THE FOOTBALL ASSOCIATION

and

TOM POPE

WRITTEN REASONS OF THE APPEAL BOARD

Appeal Board:
Richard Smith QC (Chairman)
Simon Parry
Tony Agana

Michael O'Connor – Lead Judicial Services Officer - Secretary

Sam Shurey – FA Regulatory Advocate for the Respondent

Tom Pope – Appellant
Craig Harris – Appellant's Counsel

Date of Hearing: 7th September 2020
(By *Microsoft Teams*)

INTRODUCTION

1. The Appeal Board was appointed pursuant to The Football Association's Disciplinary Regulations to determine an appeal brought by Tom Pope (the 'Appellant').

2. By way of Notice of Appeal dated 3rd July 2020, the Appellant appealed against the decision of a Regulatory Commission (the 'Commission') made on the 17th July 2020. That decision ruled that the Appellant had breached FA Rule E3(2) by posting of a Tweet on the 5th January 2020.

3. The appeal was heard on 7th September 2020. Having regard to the restrictions and implications of coronavirus the hearing was, by agreement, heard remotely. At the conclusion of the hearing the Board reserved its decision. This document contains the written reasons for the Board's decision having considered the entirety of the materials before them. Failure to explicitly refer to a particular document or submission, should not be inferred to mean that it had not been considered. The reasons are designed to be informatively succinct.

4. The appeal was conducted by a review of the documents, assisted by the oral submissions made by those instructed to represent the Parties. The burden was on the Appellant to establish to the requisite standard of proof that the Commission came to a decision which no reasonable Commission could have come. As has previously been noted on many occasions, an Appeal Board should only disturb evidential assessments and factual findings

if they are clearly wrong or wrong principles have been applied. The threshold is high and deliberately so.

BACKGROUND

5. In the early hours of the morning on the 5th January 2020, the Appellant was using his Twitter account. He was asked a question by another Twitter user, namely "*please predict the #WWIII result you king.*" The Appellant was to reply;

> *"We invade Iran then Cuba then North Korea then the Rothchilds are crowned champions of every bank on the planet 😂😂😂the end 👍👍👍"*

6. The Appellant's Tweet was followed by a series of exchanges that suggested that the Tweet was racist. The Appellant responded by indicating that he did not know that the statement he had made could be seen as anti-Semitic, and that the reference to the Rothschild family was made simply because they owned all of the banks apart from those in the three countries the Appellant had detailed in his Tweet.

7. The Appellant was charged with misconduct by the FA, contrary to FA Rule E3(1), on the basis that his reference to the Rothschilds amounted to an aggravated breach, contrary to Rule E3(2) by reference to race and/or religion and/or ethnic origin.

8. It had been for the Commission to determine whether the Tweet was objectively anti-Semitic having regard to the context in which it was posted. The Commission found that the Tweet was objectively anti-Semitic in its context but did not find that the Appellant was intentionally anti-Semitic in posting the statement as he did.

9. The Appellant sought to appeal the Commission's decision on liability only. There was no appeal against the sanction imposed.

THE APPELLANT'S CASE

10. The single Ground of Appeal was that the Commission came to a decision which no reasonable such body could have come.

11. It was the Appellant's case before the Commission that the Tweet was not designed or intended to be discriminatory. The Tweet, it was argued, was not obviously and inherently anti-Semitic and was not discriminatory in the context in which it was posted. Whilst accepting that the Tweet could be interpreted as anti-Semitic, it was argued that it was not necessarily so and therefore did not satisfy the objective test. As documented by the Commission at paragraph 12 of their reasons, Mr Harris submitted that;

> "*We accept that some people will potentially construe anti-Semitic meaning into the tweet, but that, we submit, it's not enough – as, arguably, more people would not*."

12. In his Grounds of Appeal the Appellant averred that the fact that some reasonable people might conclude that the Tweet was anti-Semitic was insufficient, in that;

"… the Tweet can only be considered objectively anti-Semitic if…that is the only possible interpretation of it, as would be construed by the ordinary reasonable person".

