversation that were disputed.

7. The match ended at 15.30 in a 2-0 defeat for NFFC. As the Commission said, this was a result which was "*fraught with controversy*" because of three disputed penalty appeals by NFFC, none of which was allowed or the subject of review by the VAR.

8. At 15.37, NFFC posted the tweet which was the subject of the charge. On the following day, two further posts were posted by NFFC on X at 15.22 and 17.50 respectively. It is only necessary to refer to the third post which said:

> "*Following yesterday's match at Everton, NFFC issued a statement highlighting our concern at the perception of the PGMOL appointment of VAR for the game. This was an issue we raised with PGMOL prior to the fixture because of the fear of the side show which would ensure if anything went wrong with officiating in the game. That fear has materialised, as the correctness of three important decisions against the Club have [sic] been called into doubt.*
>
> *This is not about individuals but rather how the integrity of the game is seen. We know match officials do not allow outside factors to influence their decision-making and that all referees are required to declare their 'allegiances' to PGMOL to avoid any perceived conflict or harm to the game's reputation for [sic] integrity.*
>
> *However, it is clear PGMOL must amend its rule on allegiances to account for contextual rivalries in the league table, not just local rivalries. This is currently not within the criteria but should be. Mere reliance on match officials to recuse themselves if contextual rivalries exist invites conjecture, as some have recused themselves where others have not.*
>
> *NFFC stands by its request for greater transparency around PGMOL appointments to further protect the game's reputation, as intended in PGMOL's existing approach to allegiances.*
>
> *Given the widespread and ongoing concerns, not merely of the fans, players and managers of this Club but of many others and the pundits too, over VAR decisions throughout this season any move which boosts confidence in the system should be properly considered*."

9. The initial, post-game tweet was viewed nearly 40 million times in less than 24 hours and drew a significant level of attention from football fans and pundits alike[2].

10. On 24 April, Mr Webb conceded that in the opinion of PGMOL, the decision to refuse the third penalty was a mistake and that a penalty should have been awarded and/or the VAR should have intervened to advise to that effect.

Appeal on liability

The Commission's decision on liability

11. Having referred to the decisions in *The FA v Lampard*[3] and *The FA v Arteta*[4], the Commission said[5] that (as was accepted by the parties) the test that was to be applied could be stated as follows:

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

12. Having said that there was no dispute as to the "*basic"* test to be applied, the Commission said[6] that there was considerable dispute as to what knowledge could be attributed to the "*reasonable bystander*". At paragraphs 20 to 26, it set out the reasoning which led it to conclude that the first post involved an implication of actual bias on the part of the VAR. It is necessary to set this out in a little detail.

13. First, it said[7] that the test for determining whether there had been a breach of Rule E3.1 was an objective one. There had to be an objective interpretation of the first post in its entirety in isolation from the two posts that followed it.

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[2] Para 4.33 of FA's submissions dated 17 May 2024 and Integrity Investigator's statement dated 3 May 2024 at para 9
[3] The FA v Frank Lampard 31 May 2022
[4] The FA v Mikel Arteta 11 December 2023
[5] Para 7
[6] Para 9
[7] Paras 20 to 22

14. The Commission then said[8] that it must approach the interpretation of the post "*from the standpoint of the 'reasonable bystander' who is armed with some general knowledge of the game*".

15. It then considered whether concerns of which the reasonable bystander would be aware in relation to the problems in the technical operation of VAR extended to "*questions about the propriety or otherwise of someone who might be perceived as having an interest in the outcome of a particular fixture being allowed or selected to act as VAR thereat*". As to this, the Commission said[9]:

> "*In our judgment, quite simply there was no evidence before us that this is an issue which has been a topic of such [or indeed any] discussion within the ambit of the reasonable bystander."*

16. It continued:

> *"Evidence of that kind—or evidence that the 'propriety question' was being asked sufficiently frequently to enable us to say that a reasonable bystander would regard it as an issue—might have driven us to a different conclusion. However, the suggestion that it should be the subject of a healthy discussion [which was the highest Mr Rawlinson could put it] does not lead to the conclusion that the reasonable bystander can be said to have knowledge of it, as an issue, let alone a problem."*

