IN THE MATTER OF A REGULATORY COMMISSION OF THE FOOTBALL ASSOCIATION

B E T W E E N:-

THE FOOTBALL ASSOCIATION

-and-

ARSENAL WOMEN FC

DECISION

Introduction

1. We have been duly constituted as a Regulatory Commission to determine whether (a) a charge brought by the Football Association ("the FA") against Arsenal Women FC ("the Club") has been proved and (b) in the event that we find the charge proved what sanction or sanctions should be imposed.

2. The charge is specified in a letter dated 12 August 2019 from the FA to the Club as being "*Misconduct for a breach of FA Rule E4*". Particulars of the breach are as follows:

> "*It is alleged that, in dismissing Mr Robin Carpenter on 14 May 2014, the Club carried out an act of discrimination by reason of disability which was not otherwise permitted, both by law and the Rules or Regulations of the FA.*"

3. The letter of 12 August 2019 was sent to the Club with an Explanatory Note which contained further information about the charge at paragraphs 6 and 7. Those paragraphs read as follows:

> "*6. The FA avers that, in dismissing Mr Carpenter, Arsenal discriminated against him in that:*
>
> *(a) it treated Mr Carpenter less favourably than it treated or would have treated others because of his disability, pursuant to Section 13*

of the Equality Act 2010 ("Direct Disability Discrimination");and/or

(b) *it treated Mr Carpenter unfavourably because of something arising in consequence of his disability, pursuant to Section 15 of the Equality Act 2010 ("Discrimination Arising from Disability"). In this regard, the FA further avers that Arsenal cannot show that:*

(i) *its treatment of Mr Carpenter was a proportionate means of achieving a legitimate aim; and*

(ii) *it did not know, and could not reasonably have been expected to know, that Mr Carpenter had the disability; and/or*

(c) *in circumstances where it had in place a provision, criterion or practice which put Mr Carpenter at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it failed to take such steps as it would have been reasonable to have taken to avoid the disadvantage, pursuant to Sections 20 – 21 of the Equality Act 2010 ("Failure to Make Reasonable Adjustments").*

7. *In respect of each of the alleged acts of discrimination set out in paragraph 4 above, the FA avers that, at the material time:*

(a) *Mr Carpenter was disabled; and*

(b) *Arsenal had actual or constructive knowledge of Mr Carpenter's disability.*"

4. During the season 2013/14, Mr Robin Carpenter was the Head coach of the Club's Under 15 team. He was engaged in that capacity pursuant to a written contract which specified that he was "*a consultant*". Mr Carpenter's engagement as head coach, pursuant to that contract, subsisted for the whole of the season 2013/2014.

5. In early March 2014, Mr Carpenter disclosed to Mr John Bayer that he believed that he was suffering from autism. At the time, Mr Bayer was the Technical Director at the Club's Centre of Excellence and he had been the person who had appointed Mr Carpenter as the head coach of the Under 15 team. Some weeks later Mr Bayer passed on that information to Ms Clare Wheatley, then the Club's Development Manager.

6. On 9 May 2014 Mr Carpenter met with Mr Bayer and Ms Wheatley at his request. The meeting lasted for more than an hour and it seems clear that much of the time was taken up with Mr Carpenter seeking to explain how he had been and was being affected by autism both in his personal life and in his work as a football coach.

7. On 14 May 2014 another meeting between Mr Carpenter, Mr Bayer and Ms Wheatley took place. On this occasion Mr Bayer read from a pre-written script. In summary, Mr Bayer informed Mr Carpenter that he would not be engaged by the Club as the Head coach of the Under 15 team (or in any other role) for the season 2014/15. (During the course of the proceedings before the Commission this meeting came to be referred to as "the dismissal meeting" and we shall adopt that phrase when referring to it in this decision). Pursuant to the terms of his contract Mr Carpenter was given 4 weeks' notice. It is now common ground (for reasons which will become clear) that Mr Carpenter was given notice of dismissal at this meeting and we shall use the word "dismiss" to describe the termination of Mr Carpenter's contract.

8. The Club accept and, indeed, assert that it was Ms Wheatley who made the decision to dismiss Mr Carpenter. It is common ground that she made that decision after consultation with Mr Bayer and having asked for and received advice from a person working in the Human Resources Department of The Arsenal Football Club PLC (Ms. Claire Boog-Allan).

9. Mr Carpenter was distraught at the decision made on behalf of the Club. He sought his own advice and, in consequence, he began proceedings in an Employment Tribunal ("the ET") in which he claimed compensation for unfair dismissal and disability discrimination. Mr Carpenter brought the proceedings against the Club, Mr Bayer and Ms Wheatley (together, when appropriate, referred to hereinafter as "the Respondents"). From the outset the legal advisors appointed by the Club acted for all three Respondents.

10. On the day that the substantive hearing of Mr Carpenter's complaints was due to begin, a settlement agreement was concluded. The agreement was signed by Mr Carpenter on his own behalf and by Ms Judy Pitrakou on behalf of all three Respondents. Ms Pitrakou was then, and still is, a Human Resources Consultant who provides services to the Club, although, as we understand it, she is engaged by The Arsenal Football Club PLC. We

will refer to aspects of this agreement in due course; at this stage it suffices to note that it begins by recording an agreement that:

> "*1. The First Respondent shall concede and accept liability for the Claimant's claims of unfair dismissal and disability discrimination on behalf of all three Respondents…*"

11. We turn to the proceedings before us. The charge faced by the Club and the explanation of the charge provided by the FA are set out at paragraphs 2 and 3 above. The Explanatory Note provided by the FA also notified the Club that in these proceedings the FA intended to rely upon Regulations 23 and 24 of the FA's Disciplinary Regulations which are in the following terms:

> "*23. The fact that a participant is liable to face or has pending any other criminal, civil, disciplinary or regulatory proceedings (whether public or private in nature) in relation to the same matter should not prevent or fetter the association conducting proceedings under the Rules.*
>
> *24. The result of those proceedings and findings upon which such a result is based shall be presumed to be correct and true unless it is shown, by clear and convincing evidence, that this is not the case.*"

12. On 28 November 2019, the Chair of the Commission, Sir Wyn Williams, conducted a preliminary hearing to determine a number of issues which had been raised by the FA and the Club as to the applicability of Regulation 24. For ease of reference, we attach hereto, as Appendix A, his decision dated 10 December 2019.

13. At paragraph 34, the Chair wrote:-

> "*34. The Settlement Agreement does fall within Regulation 24 since, in my view, it constitutes 'the result of [the prior] proceedings'. Accordingly, the Commission will presume that its terms are correct and true. In particular, it will presume that it is correct and true that the Club conceded and accepted liability for the claims made by Mr Carpenter in respect of unfair dismissal and disability discrimination. In the Settlement Agreement there is no qualification to the Club's acceptance of liability for the claim of disability discrimination made by Mr Carpenter. Accordingly, it seems to me that paragraph 1 of the Settlement Agreement, properly interpreted, constitutes an admission by the Club of the various allegations of discrimination made by Mr Carpenter. That, of course, is not dispositive of the issue whether the Club is guilty of misconduct. It is open to the Club to rebut the presumption which arises by proving on balance of probability by clear and convincing evidence that it did not*

> *discriminate against Mr Carpenter* ***in any of the respects described in the Notice of Claim***. [My emphasis]"

14. At a hearing before the Commission which took place on 3, 4 and 5 March 2020 ("the liability hearing") we received evidence from the parties relating only to the issue of whether the charge had been proved. The parties conducted their respective cases in accordance with the ruling which we have set out above. The Club accepted that it had to establish by clear and convincing evidence that it had not discriminated against Mr Carpenter by reason of disability. If the Club was unable to discharge that burden upon it the charge of misconduct would be proved.

15. During the course of this hearing we were provided with evidence from a variety of sources. First, we had the Bundle of documents which had been prepared for the proceedings before the ET. That Bundle was comprised, in the main, of the Claim Form filed by Mr Carpenter, the Response Form filed by the Respondents and the witness statements and supporting documentary evidence which had been assembled by Mr Carpenter and the Respondents. Second, on behalf of the Club, we had witness statements from Ms Wheatley, Ms Pitrakou and from Ms Karen Ann Josephides which had been prepared specifically for these proceedings. Ms Josephides is the People Director of The Arsenal Football Club PLC (a position formerly called Human Resources Director) and she has held that position for 10 years. Third, the Club disclosed, voluntarily, and relied upon a significant number of emails and documents to which the emails related and which had come into existence by virtue of the ET proceedings. Fourth, there were documents adduced in evidence by the Club to demonstrate "the Club's coaching philosophy". Fifth, there were transcripts of interviews which had taken place between FA investigating officers and Mr Bayer and Ms Wheatley. Sixth, there were witness statements from Mr Carpenter. Seventh, the Commission heard oral evidence from Ms Wheatley, Ms Pitrakou, Ms Josephides and Mr Carpenter.