13. It was submitted that the Commission's finding that the only possible interpretation of the Tweet was one that had an anti-Semitic meaning, was a finding that no reasonable Commission could have come to. In support of that contention, the Appellant relied upon the observations made in the particulars of his Grounds of Appeal, namely;

"a) The findings upon which its decision was reached, as set out below, are positively inconsistent with the evidence given by the FA's expert witness, Prof. David Feldman, at the RC hearing.

b) Its finding that the context in which the Tweet was posted, from which its objective meaning should be construed, includes the ordinary, reasonable person having, *"knowledge of the history of anti-Semitism including the old tropes and defamations in respect of Jewish people in general and the Rothschilds in particular"* is wrong, notwithstanding that it is accepted that the ordinary reasonable person (by whose standards the Tweet's objective meaning will be assessed) is not to be taken as being ignorant of issues of anti-Semitism.

c) Its finding that the reference to the Rothschilds in the Tweet is akin to deliberately ambiguous anti-Semitism, such as the use of the "Quenelle" gesture by players in preceding cases, in particular in *The FA v Nicolas Anelka (2014)*, is wrong; and

d) Its ultimate finding, that the use of the Rothschild name must be taken as synecdoche for "Jew", in the context of the Tweet, such that the Tweet was *"obviously anti-Semitic"* and there is *"no other reasonable objective interpretation"* of the reference to the Rothschilds within it is one to which no reasonable such body could come."

THE FA'S CASE AS RESPONDENT

14. It was The FA's case before the Commission that the Tweet was, objectively considered, anti-Semitic. The Appellant's alleged lack of knowledge as to the anti-Semitic content of that which he had posted, was (as the Appellant was to agree) irrelevant in determining the charge under consideration.

15. The FA argued in response to the appeal that the appellant's interpretation of the objective test was incorrect, in that it is not a correct application of the test to assert that the Tweet could only be construed as objectively anti-Semitic if that was the only interpretation capable of being construed by the notional reasonable person.

16. The Commission, in the view of the Respondent, came to a reasonable decision in relation to the determination of the charge, the Commission having correctly applied the objective test. Having deemed the Tweet to be anti-Semitic, it was unavoidably found to be in breach of FA rule E3(2).

THE EXPERT EVIDENCE

17. Professor David Feldman gave evidence before the Commission. His evidence was not recorded. Notes taken by Counsel for the Appellant were helpfully provided to the Board. It was not the expert's place to opine upon the specific test to be applied in the proceedings by the Commission, but rather to provide expertly informed background that may be relevant to the application of that test. The Professor's evidence was not determinative of the Commission's finding; it was for the Commission alone to decide the result of the application of the objective observer test.

18. The Commission summarised what they no doubt saw to be some of the important parts of the expert evidence at paragraphs 15-19 of their Reasons. Whilst the Commission chose thereafter not to make specific reference to the import of the evidence in their reasoning, it is sensible to infer that the Commission had in mind that summary when reaching those conclusions.

19. The Board read and considered the expert's report and all the available notes of his evidence before the Commission. Mr Harris had submitted that the Commission's conclusions were "*positively inconsistent*" with Professor Feldman's evidence. That assertion had no foundation at all when one considered the written report of the witness and his evidence in chief. However, Mr Harris put considerable weight on certain answers the witness gave in cross examination; they were helpfully highlighted in the notes provided to the Board and need not be repeated here.

20. Taken in isolation, certain of the replies relied upon by the Appellant could be taken as being consistent with a conclusion less clear than that originally set out in writing. Not least, the expert had at one stage of his evidence spoken of the Tweet being in a "*grey area*" of interpretation.

21. However, as Mr Harris fairly and correctly observed in his oral submissions before the Board, to select only a part of the evidence can be unhelpful. By way of an example and no more, when the expert (at his own request) returned to give further evidence to the Commission, inter alia, on the 'grey area', his answers as noted by counsel were very clearly capable of being interpreted as supportive of the FA case and consistent with the sense of his original written report (see answers 86 - 89 in the note of evidence).

22. There needs to be a careful overview of all of that which was said. When adopting that analysis, the Board were clear that the evidence of the expert could be seen to be consistently supportive of the case presented by the FA. The Board rejected the Appellant's suggestion that the evidence, properly considered, was inconsistent with the conclusions reached by the Commission. In particular, the Board were not persuaded that when the expert's evidence was considered in the whole, it could be said that his opinion as to the anti-Semitic nature of the Tweet was qualified by a need to consider material and information beyond the immediate context of the Tweet itself.