17. This lack of evidence led the Commission[10] to reject NFFC's submission that the reasonable bystander could be armed with the knowledge that "*the known or believed 'footballing loyalty' of VARs was a topic of discussion, or on the radar of supporters".*

18. Having rejected the submission that the reasonable bystander would have knowledge of concerns about the perception of bias in the appointment of a VAR Referee who (in this case) was a supporter of a club (Luton Town) directly competing in a three-way relegation fight against the two clubs in the match in question, the Commission turned to the wording of the first post[11]. It said that the post was "*far more than a complaint borne of frustration at the fact that NFFC had been on the receiving end of two doubtful decisions and one decision that was subsequently admitted on behalf of PGMOL to be wrong."*

[8] Para 23
[9] Para 23
[10] Para 24
[11] Para 25

19. The Commission concluded:

> "*In our judgment, a 'reasonable bystander' armed with some general knowledge of the sport would inevitably conclude that the decisions which 'went against' NFFC were clearly linked to the VAR being a Luton fan and, as such, inevitably involved an implication of actual bias on his part against NFFC, and we so find on a balance of probabilities. It follows, in our judgment, that as the integrity of a match official has been called in to question in this way, this was improper conduct, and thus, we find the charge proved"*[12].

20. The Commission confirmed[13] that the post "*involved an implication of actual bias, as opposed to unconscious, perceived or apparent bias."*

NFFC's challenge to the Commission's decision on liability

21. NFFC accepts that the "*reasonable bystander*" test is the applicable test and is an objective one. As was stated by the Commission in *Arteta* (citing other authorities)[14], the reasonable bystander is a person "*appraised of all relevant facts and circumstances relating to the conduct/utterance, including the context of the conduct/utterance".*

22. In its Notice and Grounds of Appeal, NFFC says that (i) the Commission reached a decision as to the meaning of the tweet which was "*perverse*"[15] and (ii) failed to apply the correct test to the words so that NFFC did not receive a fair hearing[16].

23. It makes a number of detailed submissions. First, the post was "*equally consistent with a complaint that the situation gave rise to an appearance of bias. And without doubt it was consistent with any influence which club affiliation might have had upon the VAR's decisions having been an unconscious one"*[17].

24. Secondly, giving the words of the post their ordinary and natural meaning, "*it is impossible to conclude that the words contain an implicit, let alone actual imputation of bias*."[18]

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[12] Para 26
[13] Para 27
[14] Arteta para 28(a)(ii)
[15] Notice of Appeal para 32
[16] Ibid para 34
[17] Ibid para 31
[18] Ibid para 33

25. Thirdly[19], the Commission failed correctly to apply the test for apparent bias enunciated, for example, in *Porter v Magill*[20], *viz*: "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".* The Commission was wrong to find that there was no evidence that perception of bias "*had been a topic of…discussion within the ambit of the reasonable bystander"* and that the suggestion that it was for a party to provide evidence of the same reversed the burden of proof from The FA to NFFC.

26. Fourthly, the Commission misapplied the reasonable bystander test[21]. There was no need for NFFC to produce evidence that a particular cohort of supporters were discussing the issue of potential conflicts of interest. The issue was self-evidently a live one otherwise, for example, there would be no PGMOL policy on it. During the game, a number of controversial decisions were made. In that context, fans would have well understood that there was at the very least a perception of bias created, or a risk of unconscious bias, when a fan of a potentially rival Club was appointed as a match official.

27. Fifthly, therefore, even if inelegantly worded, the post was "*no more than a protest at the appearance of bias created by the appointment of a Luton fan to the fixture".*[22] The most obvious interpretation of the post is that it was saying that the VAR errors were especially upsetting and egregious given that NFFC had already raised concerns about the VAR and a potential conflict of interest prior to the game. The second part of the post focusses on the conduct of PGMOL rather than on the conduct of the VAR as an individual. The reference to the VAR being a Luton fan "*is almost incidental and has been elevated out of all proportion".*[23]