16. We make it clear that we have read all the documentary evidence which was adduced before us. We have been provided with transcripts of the oral evidence given to the Commission which we have also read. Inevitably, in a case of this type, there will be parts of the evidence to which one of the parties attaches greater importance than does the Commission and there will be parts of the evidence considered relatively unimportant by one of the parties to which the Commission attaches significance. For the avoidance

of doubt, we have recorded in this decision those parts of the evidence which we consider to be most important. We have not attempted to record or summarise all the evidence which we have considered.

17. The focus of the evidence which we heard and read on the issue of liability was twofold. First, the evidence addressed the course of the proceedings in the ET and the reason why the Club entered into the Settlement Agreement. Second, the evidence addressed the reason why Ms Wheatley decided to dismiss Mr Carpenter. We stress, however, that the evidence relating to the reason for Mr Carpenter's dismissal was not a narrow focus upon what was operating upon Ms Wheatley's mind on and shortly before 14 May 2014 but, rather, included a review of Mr Carpenter's time spent coaching for the Club, his attributes as a coach, his willingness to espouse the coaching philosophies of the Club and the circumstances in which he disclosed the possibility of his suffering from autism.

18. On or about 27 March 2020 we made known to the parties' legal representatives our decision that the charge brought by the FA against the Club had been proved. We gave detailed reasons for that decision and we invited the parties to provide a list of proposed typographical corrections (with which invitation they complied). Thereafter we invited them to file and serve written submissions on sanction(s).

19. Shortly after sending out our draft we were asked by FA Regulatory for authority to provide Mr Carpenter with a short note in which our decision on whether the charge had been proved was revealed and, to a very limited degree, explained. A form of words was agreed between the Club and the FA and we authorised disclosure of the note to Mr Carpenter.

20. On 16 April 2020 the FA provided us with written submissions upon appropriate sanctions. The Club responded with written submissions dated 29 April 2020.

21. Ordinarily, a hearing would have been convened during the course of the coming weeks at which we would have received oral submissions about sanctions. However, in the unique circumstances prevailing, it did not seem to us that we should delay our decision on sanctions so as to enable an actual or virtual hearing to take place. On 30 April 2020 we notified the parties of our intention to determine sanctions on the basis of the written

submissions which had been received unless objections were raised to that course of action. No objection has been raised by either party. We are satisfied that such is the quality of the written material provided by the parties that we can determine sanctions appropriately without further submissions, either written or oral.

22. Accordingly, what follows are our reasons for reaching the conclusion that the charge brought by the FA against the Club has been proved and our decision on sanctions together with the reasons which underpin the sanctions we have imposed. The reasons supporting our conclusion that the charge has been proved are to be found under the heading "Liability".

LIABILITY

23. We propose to deal with this under discrete sub-headings.

The proceedings before the ET

24. Mr Carpenter commenced proceedings in the ET on or about 4 August 2014. As we have said, he brought the proceedings against the Club, Mr Bayer and Ms Wheatley. A Response Form on behalf of all three Respondents was completed by asblaw LLP, solicitors who had been instructed by Ms Pitrakou. In the Response Form, Ms Pitrakou was specified as "*Name of Contact*" and Mr Justin Terry of asblaw LLP was named as the legal representative of each Respondent. The *"Grounds of Resistance*" set out in each Response Form was common to all three Respondents. They argued that the ET had no jurisdiction to entertain Mr Carpenter's claims because he was neither an employee of the Club nor a person having the status of a "worker". Additionally, all three Respondents denied unfair dismissal and disability discrimination. On 21 October 2014 Employment Judge Southam conducted a hearing to determine whether the Tribunal had jurisdiction to entertain Mr Carpenter's claims. By this stage Mr Carpenter was legally represented; at the hearing his case was conducted by Ms Sarah Clarke of counsel. The Club was represented by Ms Mulcahy QC (who represents the Club before us). The Employment Judge found that Mr Carpenter was engaged by the Club under a contract of employment and that, in consequence, he was entitled to pursue his complaint of unfair dismissal against the Club and his complaint of disability discrimination against

all three Respondents. He gave detailed and cogent reasons for concluding that Mr Carpenter had been an employee of the Club rather than a self-employed consultant as the Club had argued. We were told (and it is common ground between the parties in these proceedings) that Ms Mulcahy QC gave notice prior to and/or at the hearing that she proposed to make an application to have Mr Bayer and Ms Wheatley "*removed*" from the proceedings as Respondents. However, that application was not pursued at the hearing in the sense that although it may have been mentioned to the Employment Judge, no detailed argument on the point took place and there is no reasoned decision of the Judge relating to the contention that Mr Bayer and Mr Wheatley should cease to be Respondents.

25. Provisionally, Employment Judge Southam directed that the substantive hearing should be listed to be heard for three days from 7 January 2015. However, he was mindful that the Respondents were disputing that Mr Carpenter was disabled at the time of his dismissal and that this issue might be resolved before the substantive hearing. Accordingly, he invited the parties to consider how best to proceed.

26. As it happened, a Case Management hearing took place on 7 January 2015. Before that date, however, two significant events had occurred. First, Mr Carpenter's solicitors disclosed medical evidence which demonstrated, unequivocally, that Mr Carpenter suffered from autism and that he had done so throughout his life. Second, the Club made an offer to settle Mr Carpenter's claims which was, in summary, that the Club would provide Mr Carpenter with a reference and, additionally, pay him compensation in the sum of £13,000.

27. At the Case Management Hearing on 7 January 2015, Employment Judge Southam specified that the substantive hearing of Mr Carpenter's claims would take place on 18, 19, 20 and 21 May 2015. He also set out the issues which the Tribunal would have to determine. One of those issues was "*whether or not [Mr Carpenter] was a disabled person at any material date*". The Employment Judge made a number of Directions which were pertinent to resolving that issue, including a Direction that the Respondents should, by 18 February 2015, inform Mr Carpenter and the Tribunal whether or not they accepted that he was a disabled person at the time of his dismissal and, additionally, serve any medical evidence upon which they intended to rely by 18 March 2015.

28. By letter dated 18 February 2015, the Respondents, by their solicitors, notified the Tribunal and Mr Carpenter that they did not admit that Mr Carpenter was a disabled person. However, having obtained medical evidence of their own, on 31 March 2015 the Respondents made a formal admission to the effect that Mr Carpenter had been a disabled person at all material times.

29. Between 7 January 2015 and 30 April 2015, there were attempts by the lawyers acting for the Club and Mr Carpenter to broker a settlement. Those attempts were unsuccessful. We do not consider it necessary to describe these attempts in detail. However, it is worth observing that one of the features which stands out from this period is that Mr Carpenter was seeking to persuade the Club, as part of the settlement, to support an application which he wished to make for an UEFA A licence coaching qualification. This involved discussions internally within the Club as well as email correspondence between the lawyers and in this period no real progress was made in relation to this issue.

30. However, as the hearing date loomed negotiations became more focussed. On any view, negotiations began in earnest at the end of April/beginning of May 2015. In our view, it is necessary to set out in some detail what happened in the period from the end of April 2015 to the scheduled date of the ET hearing on 18 May 2015.

31. We begin our narrative with a chronological account of what occurred between the Club and its lawyers, and between the Club's lawyers and those acting for Mr Carpenter.

32. On 30 April 2015, Ms Rebecca Thornley-Gibson (by now the lawyer within asblaw LLP conducting the ET proceedings on behalf of the Respondents), sent Ms Pitrakou a detailed note (hereinafter referred to as "the advice") which addressed a number of issues under three separate sub-headings, namely "*Where are we now?*", "*Options on how to deal with the Tribunal hearing*", and "*Current merits/issues*". The section of the advice headed "*Where are we now?*" set out important staging posts in the proceedings which we need not repeat since they have been described in summary above. The sections headed "*Options on how to deal with the Tribunal hearing*" and "*Current merits /issues*" highlighted a number of key points which had to be considered. In our view, these sections of the advice are crucial to an understanding of what transpired subsequently and, accordingly, we quote them in full.

