THE INDEPENDENT FOOTBALL OMBUDSMAN

Chartered Trading Standards Institute
ADR Competent Authority

The Independent Football Ombudsman is approved by Government under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015

IFO COMPLAINT REF: 20/02

A SUSPENSION AT BRIGHTON & HOVE ALBION

The Role of the Independent Football Ombudsman (IFO)

1. The office of the IFO has been established by the three English football authorities (The Football Association [FA], The Premier League and The English Football League [EFL]) with the agreement of Government. The IFO has been designated as the final stage for the adjudication of complaints which have not been resolved within football's complaints procedure. The IFO is an Approved Alternative Dispute Resolution Body and its findings are non-binding. IFO Adjudications will normally comprise two parts: an impartial assessment of the substantive complaint and a review of the procedure by which the complaint was handled. The IFO's role is to investigate the complaint and judge whether it was dealt with properly and whether the outcomes were reasonable for all parties concerned. Under the procedure agreed by the Football Governing Bodies, the adjudication of the IFO is final and there is no right of appeal against IFO findings.

2. The IFO must make clear that in investigating this complaint he has received full cooperation from Brighton and Hove Albion FC.

The complaint

3. A Brighton supporter complained, through the Football Supporters' Association (FSA) that he had been unjustly banned by the Club. He contended that:-

* the terms and conditions of his season card were unfair trading;
* a tweet which he had made was not racist, but fair and allowable:
* the tweet did not damage the Club's reputation;
* he had concerns about the appeal process used by the Club.

Background

4. Under the heading "Social Media and Telecommunications" in the sanctions section of the Club Charter it states that "offences can be committed via online or via email, social media, telephone and letter and will be treated in the same manner as if actioned in person."

The facts of the case

5. The complainant, together with a friend, runs a fans' website and an associated Twitter account, called *"We Are Brighton"*. They make clear that they are in no way affiliated to the Club and that all views expressed are their own. On 31 August, following a heavy defeat at Manchester City, the complainant tweeted "Genuine question, @GaryLineker won't ask it though. How many Arabs have died to pay for that 4 – 0 win?" The Club asked the complainant to remove the tweet, calling it "ridiculous, offensive and embarrassing to our club". The complainant did so out of loyalty to the Club, but was disappointed with their view. On 6 September the Club withdrew the complainant's season ticket on the grounds that his tweet had been racist and an embarrassment to the Club and had been posted while the Club's directors and guests were being hosted by Manchester City's board. They said that a condition to purchasing a ticket was that an individual:

"must at all times do everything within their power and control to protect and enhance the good name of the Club and not to diminish or besmirch the good name of the Club in any way or through any means …. [including] conduct on social media". (paragraph 1.3 of the ticketing terms and conditions.)

6. That same day the Club's Police Liaison Officer (PLO) telephoned the complainant to say that the police would not be taking action against him. On 11 September the PLO emailed the complainant saying that, while the tweet might be regarded as offensive by some, the police did not feel that a crime had been committed which the police would pursue. In considering the complainant's explanation that the tweet was more of a political statement, the PLO felt that he had to take freedom of speech into consideration and the tweet fell into that category. On 20 September the Club sent the complainant a notice of cancellation and indefinite withdrawal of his season ticket, with provision for a review after five years. Although the police had determined that no crime had

been committed, the Club found the tweet to be of a racist nature and highly offensive.

7. On 30 September the complainant appealed against the sanction and their refusal to refund him for games missed. On 14 October the Club's Chief Operating Officer (COO) offered the complainant 23 October as a date for the appeal hearing. On 18 October there were exchanges of emails as the complainant had not received the email of 14 October, and he was going on holiday. On 6 November, the complainant attended a hearing, chaired by the COO accompanied by the Finance Director and Supporter Services Manager. On 22 November the Club wrote to the complainant saying that, at the hearing, the complainant had recognised why some people might regard his tweet as racist and that the timing of it had been inappropriate and could have been worded better to make the political point he intended; and should not have been sent from an account which is perceived to represent the views of many of the Club's fans. The panel had considered the mitigation offered and had decided that he could request a review of his ban on 6 September 2020. The complainant remained dissatisfied and on 13 December complained to the IFO.