28. In his helpful Note and oral submissions on behalf of NFFC, Mr De Marco KC said that the context of the post was NFFC's stated prior concern about the perception of bias in the appointment of Mr Attwell since he was a Luton Town supporter. Had the Commission applied the reasonable bystander test properly, it would have found that the post only sought to criticise the *process* that led to the appointment and did not cross the line from legitimate comment to misconduct. The reasonable bystander would know that the appointment of a Luton Town supporter as the VAR for this NFFC/Everton

[19] Ibid paras 34-35
[20] [2002] 2 AC 357 per Lord Hope at para 103
[21] Notice of Appeal paras 38-45
[22] Notice of Appeal para 46
[23] Para 56 of the Participants' Response to the charges dated 14 May 2024

match would give rise to an appearance of bias. The Commission was wrong to require evidence of this. NFFC had a concern about the appointment of Mr Attwell and raised it with PGMOL before the match. Raising this concern was a legitimate thing to do. The concern was about apparent bias, not actual bias.

29. As for the meaning of the post itself, NFFC submits that the Commission was wrong to conclude that it involved an implication of actual bias and an attack on the integrity of the VAR. At most, it amounted to a complaint that an appearance of bias had been created by appointing Mr Attwell as the VAR.

Decision on appeal against decision on liability

30. We dismiss this appeal substantially for the reasons given by Mr Laidlaw KC on behalf of The FA. The submission that NFFC did not receive a fair hearing is not based on an allegation of procedural unfairness. It depends entirely on the submission that the Commission applied the wrong test as to the meaning of the tweet. To dress this submission up as an allegation that the Commission denied NFFC a fair hearing is misconceived. The sole ground of appeal, therefore, is whether the Commission "*came to a decision to which no reasonable such body could have come*"[24].

31. The Commission was right to say that there was no evidence that the issue of apparent bias had been a topic of discussion "*within the ambit of the reasonable bystander*". This did not mean that the Commission was saying that it was for NFFC to produce such evidence. It merely found that, as a matter of fact, there was no such evidence which, had it existed, might have formed the basis of a finding that the tweet complained of a perception of bias.

32. We agree with the Commission's interpretation of the post. We do not accept that the post criticised Mr Attwell's appointment for *apparent* bias. If the facts had simply been, *without more*, that Mr Attwell had been appointed as the VAR in the face of NFFC's opposition on the grounds that he was a Luton Town supporter, a subsequent complaint by NFFC about his appointment could not have amounted to misconduct. The complaint would not have been about any decisions that Mr Attwell had made. It would have been that Mr Attwell should not have been appointed on the grounds that any decision he made might have been susceptible to challenge for apparent

[24] Rule 2.3 of the Disciplinary Regulations

bias. That is because the reasonable bystander, knowing the facts, would have concluded that there was a real possibility that any decision by him would be biased.

33. But the facts of this case are very different. Crucially, the tweet was not posted before Mr Attwell had made any decisions. It was posted after he had made the controversial decisions during the match which had angered NFFC. It is important to read the comments as a whole. They were expressed in intemperate language. They referred to "*Three extremely poor decisions…which we cannot accept"; "we warned the PGMOL"; "our patience has been tested multiple times*" and "*NFFC will now consider its options".*

34. It is true that the post was critical of PGMOL. But we do not accept that this criticism was the real focus of the post or that the reference to the VAR as a Luton fan was incidental. It was the VAR who was the real focus of the posts and, in particular, the comments about (i) the poor quality of his decisions; (ii) the warning that he was a Luton fan; and (iii) NFFC's patience having been tested multiple times. It was his decisions not to intervene in the match referee's penalty decisions which really mattered to NFFC and gave rise to the anger that was expressed in the post and the threat by NFFC to "*consider its options*". The angry and intimidatory tone of the language is particularly telling. Concerns about apparent bias on the part of the VAR will have caused Mr Clattenburg on 19 April (ie before the match) to draw Mr Webb's attention to the fact that Mr Attwell was a Luton supporter (although apparently not to ask for him to be replaced). We note that there is no evidence that the decision by Mr Webb not to replace Mr Attwell before the match gave rise to any anger on the part of NFFC at the time. This is not surprising. The anger which gave rise to the tweet was generated by Mr Atwell's decisions in relation to the three penalties.