"***Options on how to deal with the Tribunal hearing:***

- *Can prepare for full hearing and defend.*
- *Can admit liability that he has been discriminated against on the ground of disability and just attend on the basis the dates given for hearing are converted into a Remedy Hearing where compensation is determined.*
- *Can not turn up at all and judgment will be given and compensation awarded in Respondents' absence.*
- *Note that as Clare and John have been added as Respondents they may not agree to bullets 2 and 3 above.*

Current Merits / Issues:

- *Was the Claimant a disabled person at the time of the alleged discrimination?*
- *If the Claimant was a disabled person at the time of the alleged discrimination, was he discriminated against because of something arising from his disability, i.e. due his behavioural traits of autism?*
- *Did the Respondent consider any reasonable adjustments in respect of changes that could have been made to accommodate his behavioural issues arising from his autism.*
- *Were Clare and John aware he was disabled at the time they made the decision to dismiss him?*
- *Was the dismissal decision made because he was disabled / for a reason arising from his disability or some other reason?*
- *Clare and John's evidence is crucial. They will say he did not follow the Club philosophy on development and at the time they came to their decision not to renew they did not know he was disabled. If he did not follow the Club philosophy for a matter arising from his disability and Clare and John knew that he was disabled and they did not consider reasonable adjustments, then there would be a finding of disability discrimination.*
- *John and Clare had no awareness of the autism until 3 March '14 and 28 April '14 respectively. If they can show they had already made their decision not to renew at this point, then they are likely to be able to show that they could not have discriminated as a result of his disability as they did not know he was disabled and there was nothing that should have put them on notice.*
- *If John and Clare cannot evidence they had made the decision before they became aware of the autism, then the Claimant is likely to win his case as John and Clare should have looked at what could have been done via medical evidence to obtain information on reasonable adjustments and it is*

likely to be inferred that the autism notification was the reason for the dismissal decision.

- *I put the likelihood of the Tribunal finding for the Claimant as 60 percent, due to the emphasis they will put on Clare and John to have considered their final position in light of the autism* ".

33. Some hours after receiving this Note, Ms Pitrakou sent it to Ms Josephides. She explained to Ms Josephides that "*in the interests of keeping this out of the ET hearing, I asked Rebecca to give us clarity around a few options – some of which you may find unpalatable, but we need to consider our position and so I wanted us to be clear on options / implications*". She went on to inform Ms Josephides that she had been in contact with Blackstone Chambers in relation to representation at a contested hearing. Chambers had indicated that fees would be incurred as from 11 May 2015, i.e. one week prior to the start of the hearing, and that the fees for a contested hearing over four days would be of the order of £20K. She assured Ms Josephides that *"We are doing everything reasonably practical to get this settled"* before asking for *"her thoughts"*.

34. Ms Josephides replied the following day. Her reply was short and to the point:-

> "*Thanks for the note. We are obviously trying our best to settle. I understand that we have given the last chance to settle with us providing a reference/agreed form of wording. Fingers crossed some sense prevails.*
>
> *We want to keep out of ET as it will attract press / incur significant legal costs.*
>
> *I suggest we continue to try to broker a settlement before 11th May.*
>
> *If no joy, go for admitting liability and go for the remedy hearing. References have been written by Clare & John which really don't help our case – glowing about his ability until of course we find out about his disability – this is how it will be perceived anyway.*"

Ms Pitrakou responded promptly. She informed Ms Josephides that "*We will do our utmost to get the case settled before May 11th*" and that if that was not possible "*I will stand Blackstone Chambers down and we will admit liability and progress to a remedy hearing*". She went on to explain the settlement offer which had been made previously and the difficulties involved in supporting Mr Carpenter's application for an UEFA A Licence.

35. Over the ensuing days, there were a number of email communications between the lawyers acting on behalf of Mr Carpenter and the Respondents. A number of the emails contained offers in settlement on behalf of the Club and counter-proposals made on behalf of Mr Carpenter. It is unnecessary to describe the twists and turns of the negotiations during this period save to say that the Club (and Mr Bayer and Ms Wheatley) came to hold the view that it would be possible to offer support to Mr Carpenter in his quest to attain an UEFA A licence.

36. Mr Carpenter's claims were not settled by 11 May 2015. Nonetheless, neither the Club nor Mr Bayer and Ms Wheatley admitted liability.

37. On 14 May 2015, Mr Carpenter's solicitor emailed Ms Thornley-Gibson to indicate that the latest offer which had been made on behalf of the Club was not acceptable and to explain that:-

> "*My instructions are that my client wants a finding of discrimination and /or unfair dismissal against your client in the way he has been treated.*
>
> *In addition, he is of the view that any confidentiality clause or restriction on his ability to tell the truth will hamper him in the future with regard to pursuing a career as a football coach and/or manager.*"

38. Ms Thornley-Gibson immediately notified Ms Pitrakou of this development. She wrote:-

> "*This has been his agenda all along and I really do not see how we get around this, save for doing a COT3 that admits liability and does not have a confidentiality clause in it.*" (COT3 is an agreement reached between the parties to a dispute in the employment tribunal which is brokered with the assistance of a member of ACAS).

39. Ms Pitrakou's response (late that night) was to suggest that an admission of unfair dismissal would be more palatable all round than an admission of discrimination, but that there would be a need for a further discussion on 15 May.

40. 15 May 2015 was a Friday and, therefore, it was the last working day before the ET hearing was scheduled to begin. At 10:00am that morning, a telephone conference call took place in which Ms Pitrakou, Ms Josephides, Ms Thornley-Gibson and Ms Catherine Callaghan of Blackstone Chambers participated. (Ms Callaghan was the barrister

instructed on behalf of the Respondents to attend the hearing on 18 May.) No note of what was discussed has been adduced in evidence. Indeed, it is not clear whether any note was made. When Ms Pitrakou and Ms Josephides were asked questions about this conference call by Ms Gallafent QC, (leading counsel for the FA) neither was able to provide an account of what was discussed.

41. During the course of the day, Ms Pitrakou composed an email to send to Mr Bayer and Ms Wheatley in order to explain what was to likely to occur at the hearing which was due to begin on the following Monday. At 3:20pm, she sent the proposed email to Ms Thornley-Gibson for her comments.

42. It seems probable that while Ms Pitrakou was putting the finishing touches to her draft email to Mr Bayer and Ms Wheatley, Ms Thornley-Gibson and Mr Justin Hayward (Mr Carpenter's solicitor) were having telephone discussions about the terms of a possible settlement. There is no direct evidence as to what was said between them, but there are references in the documentary evidence which certainly point to what was said. At 3:40pm, Mr Hayward sent an email to Ms Thornley-Gibson to which was attached a draft of a proposed COT3. The COT3 consisted of 15 paragraphs. It also had two schedules which contained a draft reference and a letter of support by the Club for the application which Mr Carpenter proposed to make to the FA to be allowed to participate in the course leading to an UEFA A licence. The document began by reciting that:-

> "*The First Respondent shall, on the basis that all Respondents concede and accept liability for the Claimant's claims of unfair dismissal and disability discrimination, pay to the Claimant the sum of £15,200…*"

The email to which this COT3 was attached explained that it was sent without Mr Carpenter's comments or amendments. It was also made clear that this document was for discussion between the parties at the Tribunal on the Monday following. About 9 minutes later Mr Hayward sent an email to Mr Carpenter. He attached the most recent draft terms of settlement. He began by informing Mr Carpenter that *"ALFC have made a revised offer of settlement on the basis that they accept liability"* and he went on to relay to Mr Carpenter that *"They have asked if Claire and John can be dropped from the concession"*.

43. At 4:08pm, Ms Thornley-Gibson emailed Ms Pitrakou and Ms Callaghan as follows:-

> "*Following discussions with the Claimant's solicitor this afternoon, I can advise that the Claimant is 'receptive' to considering a settlement on the basis of admission of liability. His solicitor has re-worded the COT3, although this is without the Claimant's comments, so may change. However, the general consensus is that now the Claimant appears receptive to settlement this is more likely to happen on Monday morning when the Claimant is at Tribunal with his mother and counsel, and has the ability to have face-to-face conversations. I therefore do not think there is anything further that can be achieved today and it is very much over to you both to continue with the settlement discussions on Monday.*
>
> *Rather than a COT3 ACAS arrangement on Monday however it would appear a settlement agreement is the more likely option, but once wording in principle has been agreed, a settlement agreement can be drafted.*"

44. At 4:18pm, Ms Thornley-Gibson replied to Ms Pitrakou about the proposed email to Mr Bayer and Ms Wheatley. In short, she approved it. In consequence, at 4:26pm, Ms Pitrakou sent the email to Mr Bayer and Ms Wheatley. The salient parts of this email are set out below at paragraph 52.

45. At 4:37pm, Ms Pitrakou replied to the email which had been sent to her by Ms Thornley-Gibson at 4:08pm and copied her reply to Ms Callaghan. She wrote:

> "*Thanks Rebecca,*
>
> *Catherine, I intend for us not to leave the Tribunal on Monday without having a Settlement Agreement signed and accepted by both parties. This has to be put to bed on Monday one way or another, but hopefully before any Tribunal Judgment is made against the parties.*"

Four minutes later, Ms Callaghan replied "*Agreed!*".

46. Mr Bayer and Ms Wheatley, as intended, did not attend the ET on 18 May 2015. As we understand it, those present at the Tribunal were Mr Carpenter, his mother, his legal advisors, Ms Callaghan and Ms Pitrakou. It seems to be common ground that the Tribunal Chair invited the parties to undertake and/or continue with negotiations to try to reach a settlement. After discussions which, apparently, lasted for most of the morning, the Settlement Agreement to which we have referred at paragraph 10 above was concluded.