DETERMINATION

23. As detailed herein above, the Commission did not find that the Appellant was intentionally anti-Semitic in posting the Tweet that he did. However, as understood by all concerned in

this appeal, the issue as to whether the Appellant was himself anti-Semitic was quite different from the question as to whether objectively assessed the Tweet itself was anti-Semitic.

24. The principal issue before the Board was the application of the objective test by the Commission.

The Test

25. The test is an objective one, commonly known as the 'reasonable observer test'. In the context of the facts in this case, the Commission had to decide whether a reasonable person reading the content of the Appellant's Tweet in context, would consider that it was anti-Semitic.

26. The Commission concluded at paragraph 10 of their reasons that, "*the mere fact that some people might be ignorant of the meaning did not detract from its discriminatory meaning".* That is a proposition with which the Board agreed, nor was it suggested otherwise by the Appellant. Further, it was a matter of agreement between the Parties that the notional reasonable observer was taken to have (at very least) an understanding and knowledge of matters relating to anti-Semitism. In his submissions before the Board, Mr Harris accepted (as the Commission had set out at paragraph 26 of their Reasons) that "*the ordinary reasonable person….. is not ignorant of the history of anti-Semitism and the suffering and deaths that have resulted from it"*

27. The Board rejected what Mr Harris described to be the 'central submission' of the Appellant's appeal, namely that the objective test required that the Tweet the subject of the charge needed to be considered as anti-Semitic by the reasonable observer, to the *exclusion* of all other interpretations. The Board concluded that the fact that some reasonable people might have come to a different conclusion as to the interpretation of the Tweet, did not prohibit a finding that the test was satisfied and the charge proved.

28. The Board concluded that such an approach to the test reflected nothing other than that which had been employed in previously decided cases. It was also worthy of note that to decide otherwise would serve to allow the language of ambiguity to be used as a shield behind which to hide the deliberate use of discriminatory language.

29. In so far as was necessary, and mindful of the competing arguments advanced by the Parties, the Board concluded that support for the aforesaid interpretation of the test was to be found by way of example, in the *Anelka* case (as the FA had highlighted in their submissions to the Board).

30. In *Anelka*, the evidence revealed that the quenelle gesture was open to more than one interpretation as to its meaning, including those that were not anti-Semitic. However, such was the strength of the association between the particular gesture and anti-Semitism on one clear interpretation, the Regulatory Commission found the charge proved.

31. The Appellant had accepted in the presentation of his arguments that *some* reasonable people might well interpret the Tweet in the way alleged by the FA and so in contravention of the charges faced. That concession, when applied to the correct interpretation of the relevant objective test as the Board have found it to be, would render the finding of the Commission unobjectionable even on the Appellant's analysis. However,

the Board continued to consider the Commission's finding that the anti-Semitic interpretation of the Tweet was the only reasonable interpretation thereof.

The Context of the Tweet

32. Any objective assessment of proper inferences or conclusions to be drawn from a given set of facts unquestionably requires that the assessment is made having regard to the context in which the facts appear. Context can provide for a different conclusion upon the facts, absent that context.

33. There was no dispute that the Appellant's Tweet should be judged in the context of the question that led to its publication; a question about a third World War. The FA argued that in addition thereto the Commission were entitled, in applying the objective test, to have regard to the subsequent observations of the Appellant as appeared in the papers prepared for the hearing at first instance. That was a contention with which the Board did not agree. Whilst such material was clearly relevant to the Appellant's own state of mind, it did not assist in the objective assessment of the Tweet at the time it was posted.

34. However, nowhere in the Commission's reasons did they suggest that they took account of those other matters. To the contrary, the Reasons are worded such that it is clear the Commission did not rely on that background in assessing the context of the Tweet. At paragraph 23 of the Reasons the Commission detail the context that was considered to be relevant, without reference to such other 'background' as it has been referred to by the Board. Such approach by the Commission is echoed at paragraph 27 of the Reasons where it was observed that;

" … on *an objective reading the statement, whether on its own or taken together with the question it was responding to, was an obviously anti-Semitic statement."*

The Application of the Test

35. The Commission came to the conclusion that there was only one objective interpretation of the Tweet, namely that it was anti-Semitic. Again, with reference to paragraph 27 of their Reasons, the Commission said;

"This Regulatory Commission unanimously finds that on an objective reading the Statement, whether on its own or taken together with the question it was responding to, was an objectively antisemitic statement. There is no other reasonable objective interpretation. It is clearly an old trope and myth drawn from the same poisonous reservoir of hatred and lies that all antisemitism comes from."