35. Ultimately, this appeal on liability turns on the true meaning of the language used in the post and whether the criticism was of apparent or actual bias on the part of the VAR. Apparent bias (entailing no more than the *risk* of bias) is materially different from actual bias. It is inherently unlikely that a complaint about the rejection of an argument about *apparent* bias would generate such strong comments as those made in the post. But it is not at all surprising that "*three extremely poor decisions*" by an official who had an interest in the outcome of a match would generate such comments.

36. In our view, the Commission reached the right conclusion at paragraph 26 of its Decision. On the face of the tweet, there was plainly an implied allegation of actual bias. Alternatively, the Commission's decision was not one to which no reasonable such body could have come.

Appeal on sanction

37. On 3 October 2024, the Commission provided its Decision and Written Reasons on Sanction. It concluded[25] that, in addition to a formal warning, NFFC should receive an immediate financial penalty:

> *"In all the circumstances, balancing our assessment of culpability and harm with all of the aggravating and mitigating factors, we have concluded that the appropriate sanction is a financial penalty of £750,000".*

Culpability and harm

38. The Commission said that the seriousness of the breach had to be assessed by reference to the twin issues of Culpability and Harm[26]. It is not in dispute that this was the correct approach.

39. As regards **culpability,** the Commission applied the "sliding scale" approach for which NFFC contended[27]. The five categories of culpability on the scale were (i) Very High - deliberate intention; (ii) High – reckless disregard; (iii) Medium – gross negligence; (iv) Lower – simple negligence; and (v) Lowest – cases which only just cross the line in terms of being impermissible comments.

40. The Commission carefully reviewed a number of factors and did not accept The FA's submission that the case fell at "*the highest end of the scale*". It was to be distinguished from the case where careful thought and attention is given to deliberately bringing the game into disrepute. But neither did it accept NFFC's submission that it fell within the category of "*medium culpability*". It concluded that the circumstances of the case warranted a finding of "*high culpability*". The reasons it gave were:

(i) The clear implication of actual bias;
(ii) Against a readily identifiable individual;

[25] Sanction decision para 70
[26] Sanction decision para 13
[27] Ibid paras 15 to 34

(iii) The irresponsibility and lack of accountability in the drafting of the post and its mode of circulation;
(iv) Reckless disregard to the consequences or impact of the post; and
(v) The fact that Evangelos Marinakis (NFFC's owner) on 11 May 2024 stated in an interview with The Mirror newspaper that there was the possibility of a "*vendetta*" by match officials against NFFC.

41. The Commission acknowledged that NFFC later rued its choice of words and the ways in which its grievances were aired, but by that stage the damage had been done. In any event, "*the subsequent posts fell far short of a genuine apology, but were in the nature of a damage-limitation exercise*".

42. As regards **harm,** the Commission said[28] that the principal (but not the sole) victim of "*this ill-chosen and irresponsible post*" was Mr Attwell. The Commission had in mind the contents of his statement which set out the stress, distress, fear and embarrassment caused to him and his immediate family. The impact upon Mr. Attwell and his family had plainly been very significant indeed. To Mr Attwell, the harm had continued well beyond the short period of little more than the first 24 hours after the post appeared (as NFFC had contended).

43. The Commission said that there was no evidence that other match officials had suffered "*any more than they do, deplorably and sadly regularly, when their colleagues are abused*"[29]. But it took on board and accepted the observations of Mr Webb that the conduct of NFFC had the potential to serve as a "green light". In his statement, Mr Webb said:

> "*From a wider perspective, I am also deeply concerned that NFFC's comments will have a detrimental impact on the way Referees, operating at all levels of the game, will be treated. It is well observed that what happens in the professional game is often mirrored in grassroots football, with children specifically susceptible to influence. I know from speaking with many Officials that they often feel unsafe when performing their role, and the conduct of NFFC has the potential of serving as a green light to those who seek to abuse Officials and normalises questioning the integrity of all Referees."*

44. The Commission concluded that, balancing all of the factors it had set out, the level of harm was at least high, although it did not accept The FA's assessment of harm as being at the '*highest end of the scale'*.