47. Inevitably, there has been much focus upon Clause 1 of this agreement. However, it is worth noting other provisions. Clause 6 constituted an obligation upon the Club to provide a reference for Mr Carpenter in accordance with a draft attached as Schedule A. Clause 7 imposed an obligation upon the Club to provide him with a letter in support of his application to attend a course which if completed successfully would result in his obtaining an UEFA A Licence. A draft letter of support was attached at Schedule B. Clause 10 imposed upon Mr Carpenter an obligation not to disclose the settlement terms to the press and media, but that same clause permitted him to communicate the reasons for his dismissal and the First Respondent's acceptance of its discrimination "*to any other football club, their employees, officers, directors and anyone else associated with such a club or any other potential employer*". Not surprisingly, the agreement did not include any provision prohibiting him from notifying the FA of its terms or the underlying complaints giving rise to the agreement.

48. The draft Reference at Schedule A was written in favourable terms. It is of some importance, in our view, that the reference spoke in positive terms of Mr Carpenter's coaching qualities and abilities. The Club was equally positive in the terms of its support for Mr Carpenter to be permitted to attend the course leading to the qualification of an UEFA A Licence. The draft letter at Schedule B was unequivocal.

49. Throughout these proceedings Ms Wheatley, Ms Pitrakou and Ms Josephides have been at pains to point out that the Club entered into the Settlement Agreement for "commercial reasons". When asked what that meant, they explained that the Club wished to save the costs of a fully contested hearing and it wished to avoid unwelcome publicity which might impact unfavourably upon it. Ms Wheatley and Ms Pitrakou, in particular, asserted that they did not believe that there had been any discriminatory conduct on the part of Mr Bayer and Ms Wheatley and that the Settlement Agreement was not, despite its terms, a true acceptance by them or the Club that such conduct had taken place.

50. We turn next to a chronological account of what occurred in the period 30 April 2015 to 18 May 2015 as between the Club, its lawyers and Mr Bayer and Ms Wheatley.

51. On 30 April 2015 Ms Pitrakou emailed Mr Bayer and Ms Wheatley about witness statements which Mr Bayer and Ms Wheatley were to make for the ET hearing. She asked

that they send the statements to Ms Thornley-Gibson together with any track changes by the following day. She suggested, too, that the four of them should have a telephone conference call on 5 May 2015. Over the course of the following days the draft witness statements were considered, as were drafts of two letters to be provided by the Club. One draft letter was a proposed reference for Mr Carpenter; the second draft was a letter in support of any application which Mr Carpenter might make to be admitted to the course leading to the UEFA A licence qualification.

52. It is worth noting at this stage that there is no evidence before us which either shows or even suggests that the advice which Ms Thornley-Gibson had sent to Ms Pitrakou on 30 April 2015 was shared with Mr Bayer or Ms Wheatley. Further, there is no evidence which suggests that the exchanges between Ms Josephides and Ms Pitrakou of 1 May 2015 which were consequent upon that advice were shared with Mr Bayer and Ms Wheatley.

53. Did the telephone conference call scheduled for 5 May 2015 actually take place? There is no clear direct evidence that it did. However, in the afternoon of 5 May 2015 Ms Thornley-Gibson emailed Mr Bayer and Ms Wheatley to thank them for their time that morning. The content of that email, of course, is entirely consistent with the call having taken place. In her oral evidence, Ms Wheatley was inclined to accept that the telephone conference had happened. However, she had no recollection of what was discussed. When Ms Pitrakou was cross-examined about whether the call had taken place and, if so, what had been said, she could remember nothing about it.

54. On 6 May 2015 there were email exchanges between Ms Wheatley, Ms Pitrakou and Ms Thornley-Gibson. At 10.34 am that day Ms Wheatley sent a long email to Ms Pitrakou and Ms Thornley-Gibson in which she set out a great deal of detail about the UEFA A licence procedure and what the Club could offer Mr Carpenter to facilitate his acceptance for a course. She then wrote:

> "*Can we offer the above (plus a pay out and general reference) only if RC agrees not to go to Tribunal or is it his right to enter the Tribunal and then make his mind up at any moment prior to the Judge's decision. Of course, he won't get any of the above once the Judge has ruled. Surely it therefore has to be in his interest to accept the above.*

Rebecca – Could you confirm that once the Tribunal starts, if RC decides to stop proceedings we are still to provide a letter of reference if that forms part of the package being offered?"

Ms Pitrakou replied:

> *"With regard to the last two paragraphs, in summary, the Club and RC's Advisor / Counsel can agree to settle at any time – that may be before or during the Tribunal hearing. Any agreement can be made between the parties involved to provide a reference, settlement sum and financial support to pay for the UEFA A Licence. However, all deals are off the table once the Employment Judge makes / delivers their decision. We will of course do everything possible to settle this in the interests of all parties before the ET hearing is due to commence. If this is not possible, we will determine further steps then.*"

55. By the close of business on 6 May 2015 the witness statements of Mr Bayer and Ms Wheatley had been finalised and the terms of draft letters which the Club was prepared to write in support of Mr Carpenter had been agreed. There may have been telephone discussions that day involving Ms Pitrakou, Ms Wheatley and Mr Bayer; if so, we were provided with no evidence about what was said.

56. So far as we are aware there was no contact between Mr Bayer, Ms Wheatley, Ms Pitrakou and Ms Thornley-Gibson (or at least no contact of substance) between 6 May and 10 May 2015. At 8.21am on 11 May Ms Wheatley emailed Ms Pitrakou and Ms Thornley-Gibson asking for an update. Her email concluded:-

> "*Finally, may I ask if this case goes against John and I, does that mean we have 'discrimination' against our names professionally. If so, can we talk about that as I sincerely feel that would be inaccurate and completely unfounded. As you know we took the course of action after seeking advice.*"

57. On 13 May 2015, during the morning, Ms Pitrakou spoke to Mr Bayer by telephone. Her oral evidence was that she was unable to recollect whether she had spoken to Mr Bayer and, if so, what had been said. However, we are satisfied that there must have been a call between Ms Pitrakou and Mr Bayer and in it Ms Pitrakou must have described to Mr Bayer the stage which had been reached in negotiations and what would happen, in her view, if there was no settlement. We say that because at lunch time that same day Mr Bayer emailed Ms Pitrakou (copied to Ms Wheatley and sent on her behalf as well) in the following terms:-

"*Thanks for speaking to me this morning and explaining that, as things stand, RC will now be going ahead with the hearing and explaining that the Club was now considering attending the hearing on Monday and admitting liability.*

I have since spoken to Claire. We are both concerned and we both need to understand how the Club's actions could affect our professional standing and integrity because, as you know, Claire and I do not admit liability and we do not accept that we dismissed RC because of his alleged illness.

We also need to understand what options are open to us as individuals to defend our reputations if the Club does choose to admit liability and we are keen to know if the Club can instruct us to admit liability as individuals.

We would also like to know of any assurances the Club would offer in terms of protecting our professional reputations in both the public and private domains should liability be accepted by the Club.

For obvious reasons we need to understand the position before the hearing and I am sure you understand why we needed to write to you about this."

Ten minutes later, Ms Pitrakou emailed both Mr Bayer and Ms Wheatley to say that she would call them both. However, Ms Pitrakou had no recollection of making such a call. Ms Wheatley gave no evidence as to whether a call had been made and, if so, what had been said.

58. That brings us to the email which Ms Pitrakou sent Mr Bayer and Ms Wheatley at 4.26 pm on 15 May 2015. The salient parts are as follows:-

"*Hi, further to my telephone call and as requested, I outline where we are following a call with the Club's advisors and Counsel today. As explained previously on a number of occasions this position can still alter throughout the course of the day and right up to Monday itself.*

- *The Club has advised ASBLAW to continue to try and seek settlement by admitting to unfair dismissal – all Respondents. We can't avoid this…*
- *If this is not acceptable, we have asked to seek a settlement by agreeing to unfair dismissal and if necessary discrimination – the Club will accept the discrimination claim as the First Respondent if at all possible. We are aiming to not have a Judgment passed against you both personally for discrimination – but can't guarantee this.*
- *As explained previously, attending an ET and having yourself and John on the stand for a number of days is not our intended position and also we are clear you would not personally wish to have to take the stand over a number of days. The Club also does not want adverse media publicity attention, particularly given there are weaknesses in our case as previously outlined.*

As of now, Counsel and I will attend ET on Monday. Our view is not to have you attend, as if you are present, you will most likely be asked to take the witness box.

If the worst comes to the worst and to avoid a Tribunal hearing we admit liability both for unfair dismissal and discrimination, I asked what this may mean for you both. In summary, if you were making an application for funding, then a question may be asked – considered low risk. If you apply for another job, low risk, not likely to be asked. He could continue with a financial claim against you both personally, the Club would provide you both with an indemnity against any financial claims in relation to this case.