The FSA submission

8. In a lengthy submission the FSA said that the complainant's website contained a disclaimer clearly stating its independence "…. We are in no way affiliated to the Albion and all the views on here are our own." The FSA said that it was not reasonable for the Club to try to restrict freedom of expression. The Club had provided no evidence that the tweet was considered by "many" as hostile and prejudicial based on race and/or religion.

9. The FSA had obtained an opinion from Trading Standards that the Terms and Conditions upon which the Club were relying to withdraw the complainant's season ticket, ie "social media", was unfair under the Consumer Rights Act 2015 because it caused a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. [Part 1 of Schedule 2 to the Act lists terms that may be regarded as unfair. The list includes in paragraph 7 "A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract."] The FSA said that the Club had failed to address these matters either in writing or at the appeal hearing.

10. The FSA said that the complainant disputed what the Club had said at the appeal hearing about his having accepted many of the points they had made. He had apologised for any embarrassment caused to the Club Chairman, but had not accepted the basis of the Club's charges against him. Nor did he accept that

embarrassment had been caused to Manchester City and, even if it had, it was a legitimate point of view in a free society.

11. The FSA said that before the hearing had taken place the complainant had raised concerns about the fact that, contrary to natural justice, there would be no official recording of the proceedings, nor was he allowed legal representation, leaving him with no way of producing evidence to counteract the Club's version of the hearing which he could use in his complaint to the IFO.

12. The FSA could see no justification for the Club having told the complainant that they would be notifying the FA and other football clubs of his exclusion and the reasons for it. The primary basis for sharing such information should be in accordance with, and reasons for, provided by Data Protection legislation.

The Club's submission

13. The COO told the IFO that the Club had carefully reviewed the case in the light of the complaint. He believed that the Club had acted in good faith and transparently at all times and had followed their documented procedures and acted in compliance with the ticketing terms and conditions, which the complainant had accepted in purchasing his ticket, and the Club Charter. The Club maintained that the complainant's tweet was in breach of those terms and was regarded by the Club as racist in nature, thereby diminishing and besmirching the Club's good name. They had applied a sanction of five years as specified in the Club Charter. The appeal panel had considered the evidence in a professional manner and the complainant had confirmed that he had every opportunity to state his case and that he had been given a fair hearing. The panel had reduced the sanction to one year. The COO said that the appeal panel process is not intended to be a judicial process; it is a forum set up voluntarily by the Club to allow supporters an opportunity to make representations about any sanctions imposed. The process is clearly set out in the Club's Charter. They had made clear to the complainant beforehand that he was not allowed representation and the proceedings would not be audio recorded. They had allowed character references and had received around 40, all of which had been shared with the panel members. The COO said that while all supported the complainant's good character and loyalty to the Club, there were comments describing the tweet as "distasteful", "would have been embarrassing to [the Chairman]", "not the brightest thing to write", and "could understand that he made an incendiary and offensive social media comment".

14. On the matter of the Club's refusal to refund the complainant for games missed, the COO said that a banned supporter is still responsible to keep up payments on direct debit. The Club had decided not to withdraw the complainant's account completely, which would have meant joining the waiting list for reinstatement. If the complainant wished to cancel his season ticket for season 2020-21 he could have done so in February when renewal information

was issued. If he keeps up his repayments, he can list his ticket on the Club's official ticket exchange and will receive a pro-rata refund for each game sold, subject to a £1 administration fee.

15. With regard to the sharing of information with other clubs, the COO said that clause 4 of the terms and conditions clearly states that, in the event of a season ticket being withdrawn or cancelled, the Club reserves the right to "notify any Football Authority and/or other football clubs of such exclusion and/or disqualification (and the reason(s) for such ….)" In the event, the Club had not done so, but if they had, it would have been in line with all appropriate data protection.