[28] Ibid paras 35-46
[29] Ibid para 45

45. As we understand it, NFFC does not take issue with the Commission's finding of high culpability or its assessment of harm as being at the highest end of the scale.

The Commission's approach and conclusion[30]

46. The Commission made the point that the fact that no apology had been made to Mr Attwell or The FA and that the post had not been withdrawn by NFFC despite a specific invitation by The FA to do so, were evidence of a lack of genuine remorse on the part of NFFC. This was relevant to the level of the financial penalty which was necessary and proportionate in this case.

47. On behalf of The FA, it was submitted that a sanction in excess of £1 million should be imposed "*to reflect the seriousness of the misconduct, the culpability of NFFC and the other legitimate sanctioning objectives such as punishment, deterrence, harm and the overall aim of protecting/preventing damage to the integrity, reputation and image of the game".* The misconduct was described by The FA as an "*egregious, direct and public attack on the integrity of a Match Official and, in turn, the game of football, on an unparalleled scale".*

48. NFFC did not suggest an alternative figure, but strongly disagreed with The FA's figure of £1 million. The Commission did not rely on financial penalties awarded in other cases. That was because, as was accepted by both parties, there was no precedent for decisions on sanction for the type of misconduct that was committed by NFFC in this case. In its Submissions on Sanction before the Commission,[31] The FA relied on a number of authorities "*purely to demonstrate the fact that financial penalties against clubs are substantial in respect of serious Misconduct".* It referred to *The FA v Everton FC* (September 2022) and *The FA v Manchester City FC* (October 2022). Everton FC and Manchester City FC were fined £300,000 and £260,000 respectively. It also referred to *The FA v Brighton & Hove Albion & Others* in which the Club was were fined £366,600.

49. The Commission accepted NFFC's submission that it could not be assisted by cases involving the imposition of 6-figure fines on Premier League Clubs for different types of offence. It said that its approach must be governed by (i) the need for consistency, (ii) the importance of imposing a penalty that is proportionate to culpability and harm and (iii) the need to "*deter other clubs from behaving in a similarly cavalier and irresponsible manner in an era where*

[30] Ibid paras 47 to 76

[31] FA Submissions before the Commission para 15 and footnote 2

social media 'rules', which is linked to the Commission's aim of protecting the integrity, reputation and image of the game"[32].

50. It also said that the fact that the post had not been removed and no apology had been made to Mr Attwell meant that the breach of Rule E3.1 was a continuing offence.

51. Finally, NFFC's concerns expressed to Mr Webb before the match could not begin to excuse the method which it chose to adopt as a means of conveying its concerns and anger after the match. These concerns provide a reason, but not a justification, for its conduct. It chose an "*exceptionally poorly judged method of conveying its concerns".*

52. In its conclusion, the Commission said: "*In all the circumstances, balancing our assessment of culpability and harm with all of the aggravating and mitigating circumstances, we have concluded that the appropriate sanction is a financial penalty of £750,000."*[33]. It saw no reason for suspending part of the penalty. In addition, it formally warned NFFC as to its future conduct and ordered it to pay the Commission's costs.

The grounds of appeal

NFFC's case

53. NFFC's case is that the Commission "*imposed a penalty ...that was excessive*" (Regulation 2.4 of the *Non-Fast Track Regulations*). The fine of £750,000 was manifestly excessive, in particular when compared with the financial penalties imposed on similar status clubs for similar or more serious misconduct.

54. The Commission adopted the arbitrary and unjustified starting point of a fine in excess of £1 million that had been proposed by The FA. It gave excessive weight to the arbitrary sanction suggested by The FA and failed to explain how this starting point had been arrived at or why the figure of £750,000 was chosen.