…

As I am scripting this, we have just been advised that he now appears receptive to a proper settlement discussion at the start of Monday and if successful this would avoid a Tribunal Judgment."

59. Mr Bayer replied to Ms Pitrakou that evening. He told her that he needed "*clarification on a number of points in advance of Monday morning*". He enquired whether he should raise those points with Ms Wheatley "*so she can brief you before Monday*". So far as we are aware, Ms Pitrakou did not reply to that email. There is no evidence that either Mr Bayer or Ms Wheatley spoke to Ms Pitrakou that Friday night or over the weekend.

60. At 8:30pm on 17 May 2015, Ms Wheatley emailed Ms Pitrakou. She wrote:-

"*Thank you for your email.*

Would it be possible to have a brief chat prior to 10:00am tomorrow morning please? I'll be available to speak at any time prior to then."

At 9:08am on 18 May, Ms Wheatley sent Ms Pitrakou a reminder. So far as we are aware Ms Pitrakou did not respond in writing to either email.

61. In their oral evidence, both Ms Pitrakou and Ms Wheatley were unclear as to whether a conversation had taken place between them prior to 10:00am on 18 May 2015. Both thought that a conversation took place during the course of the morning but that conversation was about the terms of the letters of reference and support to be provided to Mr Carpenter.

62. In her Witness Statement for these proceedings dated 29 January 2020, Ms Wheatley says that she was not consulted by or on behalf of the Club in relation to the decision to

settle Mr Carpenter's claims on the basis of an admission of discrimination. She says, too, that if she had been consulted she would have objected – see paragraph 25 of the witness statement. In her oral evidence under cross-examination, Ms Wheatley maintained that stance.

63. The Club asked Mr Bayer to provide a witness statement for these proceedings and it also asked him to give oral evidence. Mr. Bayer declined to make a statement and he declined to appear as a witness. In a letter dated 24 January 2020 to Mr James King. Legal Counsel to Arsenal Football Club, he said that he stood by the contents of his witness statement dated 7 May 2015, that he denied the suggestion that he had discriminated against Mr Carpenter, that he had been dismayed to discover that *"Arsenal Women FC chose to concede that, along with Clare Wheatley, [he] had discriminated against Robin Carpenter"* and that the Club did so *"without informing [him], seeking [his permission] or consulting with [him] at any time"*.

Mr Carpenter's Dismissal

(i) His association with the Club

64. Mr Carpenter was engaged by the Club in the capacity of a head coach from the beginning of the season 2007/08. He began as a coach for the Under 10 team but, after some months but still within the 2007/08 season, he took over as head coach of the Under 14 team. He had in this short time, so it appears, impressed Ms Wheatley. On 10 December 2007, she wrote a reference for him which was extremely positive. She described how she "*felt compelled*" to move him from being head coach of the Under 10 team to head of the Under 14 team. She described his main strengths as follows:

> "*He is dynamic in terms of personality and productivity.*
>
> *He has a fantastic work ethic and always wants to push himself.*
>
> *He can apply himself to any given situation.*
>
> *He is very conscientious and punctual.*
>
> *He has a fantastic manner with young people and adults alike.*
>
> *He is also very popular with everybody he works with (children and adults) without trying to be.*"

65. Over the following seasons to the season 2013/14, the Club engaged Mr Carpenter as the head coach of a number of age group teams. He was engaged from season to season pursuant to a written contract which described him as a consultant and which was in much the same form as the contract which governed his appointment for the season 2103/14.

66. Towards the end of the season 2012/13, Mr Bayer had occasion to write a reference for Mr Carpenter. During that season, Mr Carpenter was the head coach of the Under-13 team. In the reference, Mr Bayer wrote that he had worked with Mr Carpenter over the previous five years and then went on to describe his attributes in the following terms:-

> "*He is very focussed and determined and always strives to achieve above and beyond the targets set for him. He is also a very honest but fair coach and he likes to lead by example.*
>
> *Robin has very high ambitions and expectations of both himself and others around him.*
>
> *He is perceptive and he is able to see the bigger picture.*
>
> *Robin's focus is always on the long-term goal and he will find motivating and challenging methods, in a fun, but rewarding environment, to build up individuals and team confidence in order to help achieve that long-term goal.*"

The reference went on to list some of the achievements of the girls coached by Mr Carpenter.

67. For the season 2013/14, as we have said, Mr Carpenter was engaged as the head coach of the Under 15 team.

68. Save for the two references to which we have just referred, there is no documentary evidence relating to Mr Carpenter's performance as a coach. There was no formal appraisal system – no doubt because it was believed by those in a managerial role within the Club that coaches such as Mr Carpenter were not employees but independent consultants.

69. What is clear, however, on any view of the evidence adduced before us, is that the teams which Mr Carpenter coached were successful. It is also clear that over the time in which Mr Carpenter was engaged as a coach the two persons with whom he had most contact

who were in a "*managerial*" relationship to him, namely Mr Bayer and Ms Wheatley, were both prepared to write references about him which were, in our view, very complimentary.

70. There is no dispute that the season 2013/14 was a very successful one (measured by results) for the Under 15 team coached by Mr Carpenter. Save for a defeat to the French team Lyon in April 2014, the team was undefeated throughout the season. There is no contemporaneous document in existence, save for the script which was read to Mr Carpenter on the day that he was given notice of dismissal, to which we refer in detail below, which records any concern on the part of Mr Bayer or Ms Wheatley as to the manner in which Mr Carpenter coached the Under 15 team or as to his methods of coaching more generally. It is worth noting, too, that in his witness statement for the ET proceedings Mr Bayer confirmed that it was he who had engaged Mr Carpenter as head coach for the Under 15 team in the summer of 2013. No formal interview was undertaken. Mr Bayer made his decision based upon his knowledge of Mr Carpenter, gained through the previous five years or so when Mr Carpenter was coaching at the Club.

71. All that said, it is clear from the witness statements of Mr Bayer and Ms Wheatley that they intended to present a negative picture to the ET of Mr Carpenter's abilities to successfully coach young girls.

72. At paragraph 4 of his statement, Mr Bayer described reservations which he had about Mr Carpenter coaching at Under 15 level even as he was appointing him. He described his main reservation as being whether Mr Carpenter had the ability to adopt "*a development focussed approach*" and "*accept that winning and developing young players was not necessarily the same thing*". At paragraph 9 Mr Bayer described how, as the season unfolded, those reservations grew which led him to have a number of discussions with Ms Wheatley about Mr Carpenter's inability to follow the coaching philosophy for the Under 15 team which the Club espoused. In summary, the concern was that Mr Carpenter attached too much significance to winning which had the consequence of inhibiting player development. As a result said Mr Bayer at some point during these meetings Ms Wheatley and Mr Bayer "*moved to a position where we knew it was likely [Mr*

Carpenter] would not retain a Head coach role for the following season" – see paragraph 9 of the statement.

73. Despite his reservations and the position at which he says he and Ms Wheatley had arrived as described immediately above, Mr Bayer sent an email to Mr Carpenter on 2 April 2014 in which he invited Mr Carpenter to express his preferences by 11 April for coaching duties for the coming season. That may have been explicable on the basis that it was a generic email sent to all coaches.

74. However, Mr Carpenter did not reply in time. As a result, Mr Bayer sent him a reminder. In his witness statement, Mr Bayer said that he did so "*in equity*" in case Mr Carpenter wanted to return to a more junior role. At first blush, at least, that is surprising given that by then Mr Bayer could have been in little doubt that Mr Carpenter's ambitions would hardly be satisfied by returning to coach younger girls.

75. It is also worth noting that Mr Bayer said in his witness statement that he provided feedback to Mr Carpenter about the fact that he did not appear to be adopting the Club's development philosophy in his coaching of the Under 15 team. Mr Bayer accepted that this feedback was, in no sense, a formal appraisal but, nonetheless, he insisted that he spoke to Mr Carpenter about this issue on a number of occasions.

76. In mid-April, a number of teams representing the Club went to France to play against teams from Lyon. The Under 15 team lost its game and, according to Mr Bayer in his witness statement for the ET, some of the girls were distressed. Mr Bayer was present in Lyon; seeing some of the girls upset led him to believe that this "*may have reflected the pressure [Mr Carpenter] had placed on them to win*" – see paragraph 16 of the statement.

77. Mr Bayer also said in his statement that during the tour to Lyon, Mr Carpenter had been involved in an exchange with other coaches which was "*heated and aggressive*" and that Mr Carpenter's assistant coach informed him that she had found it exasperating to work alongside Mr Carpenter over the course of the season. She either said or invited the inference that she would no longer work for the Club if she was required to work alongside Mr Carpenter for the season 2014 /15. It was at this point, according to Mr

Bayer, that he became convinced that "*we could not continue with [Mr Carpenter's] services for the next season*" – see paragraphs 17 and 18 of the statement.