The investigation

16. The IFO carefully considered the evidence and submissions from the complainant, the FSA and the Club. On 28 January the IFO and Deputy visited the Club and met with the COO, the Supporter Services Manager and the Club's General Counsel. They explained that, although the complainant's website contains a disclaimer stating its independence, its name suggests a Club connection and it used the Club's logo at the time of the disputed tweet; the associated twitter account has 46,000 followers. The offending tweet had been brought to the attention of the CEO by Club officials and discussed with the owner while board members and guests were being hosted by the Manchester City Board, immediately after the end of the match. The tweet with its apparent Club connection was acutely embarrassing for Brighton's owner, Chief Executive and guests who had been in the Manchester City boardroom at the time. The officials said that although the complainant had taken down the tweet when asked to do so at 11pm that night, it could have been re-tweeted countless times, including through the Gary Lineker account. [*The complainant strongly disputes this and estimates that there were only 30 re-tweets and claims that there is no evidence that Gary Lineker circulated the tweet. The Club did not claim that it had been retweeted, but that the tagging of both the Gary Lineker and the MCFC accounts was intended to give the original statement the widest circulation,]* The Club argued that they were not trying to restrict freedom of expression; if, as the complainant contended, he was wanting to make a political statement, he could have used his personal twitter account, rather than using one with strong links to the activities of the Club. The tweet had attracted immediate comments including "This is so embarrassing please delete it"; When this account isn't on the sauce it's actually pretty good. When it's on the sauce after a Brighton lose (sic) it's really quite terrible"; "DELETE"; "wtf"; and "unfollowed".

17. The General Counsel disagreed with the opinions provided by Trading Standards to the FSA on both the condition relating to social media and the refusal of refunds. He maintained that the relevant terms in the season ticket terms and conditions are not unfair in that the Club did not have complete

discretion in dissolving the contract; they were making an open, honest assessment based on given criteria. The social media clause was prominent in the terms and conditions and the potential consequences of breaches were well known, as was the condition that refunds would not be given. The specific clauses which the complainant and the FSA objected to had been widely discussed prior to their introduction and were consistent with the prominent public stance the Club had taken against all forms of discrimination.

18. The Club remained of the view that their standard process for appeals, which includes a meeting with the appellant, is not unfair. On the matter of sharing information with other clubs, the officials said that that was a standard proviso which was used where someone might be regarded as a threat to safety at an away match. It had not been used in the complainant's case. With regard to the complainant's assertion that his tweet was "fair and allowable, as recognised by the police", the officials pointed out that what the PLO had said was that he did not feel that "a crime had been committed which Sussex Police would pursue" and that the tweet might be deemed offensive by some.

19. As is normal IFO practice, a draft report was circulated to both parties for comment. The Club made some suggestions for amendments to the text and broadly accepted the report. Conversely, the FSA, on behalf of the complainant, registered major concerns about the report. In particular, the FSA argued that this was a matter of free speech and that the complainant was expressing a political view on a topic which had prompted widespread comment from many others, including the press. The FSA again maintained that the terms and conditions were unfair and that it was wholly unreasonable to impose on supporters the obligation to represent the Club. In the wake of this submission, on 4 March the IFO met with the FSA Chair to discuss their concerns. The Chair reinforced their view that criticism of club owners was common (as recent examples at Blackpool and West Ham showed) and that it could not be right for a supporter to be disciplined for expressing a political viewpoint on a controversial matter. The Chair provided the IFO with a copy of a recent legal judgment which related to free speech and which the FSA believed was relevant to the current Brighton complaint. In the light of the discussion the IFO put supplementary queries to both parties. In considering the final draft of this report the FSA suggested that, in the changed circumstances brought about by the Covid-19 crisis, the complainant's sanction should be amended to "time served" and that he should be allowed back whenever football restarts with supporters in attendance. [*The Club indicated that it would stand by the outcome of the clear process which had been followed and that the sanction would not be changed*].

Findings

20. The IFO has found this complaint extremely difficult to adjudicate. It raises important broader principles of freedom of speech, the obligations on supporters and the status of social media comment. The crux of this complaint is whether the Club's terms relating to social media are unfair and, in relying on those to impose a sanction against the complainant, whether the Club have unreasonably restricted his freedom of speech and thereby denied him natural justice. With regard to the terms and conditions, there is a complete difference of opinion between Trading Standards, who argue that these represent an unfair contract, and the Club's General Counsel, whose legal opinion is that they do not. The IFO notes that Trading Standards has provided an opinion and not a definitive legal ruling. The IFO is not a legal tribunal and hence is not able to assess the legal merits of the parties' differing views. No doubt the Club will wish to review its contracts in the light of the Trading Standards assertions, but in practice the only way to determine the matter would be for legal action to be instituted. In the absence of such a determination, the IFO is able to consider only whether the Club's actions have been reasonable in relation to *the ticketing terms and conditions as they stand*, and the Club's handling of the matter administratively.