55. The FA has only identified the three cases to which we have referred at paragraph 47 above in which fines of over £250,000 have been imposed on a Premier League club – ranging from £260,000 and £300,000 against Manchester City and Everton respectively for Rule E21 offences (serious

[32] Sanction Decision, para 60
[33] Ibid para 70

pitch incursions etc) to £366,600 against Brighton and Hove Albion for serious financial misconduct and breach of agents rules. The *Everton* case involved two major pitch incursions by significant numbers of supporters, found to be behaving wildly and unpredictably with pyrotechnics used and players and the opposing team's manager being confronted, intimidated and assaulted. The *Brighton* case involved 21 separate breaches of FA rules relating to the payment of football agents over a 9-year period. The Club accepted the charges that it had "*concealed and/or misrepresented the reality and/or substance of the registration*" of the players involved, and that, amongst other things, this led to the Inland Revenue being deprived of c.£1,000,000. The Commission found in that case that there was "*a culture of ignoring regulations*" at the time. The fine imposed had a rational connection to the sums involved directly arising from the breach, reduced for reasons of mitigation.

56. Although there are no sanction guidelines for misconduct of the type that occurred in the present case, well paid football managers have been routinely fined for breaches of the same rule, where they have questioned the integrity or competence of a referee. Those fines tend to have some relation to a Premier League's manager's weekly income, and have broadly been in the region of £30,000 - £80,000 (the latter for a repeated breach). No example has been cited of a PL manager being fined a sum of six figures, even for repeated offences.

57. The best equivalent, in terms of sanction guidelines, are those for Rule E20 offences: breach of the rule which provides that clubs are responsible for the behaviour of their directors, players etc attending a Match to not behave in a way which is "*improper, offensive, violent, threatening, abusive, indecent, insulting or proactive*." Rule E20 charges are often brought against clubs where its players and/or other staff have been involved in "*mass confrontations*" with other players, or in surrounding and intimidating match officials. While the offence in this case is of a different nature the basis of the rule and sanctioning under it has a number of important similarities: Rule E20 offences involve club liability for the actions of club directors or employees; the sanction guidelines recognise that a club's status as a Premier League club, for example, means a higher proportionate fine to that of a lower league club; in sanctioning decisions the fact that a mass brawl or surrounding of a referee is seen by millions of people around the world as part of a live broadcast Premier League match is often a factor in determining seriousness breach/sanction. As the Club set out before the Commission the maximum fine for a Premier League Club for a serious ("*non-standard*") breach of Rule E20 is £250,000.

58. As to what figure would have been appropriate, NFFC submits that a proportionate sanction for the offence would be a financial penalty in a range up to around £250,000. Even the more serious incidents or number of breaches in the *Everton* and *Brighton* case suggest a maximum of around £300,000. If the penalty was within this type of range, while the Club might argue that not enough weight was given to mitigating factors, it would be more difficult to argue that the sanction was in itself excessive. However, the financial penalty that was imposed by the Commission, being three times the maximum for the most serious E20 offence, and significantly more than twice as much as any fine for any Club offence or offences in the past ten years, is manifestly excessive such that the Appeal Board ought to intervene to reduce it to a proportionate fine.

The FA Response

59. Mr Laidlaw drew our attention to what was said by the Appeal Board in *The FA v Jurgen Klopp*[34]. This was an appeal by The FA against a sanction under Rule 5.3 of the *Fast Track 7: Appeals—Fast Track Regulations* on the ground that the Commission had imposed a penalty, award, order or sanction "…*that was so unduly lenient as to be unreasonable*". At paragraph 20 of its Decision, the Appeal Board set out some principles as to the correct approach to be taken on an appeal under the *Fast Track Regulations*. These included that:

(a) The appeal is by way of a review, not a rehearing;
(b) The burden is on the appellant to establish that the decision was one to which no reasonable Commission could have come; and

(f) In deciding whether a sanction is unreasonable, a "*generous and significant margin of appreciation applies. It is not for an Appeal Board to substitute its own opinion on sanction unless it finds that the Regulatory Commission's decision was unreasonable or one that it was not open to the Commission to have reached*."

60. Mr Laidlaw submits that we should apply the same approach here and apply a generous and significant margin of appreciation although, as Mr De Marco correctly points out, the present appeal is under the *Non-Fast Track Regulations*.

[34] Decision 13 November 2022

61. Mr Laidlaw says that none of the decisions relied on by NFFC to support a penalty in a range of up to £250,000 is of any assistance because the facts in those cases (and indeed all other cases) are too far removed from those in the present case. If one accords to the Commission's decision an appropriate margin of appreciation, there are no grounds for interfering with it.