78. In her witness statement for the ET, Ms Wheatley said that she became aware "*quite soon*" into the 2013/14 season that Mr Carpenter was not following the Club's coaching philosophy. She said that she had regular meetings with Mr Bayer – *"usually monthly*" – in which coaches would be discussed and that in these meetings Mr Bayer told her that Mr Carpenter's approach was not the same as the other Club coaches and that "*his mentality was always to win*" – see paragraph 12 of the statement. Ms Wheatley had realised by mid-season that there were problems with the approach adopted by Mr Carpenter and it was likely that he would not be engaged for the following season. She had contemplated "*terminating Mr Carpenter's contract mid-season*" – see paragraph 13 - but concluded that this would be too disruptive to the players. She acknowledged that she had no direct dealings with Mr Carpenter about his apparent deficiencies, but she understood that there were discussions between Mr Carpenter and Mr Bayer.

79. In her oral evidence to us, Ms Wheatley said that she had decided by mid-season that Mr Carpenter's contract would not be renewed for the season 2014/15. She also gave evidence about a specific occasion in November 2013 when she went to observe Mr Carpenter at a home match and found his approach wanting. That detail had not appeared in her witness statement for the ET.

80. In his witness statements (both for the ET proceedings and for these proceedings) Mr Carpenter denied that any complaints were made to him during the season 2013/14 about his coaching of the Under 15 team. Nothing was said to him by Mr Bayer about his coaching philosophy or about an unjustified emphasis upon winning. So far as Mr Carpenter was concerned he had received no notice of any kind of problem with his coaching until the meeting of 14 May 2014.

(ii) <u>*Discussions between Mr Bayer and Mr Carpenter about Autism*</u>

81. It is common ground between Mr Bayer and Mr Carpenter that in early March 2014 Mr Carpenter disclosed to Mr Bayer that he might be suffering from a disability. In Mr Carpenter's third witness statement for the ET proceedings, he said that he told Mr Bayer

in March 2014 that he had seen his GP and she had informed him that he "*could possibly be suffering with ADHD*" - see paragraph 23. In his witness statement for these proceedings dated 13 February 2020, Mr Carpenter provided a great deal more detail as to what he says he told Mr Bayer. It suffices that we record that Mr Carpenter said that he spoke to Mr Bayer twice - on 1 March 2014 and 6 March 2014 - and on both occasions he raised the possibility that he was suffering from ADHD.

82. In his witness statement of 7 May 2015 Mr Bayer accepted that there was at least one discussion in early March at which Mr Carpenter disclosed that he might be suffering from a disability. In this witness statement, Mr Bayer said that Mr Carpenter mentioned to him that he might be suffering from Asperger's Syndrome.

83. It is common ground between the two men that when they spoke in early March 2014, Mr Carpenter asked Mr Bayer to keep his disclosure confidential. According to Mr Bayer's witness statement he respected that request.

84. At the hearing before us, there was some debate about whether, and if so when, a potential diagnosis of autism was first mentioned as between Mr Bayer and Mr Carpenter. In our view, no useful purpose would be served by setting out the various strands of evidence relating to this, since both men in their witness statements accept that there came a point in time, prior to the trip to Lyon, when Mr Bayer understood that Mr Carpenter might suffer from autism.

85. In his witness statement, Mr Bayer said that he first informed Ms Wheatley of the possibility that the Claimant was suffering from autism on 28 April 2014 – see paragraph 19. That is not what Mr Bayer told FA investigators when they interviewed him on 13 May 2019 – see Bundle A, page 514. He told the investigators that he had told her before the trip to Lyon.

86. In her witness statement for the ET, Ms Wheatley said that she was first told that the Claimant might be suffering from autism in late April 2014, i.e. her witness statement on this point was consistent with that of Mr Bayer. However, when Ms Wheatley was interviewed by FA investigators (on the day following Mr Bayer's interview), she agreed with the account which Mr Bayer had given to the FA investigators to the effect he had

told her that Mr Carpenter might suffer from autism prior to the visit to Lyon. Yet, when Ms Wheatley was cross-examined in these proceedings by Ms Gallafent QC, she steadfastly reverted to maintaining that she had not been told until late April 2014.

87. It is common ground that Mr Carpenter had not been diagnosed, formally, as suffering from autism at any time prior to 14 May 2014. Nonetheless, it appears to be common ground, too, that by late April / early May 2014, Mr Carpenter was sufficiently convinced that he might suffer from autism that he sought a meeting with Ms Wheatley and Mr Bayer so that its possible implications could be discussed.

88. The meeting took place on 9 May 2014. There are no notes of what was said. It seems to be agreed that Mr Carpenter did most of the talking and it is agreed that he spent a significant amount of time detailing how his life and his coaching may have been affected by autism. It is probable that during the course of this meeting there was some focus upon Mr Carpenter's alleged "*winning at all costs*" mentality. Certainly, Mr Carpenter probably highlighted the excellent winning record of the teams he had coached and, further, probably did so in the context of emphasising heavy defeats of rival teams.

89. On 12 May 2014, Mr Bayer emailed Mr Carpenter (copied to Ms Wheatley) in which he asked him whether he could "*make a follow-up meeting this Wednesday morning*". In her evidence, Ms Wheatley was not inclined to accept that the meeting which took place on 14 May was a follow-up to that which had occurred on 9 May. She maintained that the meeting of the 14th May would have occurred regardless of the meeting a few days previously.

(iii) *The Meeting of 14 May 2014*

90. There is no real dispute about what occurred. Mr Carpenter was told by Mr Bayer that he would not be engaged by the Club for the following season in any capacity. Mr Bayer read from a pre-written script. Mr Carpenter was too upset to respond.

91. Ms Wheatley told us in evidence that she had made the decision which was communicated to Mr Carpenter on 14 May 2014 following consultation with Mr Bayer. She also said that early on during the morning of 14 May 2014 she spoke with Ms Boog-

Allan and informed her that Mr Carpenter had disclosed the possibility that he was autistic. The thrust of what Ms Wheatley said to us was that she was asking Ms Boog-Allan whether her knowledge of the possibility that Mr Carpenter was autistic made any difference to the view which she had formed that Mr Carpenter should not be engaged by the Club for the season 2014/15. Ms Wheatley told us that she was advised that since Mr Carpenter was a consultant the possibility that he was autistic did not affect Ms Wheatley's decision.

92. Ms Wheatley maintained to us that the reasons why Mr Carpenter was dismissed were all set out in the script which Mr Bayer read to Mr Carpenter. That being so, it is necessary to set out the terms of the script in full:

> "*Robin, I will come straight to the point. We've been undertaking a review of all our coaching teams for next season.*
>
> *Having heard your views when you came in to meet us last week, it is clear that you attach a far, far too much importance to winning games as opposed to developing players.*
>
> *You spoke of 'smashing' Chelsea, 'battering' Manchester United and 'winning' the Arsenal cup, 'beating' the second-best team in England easily, spending the whole season 'plotting' how to gain revenge on Aston Villa after they beat you earlier in the season, planning for weeks to beat teams rather than following the technical syllabus, telling FA scouts how many goals you were going to 'beat' teams by, telling us why the U11 side weren't 'winning more games' telling us how you and Dan never 'lost games' when you ran sides together and attaching such a high importance to 'losing' the Lyon game on tour.*
>
> *I think you used the term 'player development' once.*
>
> *We are concerned that your philosophy is increasingly at odds with that of the Centre of Excellence, which is all about developing players, not winning games.*
>
> *We feel this attitude is becoming detrimental to the development of our players.*
>
> *We have to have Head coaches who 100 percent believe in that development philosophy rather than a winning philosophy and we need Head coaches who we feel are capable of effectively translating that philosophy into action because they believe in it.*
>
> *It is clear to us that your role in football should be managing maybe an adult team where winning rather than development is the priority and I am sure this might suit your skills better.*
>
> *For these reasons, we will not be offering you a coaching role in the Centre of Excellence next season and in accordance with your Consultant Agreement, we*

are giving you one month's notice of that decision which will be confirmed in writing to you by our Human Resources Department. Robin, I would like to sincerely thank you for the contribution you have made in the past years. I have nothing against you personally and this carefully considered decision has been taken with the future of the centre in mind and with the best interests of the players at heart. May I wish you all the very best in your future football career."

93. The FA and Mr Carpenter do not accept that the script read by Mr Bayer constituted the reasons for his dismissal. Mr Carpenter has always alleged that he was dismissed because he disclosed to Mr Bayer and Ms Wheatley the possibility that he was suffering from autism. Mr Carpenter does not accept that either his coaching philosophy or his coaching in practice was, in any way, in conflict with what was expected of him by the Club. The FA maintains a similar stance.