36. Notwithstanding (as aforesaid) that in the judgment of the Board there was no requirement in satisfying the objective test that there be only a single reasonable conclusion to the exclusion of all others, the Board considered whether there was foundation for the Commission's conclusion in terms of that exclusivity.

37. In arriving at their conclusion, the Commission had found (at paragraph 23) that the ordinary reasonable person would be aware of the context;

"…of the history of anti-Semitism including the old tropes and defamations published in respect of Jewish people in general and the Rothschilds in particular…"

and at paragraph 26 that;

"The ordinary reasonable person knows very well that the Rothschild family have been used for centuries as a synecdoche for the Jewish people – maligning the family in discourse in order to malign all Jewish people"

38. Mr Harris submitted that such approach was 'wrong' and that the conclusions were of a kind that no reasonable Commission could have come to. The Board unhesitatingly found that there was a foundation for the Commission's conclusions and the Appellant's contrary submission to the effect that such conclusion was one to which no reasonable Commission could have come, was a submission without merit.

39. It was a matter of agreement between the Parties that the ordinary reasonable person is not ignorant of the history of anti-Semitism. The context of the material under scrutiny was in the context of the consequences of a World War. Accordingly, the Board asked itself whether therefore it could properly be said to be irrational for a Commission to conclude that the knowledge of the reasonable person would include an understanding of the long history of association between the Rothschild family name and anti-Semitic comment. The Appellant had argued that to infer that the reasonable person would have knowledge concerning the Rothschild family in the context examined in the expert evidence, would be to attach an unsubstantiated "*heightened level*" of knowledge to that notional observer.

40. The Board did not agree with the Appellant's submission and were satisfied that it was reasonable for a Commission to conclude that the reasonable person 'would know very well' the family name association when one had regard to the prevalence in society of such comment, even in contemporary politics. The Tweet then had to be considered in the context of the exchanges contemporaneous to it. The fact that the Appellant's Tweet immediately attracted critical comment from readers employing exactly that line of established thinking was itself informative and support for the contention that there was a clear correlation between the use of the family name, in the particular context of the Tweet, and anti-Semitism.

41. However, it is also important to note that in reaching the conclusion that they did, the Commission had available to them in addition the evidence of Professor Feldman. As detailed herein above, it was not unreasonable to conclude that Prof Feldman's evidence, taken in the round, provided a clear insight to the long-held association between the Rothschild family name, the Jewish people, and anti-Semitism. It was evidential support for what could properly be inferred to be the knowledge of the reasonable, informed, man.

42. In the judgment of the Board it was not irrational and unreasonable for the Commission to conclude that the objective observer's knowledge of anti-Semitic matters would include awareness of a long line of historic rhetoric adversely employed against the Rothschild family name in an anti-Semitic context. To conclude otherwise would itself require a level of ignorance that would be wholly inconsistent with the evidence before the Commission as to the prevalence of the association between the family name and anti-Semitic thinking.

43. Other Commissions deciding this case at first instance may have concluded, that whilst the objective test properly applied was very obviously satisfied, there may have been some reasonable observers that did not immediately find the Tweet to be anti-Semitic. However, for the reasons set out herein above, the Board did not find that this Commission's conclusion that all reasonable people would have so concluded, could properly be said to be a conclusion that no other reasonable such body could have reached.

44. In short, The Board concluded that any reasonable Regulatory Commission that correctly applied the objective test to the facts of this case, would have found that the Appellant's Tweet was abusive and insulting and included reference to ethnic origin, race, religion or belief. Accordingly, the Appellant had failed to discharge the burden of proof and the appeal failed.

SUMMARY

45. For the reasons set out the Board dismissed the appeal.

46. Any application for costs is to be provided in writing by 16.00 on 10th September 2020. Any response to that application must be provided in writing by 16.00 on the 11th September 2020. The Board will thereafter determine the question of costs having regard to those submissions.

Richard Smith QC
Simon Parry
Tony Agana
9 September 2020