Our decision

62. In the absence of sanction guidelines or even a single previous decision for misconduct of the type that occurred in this case, the Commission was faced with a difficult task. In these circumstances, any figure arrived at was likely to be criticised as being arbitrary. The Commission did not receive from The FA an explanation of its figure of in excess of £1 million. Moreover, although it set out the factors that it took into account in arriving at its figure of £750,000, the Commission did not provide an explanation for choosing that figure rather than any other.

63. We have carefully considered whether the fines of over £250,000 imposed on Premier League clubs on which NFFC relies provide any assistance. In our judgment they do not. As Mr Laidlaw points out, none of the three decisions relied on by Mr De Marco involved an attempt to undermine the integrity of Match Officials. Maintaining their integrity is of central importance and fundamental to maintaining confidence in the integrity of football. The misconduct found in those three cases concerned clubs' responsibility for pitch invasions and serious financial misconduct, a far cry from the facts of the present case. The reliance on the fine imposed in the *Brighton* case for financial misconduct is particularly inapposite. That is not only because financial misconduct is so far removed from the misconduct that was found by the Commission in the present case. There were also particular reasons why the Commission in that case arrived at a figure of £366,600. These were that the starting point for the calculation of the figure was the sum paid by Brighton to HMRC, which the Commission halved, then reduced to £550,000 to take account of various mitigating factors and finally further reduced by one third to reflect the guilty plea.

64. The fact remains that the fine of £750,000 was far higher than any financial penalty imposed on a similar status club for serious misconduct. Should that of itself lead to the conclusion that £750,000 was excessive? We have given anxious consideration to this question. With some hesitation, we have concluded that we should not interfere with the fine.

65. As regards Mr Laidlaw's submission that we should apply the "*generous and significant margin of appreciation*" enunciated in *Klopp,* we note that this was said in relation to an appeal by the FA under Regulation 5.3 of the *Fast-Track Appeals Regulations* in an appeal based on the ground that the sanction imposed was "*so unduly lenient as to be unreasonable".* The regulation that we must apply is Regulation 2.4 of the *Non Fast-Track Regulations* which provides for a right of appeal by a Participant on the grounds that the body whose decision is appealed against "*imposed a penalty, award, order or sanction that was excessive".*

66. We have no doubt that we should accord a margin of appreciation to the Commission's decision. The appeal is by way of review and not a re-hearing. It is against a decision which, if it is not an exercise of discretion, is an exercise of judgment. It is not a hard-edged decision on a question to which there can only be one answer. We note that Regulation 33 of the FA Non-Fast Track Regulations provides that the Commission "*may impose any penalty that it considers to be appropriate in accordance with its general powers as set out in paragraphs 39 to 53 of Part A: General Provisions.* Indeed, at paragraph 12 of its submissions before the Commission[35], NFFC said:

> *"There are no standard sanctions applicable to breaches of Rule E3 in respect of social media comments. Accordingly, the Commission has the discretion to impose any penalty it sees fit whilst ensuring that this is proportionate and commensurate with the seriousness of the Misconduct, taking into account any aggravating and mitigating factors that are considered to be present".*

67. Although there is a difference between the wording of the grounds of appeal in the two provisions, what they share is the fact that (i) in both cases,

[35] Submissions 13 September 2024

the Appeal Board reviews the decisions and does not conduct a re-hearing and (ii) the decision that is reviewed is or is analogous to an exercise of discretion. We note that in enunciating the test of substituting its own opinion only if the decision under appeal was unreasonable or one that it was not open to the Commission to have reached, the Appeal Board in *Klopp* used the analogy provided by the decision in *Wilfred Zaha v The FA*[36] (a decision in a Fast Track Regulations case).

68. We have reservations about describing the margin of appreciation as "*generous and significant*" if these words connote that the margin should be greater than that allowed in a typical exercise of discretion. If the Appeal Board in *Klopp* intended that the words should have such a connotation, they did not explain why or what the words meant. In most contexts where a margin of appreciation is applied to a challenged decision, the nature or degree of the margin is not described or qualified. That is the approach that we think should be applied here.