Discrimination under the FA Rules and relevant legislation

94. Rule E4, as it appeared in 2014,was in the following terms:-

> "*A Participant shall not carry out any act of discrimination by reason of … disability … unless otherwise permitted by law and The Rules or Regulations of The Association.*"

95. In this case the parties have equated *discrimination* under E4 with discrimination under the Equality Act 2010 ("the Act"). That is hardly surprising given that Mr Carpenter was found to be an employee of the Club by the ET.

96. The relevant sections of the Equality Act 2010 are 13, 15, 20 and 21. They provide as follows so far as relevant:-

> "*13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2) to (7) …*
>
> *15(1) A person (A) discriminates a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability; and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) Sub-section (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22, and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have taken to avoid the disadvantage.

(4) to (13)...

21(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) ..."

In the context of discrimination at work, the extent of the duty under sections 20(3) and 21(2) is circumscribed by paragraph 20 of Schedule 8 of the Act which provides that A is not under a duty to make reasonable adjustments if *"A does not know, and could not reasonably be expected to know....[of the disability and that the person in question is likely to be placed at a disadvantage]"*.

97. The FA allege that the Club discriminated against Mr Carpenter in that his dismissal contravened sections 13(1), 15(1) and 21(2) of the Act. In his claim form Mr Carpenter did not specify, in terms, the sections of the Act upon which he was relying. However, the Club clearly understood that Mr Carpenter's factual allegations were capable of amounting to discrimination under sections 13, 15 and 21 (paragraphs 36 to 42 of the Grounds of Resistance) and the Directions issued by ET Judge Southam on 7 January 2015 clearly identified that the issues to be determined by the ET at the substantive hearing included whether disability discrimination under those sections had been

established. Essentially, therefore, the FA has presented its case to the Commission on the same basis as Mr Carpenter presented his claim to the ET.

98. Section 13 of the Act is silent as to whether the alleged discriminator must know that the alleged victim has a disability at the time of the alleged discriminatory act. However, relying upon the reasoning of the House of Lords in *Lewisham CBC v Malcolm [2008] UKHL 43* both Ms Gallafent QC and Ms Mulcahy QC accept that a necessary ingredient of the tortious conduct under section 13 of the Act is that the alleged discriminator either knew or ought to have known of the disability of the alleged victim at the material time.

99. No discrimination arises under sections 15, 20 and 21 if, at the material time the alleged perpetrator did not know or could not reasonably be expected to know that the alleged victim has a disability. In any given case under sections 15, 20 and 21 the tribunal in question must apply the words *"did not know, and could not reasonably have been expected to know"* (section 15) and *"does not know, and could not reasonably be expected to know"* (sections 20 and 21 and Schedule 8) to the facts as it finds them to be. We do not pause to ponder why the legislation uses slightly different language when qualifying the duties under the different sections. More importantly, we do not consider the approach which we have just described is in any way inconsistent with the decision in *Toy v Chief Constable of Leicestershire Police [EAT 3 October 2017],* a decision upon which Ms Mulcahy QC relied.

100. During the course of submissions we raised with leading counsel the possibility that we would find that more than one reason played a part in the decision to dismiss Mr Carpenter and that one of the reasons was Mr Carpenter's disclosure that he might be autistic. They both agreed that if we found that this reason was a substantial cause of the decision to dismiss, a finding of discrimination (under any of the relevant sections) would not be precluded because there were one or more other reasons for the dismissal.

101. Finally, we note that Rule E4 does not, in terms, limit the prohibition of discrimination to the context of employment. However, we do not consider it necessary or desirable to offer views upon the width of the wording of Rule E4 since this case was presented to us very much on the basis that the Club had discriminated against an employee.

Discussion

102. It seems to us important, first, to consider the reason or reasons why the Club entered into the Settlement Agreement. In our view that is an important issue in itself. Additionally, however, some of the documentary evidence in relation to this issue and the oral evidence given about it necessarily impacts upon the reliability and accuracy of the evidence given by Ms Wheatley not just about the course of the ET proceedings but also about why she dismissed Mr Carpenter.

103. In summary, the evidence of Ms Wheatley, Ms Pitrakou and Ms Josephides was that the Settlement Agreement was the product of a pragmatic and commercial approach to the ET proceedings which was uninfluenced by the merits of Mr Carpenter's claims. That is what they maintained in their witness statements for these proceedings; that is what they sought to convey in their oral evidence. How does this evidence match with the other strands of evidence in the case and the inferences to be drawn from such evidence?

104. In the initial stages of the ET proceedings the Respondents maintained a vigorous denial of any liability for Mr Carpenter's claims. A glance at the Grounds of Resistance is sufficient to justify that conclusion. At that stage, however, we are satisfied that those dealing with the claim at the Club, in particular Ms Wheatley and Ms Pitrakou, would have believed that Mr Carpenter's claims were very likely to fail because he was neither an employee nor a worker. As appears from the judgment of ET Judge Southam the preliminary issue as to the whether the ET had jurisdiction to entertain the claims was fought with skill and determination.

105. However, once that issue was resolved against the Club and, further, once it had been confirmed by reputable medical evidence that Mr Carpenter suffered from autism the Club's attitude to Mr Carpenter's claims changed markedly. As at about Christmas 2014 Mr Carpenter had served a schedule of loss in support of his claim totalling approximately £17,000. Yet, the Club saw fit as its opening gambit in negotiations to offer to provide him with a favourable reference and to pay him £13,000 in compensation.

106. As from the date of the Directions hearing on 7 January 2015 it seems clear that the focus of the Club's approach was to settle Mr Carpenter's claims. The focus became more and more pronounced once the Club's own medical evidence confirmed a diagnosis of autism and as the substantive hearing date became closer and closer.

107. In our view, the email exchanges which took place between Mr Thornley-Gibson and Ms Pitrakou, and Ms Pitrakou and Ms Josephides over 30 April and 1 May 2015 admit of only one sensible interpretation. Ms Thornley-Gibson expressed the view that there was a 60% chance that Mr Carpenter would establish his claims of unfair dismissal and disability discrimination and it was against this background, no doubt, that Ms Thornley-Gibson advised as to the options for the ET proceedings in the absence of a settlement. She suggested three options which were (a) prepare for a full hearing and defend the claims (b) admit liability for disability discrimination (as well no doubt as unfair dismissal) and have a remedy hearing on 18 May 2015 and (c) not attend the hearing with the consequence that a judgment would entered against the Respondents in their absence. Ms Pitrakou's response to this advice was to send it to Ms Josephides together with an estimate of the cost of fully defending the claims. As we have said (see paragraph 33 above) she also assured Ms Josephides that every practical step was being taken to achieve a settlement.

108. In our view, Ms Josephides' reply to Ms Pitrakou was unequivocal in its terms. Ms Pitrakou was to endeavour to achieve a settlement before 11 May 2015 (from which date an obligation would arise to pay substantial fees for representation at the ET) but if that could not be achieved *"go for admitting liability and go for the remedy hearing"*.

109. As well as expressing her view as to what should be done, Ms Josephides explained her thinking about why the course she was suggesting should be adopted. She wanted to settle the claims and avoid a hearing because significant legal costs would be saved and a hearing would attract press interest. If, however, the claims could not be settled, liability should be admitted and a remedy hearing arranged because *"References have been written by Claire & John which really don't help our case-glowing about his ability until of course we find out about his disability – this is how it will be perceived anyway."*

110. Ms Pitrakou responded with equal clarity. She would do her *"utmost to get the case settled before 11May"* but in the absence of such an outcome liability would be admitted and a remedy hearing would take place.

111. During the course of their oral evidence both Ms Josephides and Ms Pitrakou were pressed about whether a decision had been taken on 1 May to the effect that in the absence of a settlement by 11 May liability would be admitted. Neither witness was prepared to admit that such a decision had been made despite the seemingly clear words used by both in their emails. In our view, however, it matters not whether the exchange is viewed as a decision or, as Ms Josephides would have it, as a *mandate* because the reality is that nothing which Ms Josephides and Ms Pitrakou did thereafter suggests that they had any intention of disputing liability for Mr Carpenter's claims before the ET. It is true that witness statements were prepared and served which disputed liability. That, however, was unavoidable if the Club wished to maintain any credibility in negotiations. It is also true that the Club did not admit liability immediately after 11 May. In our view that was because Ms Pitrakou and Ms Thornley-Gibson were taking all the steps which they reasonably could to achieve a settlement without an admission of liability. It is also worth noting that despite the stance taken by Blackstone Chambers that fees for a contested hearing would become payable on 11 May that did not turn out to be the position so, we infer, that further discussions about fees must have taken place at some point.

112. We are satisfied that the documentary evidence demonstrates that as from 1 May 2015 there was virtually no prospect that the Club would contest Mr Carpenter's claims on the issue of liability before the ET. Between them, Ms Josephides and Ms Pitrakou had agreed upon a course of action which was, in effect, to avoid a contested hearing on the issue of liability at all costs.