21. The freedom of speech dimension of this case is not to be dismissed lightly. In the judgment brought to the attention of the IFO by the FSA, the judge concluded in that case:

> The Claimant's tweets were, for the most part, either opaque, profane, or unsophisticated. I am quite clear that they were expressions of opinion on a topic of current controversy.... Unsubtle though they were, the Claimant expressed views which are congruent with the views of a number of respected academics… which shows that many other people hold concerns similar to those held by the Claimant.

The FSA argue that the complainant was similarly expressing a view on a topic which has attracted critical comments from many others and hence that it is unfair of the Club to discipline him for exercising his right of free speech. The IFO finds that this argument would have carried more weight had he expressed his personal opinions on his own individual social media account. He admitted that he wished to embarrass the owners of Manchester City and deliberately used the "We Are Brighton" site, presumably because it would carry more weight. Hence something more is involved than merely the expression of a personal political view.

22. It is open to interpretation as to whether the complainant's tweet was racist, offensive or a political statement. Some might argue that the comments were merely distasteful and the Club's view that the tweet was racist is, of course, a subjective one. In all the discussions with the IFO the Club has consistently argued that the tweet was racist and hence a Category 5 offence, which justified the initial 5 year ban as prescribed in the Charter. Whether racist or not, it is clear is that the tweet caused embarrassment to the owner and

senior officials in the presence of Manchester City Directors in the Board Room after the match had concluded. The likelihood that the tweet would cause offence was increased by the veneer of a Club association, which the website's use of the club logo implied. The IFO accepts that the complainant's website is technically independent of the Club, while noting that the relevant statement is not included on the home page and can only be found at the end of the "About Us" page. The use of the club logo was banned after this dispute, but the complainant claims that it had been used previously and that the Club had sometimes submitted comments to be published on the website, which reinforces the impression that the website was somehow linked to the Club. The Club argue that the use of the logo "undoubtedly exacerbated the offence…because it caused a direct link to be made and would have made the reader believe that the comment was one authorised by the Club". The status of the complainant's website (with the club logo) and his 46,000 twitter followers inevitably mean that his views on the Club and matches in which they have been involved receive wide circulation. In such circumstances, the IFO is satisfied that the tweet constituted a breach of the ticketing terms and conditions, to which the complainant had signed up as a season ticket holder, and the Club were justified in imposing a sanction.

23. Thereafter, the Club followed their standard practice in dealing with the complainant's appeal and the panel properly took into account all the information before them in reducing the sanction from a ban of five years to allowing a review after one year. Although ideally the Club should allow representation at a hearing and should keep some sort of record of the proceedings, they are to be commended for actually meeting with appellants to hear their cases, something which is not widespread practice in the football world. Although there are differences of opinion between the COO and the complainant about whether he accepted many of the points made at the appeal hearing, which the IFO is in no position to resolve, that has no bearing on the IFO's overall assessment of the complaint.

24. Under FA and PL guidelines, Clubs are responsible for the behaviour of fans both home and away and the sharing of information with other clubs and the police is encouraged to help ensure the safety, security and enjoyment of other fans. Under their ticketing terms and conditions, the Club maintain the right to notify any football authority, or other clubs, of anyone excluded, and the reasons for such. In the complainant's case the Club did not, in fact, see the need to notify other clubs of his exclusion. The IFO notes that the Club have allowed the complainant to retain his status as a season ticket holder and to renew his ticket once his term of suspension has been served. In doing so, the Club have not totally banned him and required him to rejoin the waiting list before he can be reinstated, which is an associated sanction that many other clubs impose. The IFO also notes that, while the complainant could not get a refund for the previous matches missed, he would be able offer his tickets for future matches

for sale through the Club's official ticket exchange scheme, again not an option for suspended supporters at some other clubs.

Conclusion

25. The issues raised in this adjudication are complex and the IFO anticipates that both the issues themselves and this report will be the subject of further debate among football's stakeholders. The legitimacy of the Club's terms and conditions cannot be determined by an IFO Adjudication Report and can only be formally decided by a test case legal action. The IFO findings are based on the application of the current terms and conditions to which the complainant agreed when purchasing his ticket. In judging Brighton FC to be justified in imposing a sanction, the IFO notes that there were aspects which mitigated its severity. The complainant has been allowed to retain his membership, is permitted to renew his ticket and may offer his unused tickets for sale through the Club's resale facility. Such concessions have not been granted at other clubs where a similar one year suspension has been imposed.

Professor Derek Fraser, Ombudsman **21 April 2020**
Alan Watson CBE, Deputy Ombudsman