69. So we allow a margin of appreciation to the decision in approaching the question of whether the fine of £750,000 was an excessive penalty. On any view, it was a heavy penalty, albeit significantly less than that for which The FA was contending. But in our view, a heavy penalty was entirely merited for this very serious offence. Indeed, Mr De Marco does not contend otherwise. To allege that a Match Official's decision is infected by actual bias against or in favour of one of the teams is an allegation of behaviour that undermines the foundations on which competitive sport is based. It is particularly serious in the case of professional football and even more so in relation to decisions made in a crucial fixture which is likely to determine issues such as promotion and relegation to or from the Premier League where the stakes are extremely high.

70. An aggravating feature of the offence was that the tweet was viewed by millions of people. In short, it went "viral". This was predictable and no doubt intended. It was also predictable that it would cause great distress to the Match Officials and their families. We agree with the Commission's assessment of culpability and harm. As we have already said, we did not

[36] Decision 17 February 2019

understand the assessment to be challenged by NFFC. The principal submission advanced by NFFC is that the fine was manifestly excessive because it was substantially higher than any other fine that has been imposed by The FA or the Premier League in any other case. It is said that the figure of £750,000 was conjured out of the air. In its grounds of appeal, NFFC also submitted that the Commission had taken into account irrelevant matters, but this submission was not developed by Mr De Marco orally or mentioned in his helpful Note and we reject it.

71. We return, therefore, to the essential question of whether a fine of £750,000 was excessive. We are not impressed by the argument based on the fact that the fine was higher than any other fine that has been imposed by The FA or the Premier League. The other cases to which Mr De Marco has referred were so different as to be of no relevance. In reality, the Commission had to start without any assistance as to the appropriate level of fine for a case such as this.

72. In addition to the seriousness of the offence, the Commission was entitled and right to give very considerable weight to the need for deterrence and the fact that NFFC had no mitigation. The lack of mitigation was particularly striking. The post has never been taken down. That puts into context NFFC's reliance on the second and third posts on which it relies as somehow mitigating the damaging effect of the first post. The Commission was not impressed by this. Nor are we. The fact is that NFFC has never apologised for the tweet and has never accepted that it committed an offence.

73. If we were deciding the level of fine for ourselves at first instance, we might have arrived at a lower figure than £750,000, although we would have had difficulty in deciding on an appropriate figure. But we are a reviewing tribunal. Allowing a margin of appreciation and reminding ourselves that the burden is on NFFC to persuade us that the fine was excessive, we have decided that the appeal against sanction should be dismissed.

Other matters

74. We see no basis for suspending part of the fine. It is not suggested that NFFC is not in a position to pay it.

75. We are asked by The FA to order NFFC to take down the post. It is not suggested by NFFC that we do not have the power to make such an order or that there is any reason why we should not do so. The Commission did not feel it had the power to require NFFC to remove the post given its right of appeal[37], but as we have confirmed that the post on X amounts to Misconduct we consider it an appropriate use of the power vested in us by paragraph 21.5 of the Non-Fast Track Appeal Regulations to require NFFC to remove the post from its account forthwith.

76. Finally, this appeal has highlighted the difficulties faced by a Commission in arriving at a reasonable and proportionate penalty in circumstances where the facts are wholly unprecedented. It is not surprising that, in such a case, the offending club complains that the penalty imposed is arbitrary or plucked out of the air. We invite The FA to give careful consideration to issuing sanction guidelines for different kinds of offending. The FA is in a good position, after consulting with stakeholders, to publish a comprehensive and coherent range of sanctions. This would promote transparency and consistency and public confidence in the system. This has proved invaluable in the world of sentencing for criminal offences.

Conclusion

77. For the reasons stated we dismiss NFFC's appeal, both in respect of liability and sanction.

78. We order NFFC to remove the offending post from accounts @NFFC forthwith.

79. We invite written submissions on costs, with those on behalf of The FA to be received by 7 March 2025 and those on behalf of NFFC to be received by 12 March 2025.

[37] Sanction Decision, para 48

Rt Hon Lord Dyson (Chair)

Christopher Stoner KC

Lawrence Selby

Dated 27 February 2025