113. That is not to say that Mr Bayer and Ms Wheatley were aware of this strategy. We have already referred to the fact that there is no evidence to show that they were made aware of the exchanges between Ms Josephides and Ms Pitrakou on or shortly after 1 May 2015. There was, of course, the telephone conversation on May 5 and, possibly, another on May 6 in which the substance of those exchanges could have been discussed. However,

although Ms Pitrakou and Ms Wheatley were party to the conversation(s) neither was able to provide evidence as to what was discussed.

114. We have given careful consideration to the evidence given by Ms Wheatley and Ms Pitrakou about their inability to recall what was discussed in the conversation(s). We accept without reservation the difficulty of recalling the details of what was said in conversations which took place close to 5 years ago especially since they would have had no reason to think about them until about 4 years after they had occurred. Even so, we are somewhat surprised that between them they could recall nothing. That said, we do not consider it appropriate to conclude that there has been a deliberate attempt to conceal what was discussed. The probability is that their recollections are genuinely very hazy at best and that it would not be possible to form a reliable view as to what was discussed from their testimony.

115. In any event it seems clear that by 13 May both Mr Bayer and Ms Wheatley knew that it was at least possible that the Club would admit liability for Mr Carpenter's claims. So much is clear from Mr Bayer's email of that date which was sent on behalf of himself and Ms Wheatley – see paragraph 59 above.

116. Pausing there, we consider that the documentary evidence demonstrates that the most likely scenario as events unfolded during the fortnight preceding the hearing on 18 May to be as follows. Ms Josephides and Ms Pitrakou had agreed a course of action as from 1 May which involved strenuous attempts at settlement but with a fall-back position that the Club would admit liability for Mr Carpenter's claims. Throughout most of this period they were hoping that any settlement would not involve an admission of liability on the part of the Club and they were keen to avoid any acceptance of liability by or on behalf of Mr Bayer and Ms Wheatley. Ms Pitrakou was cautious about what she relayed to Mr Bayer and Ms Wheatley about this strategy. She correctly deduced that they would be reluctant to admit liability for discrimination and, in consequence, she was careful to limit what she told them to discussing possible outcomes as is clearly apparent from what occurred on 13 May. However, we also consider that at some stage, probably in one of the telephone conversations which occurred in this period, she did explain to Mr Bayer and Ms Wheatley what were the weaknesses in the Respondents' case for the ET. We

say that because the email which she sent to both in the late afternoon of 15 May otherwise makes no sense (see paragraph 58 above for the contents of the email).

117. The probability is that the Club, through Ms Thornley-Gibson, did offer to admit liability on behalf of the Club in the discussions which she had with Mr Hayward on 15 May. If that is not correct Mr Hayward wrote an email to his client shortly thereafter which was inaccurate to a remarkable degree. That seems to us to be implausible. The fact that this had occurred while, more or less at the same time, Ms Pitrakou was informing Mr Bayer and Ms Wheatley that an admission of liability was a possibility only is consistent with the general view we have formed about how events unfolded in the two weeks preceding 18 May 2015. Nonetheless, at the very least, we are satisfied that by the afternoon of 15 May, Mr Bayer and Ms Wheatley knew that it was likely that the Club would admit liability for Mr Carpenter's claims either in any settlement which was agreed between the Club and Mr Carpenter or formally before the ET.

118. Ultimately, of course, the Club admitted liability not just on its own behalf but on behalf of Mr Bayer and Ms Wheatley. Strictly, of course, the Club could be liable only if its decision maker or makers were also liable. However, we think it at least a reasonable possibility and on balance, more probable than not, that it was not explained to Mr Bayer and Ms Wheatley in clear terms that the Club was proposing to make an admission which constituted not just an admission of liability on behalf of the Club but which also constituted a personal admission on the their part.

119. Why did the club admit liability? In our view there were three principal reasons. First, it did not wish to incur the costs of a contested hearing over 4 days. Second, it wished to avoid adverse publicity. However, third, it also made the decision because it had received advice that that the Club was more likely than not to be found liable for Mr Carpenter's claims which advice it accepted. In our view, Ms Josephides considered that the Club's defence to the claims would not succeed; she said as much, in effect, in her email of 1 May 2015. Ms Pitrakou did not dissent. Ms Thornley-Gibson had provided the advice on merits and never changed it and Ms Callaghan was wholeheartedly in agreement with the view that the case should be settled once she became involved.

120. In our view the Club did not settle Mr Carpenter's claims for commercial considerations uninfluenced by the merits of the claims. We reject the evidence of its witnesses to that effect. Rather it settled the claims because the prospect of substantial costs coupled with adverse publicity became very unattractive when, as was the considered view of the Club's decision makers and advisors, the claims against the Club would succeed.

121. We turn to the evidence available as to the reason or reasons why Ms Wheatley dismissed Mr Carpenter.

122. We have considered Mr Bayer's witness statement for the ET proceedings with care. We have also taken account of the fact that his expressed reason for refusing to co-operate with the Club in these proceedings may be truthful i.e. that he was upset that the Club had admitted liability for Mr Carpenter's claims on his behalf without his express consent. However, we note that there is a significant difference between the account which Mr Bayer gave in his witness statement as to when he first told Ms Wheatley that Mr Carpenter might suffer from autism and the account which he gave to the FA investigators 4 years later. We note, too, that this difference was replicated exactly by Ms Wheatley. Mr Bayer has not been tested by cross-examination in these proceedings (although the Investigators subjected him to close questioning). It is appropriate, in our view, to approach what Mr Bayer has said with a considerable degree of caution in all the circumstances.

123. We have already concluded that we do not accept those aspects of Ms Wheatley's evidence which related to the reasons why the Settlement Agreement had been concluded. There are other factors which cast doubt upon her reliability and accuracy as a witness. First, she, too, was inconsistent about when Mr Bayer first told her that Mr Carpenter may be suffering from autism. In her witness statement of 7 May 2015 she said that it was towards the end of April 2014. To the FA Investigators she said that was before the tour to Lyon. In her oral evidence before us she reverted to asserting that it was at the end of April 2014. As we have noted immediately above the witness statements of Mr Bayer and Ms Wheatley for the ET were consistent with each other as to when Ms Wheatley was first told. Yet they both changed their mind about that when interviewed by the FA Investigators. That strongly suggests that they discussed their accounts

together before making their witness statements and before their interviews with the FA. Second, whenever Ms Wheatley was asked to remember the content of a telephone call which happened in the fortnight or so leading to the ET hearing on 18 May 2015 she could provide no detail. Yet she was able to remember the advice which she was given in the phone call which she had with Ms Boog-Allan on the morning Mr Carpenter was dismissed (about a year earlier) with clarity. As will become apparent, we tend to the view that Ms Wheatley's recollection of her call with Ms Boog-Allan is accurate. However, it is surprising that this one call stands out (even allowing for its obvious importance) but no details of any of the others stuck in Ms Wheatley's memory. Third, Ms Wheatley was instrumental in helping to draft the letters which were to become Annexe A and Annexe B to the Settlement Agreement. On any view, these letters painted a picture of Mr Carpenter as a person and a coach which was at odds with the picture which Ms Wheatley painted in her witness statement for the ET, her witness statements in these proceedings and in her oral evidence before us. We are not so naïve as to think that an employer may not "guild the lily" when providing such letters as part of a settlement but, in our view, there is a very marked contrast, indeed, between the letters in Annexes A and B and the evidence given to us by Ms Wheatley as to Mr Carpenter's coaching and personal attributes. In all these circumstances we feel bound to subject the evidence of Ms Wheatley as to why she dismissed Mr Carpenter to a rigorous and critical analysis.

124. Two aspects of her evidence we accept without reservation. We have no doubt that throughout the period in which Mr Carpenter was engaged by the Club Ms Wheatley thought that he was a self-employed contractor and that in general terms he did not enjoy what we can loosely describe as "employment rights". That is important because it helps to explain why there are virtually no documents in existence about his performance as a coach. The second aspect which we accept is that it was very much part of the Club's coaching philosophy that player development was a much greater priority than a winning team. A number of the documents produced on behalf of the Club supported Ms Wheatley's evidence on that topic.

125. We are much less inclined to accept her evidence that throughout the season 2013/14 Mr Bayer and she had discussions about Mr Carpenter's coaching methods and style and that

they became increasingly concerned about whether he should be coaching the Under 15 team because he was prioritising winning over player development. We are prepared to accept that Mr Carpenter did derive very significant satisfaction from coaching winning teams. He may also have used colourful language in conveying that satisfaction to others. That, of itself, however, does not mean that he was less than vigilant to ensure that player development was a priority. In the witness statements of Ms Wheatley and Mr Bayer there were very few, if any, examples given of situations which demonstrated unequivocally that Mr Carpenter was placing winning as a higher priority than player development. By her own admission, Ms Wheatley had no or virtually no direct contact with Mr Carpenter throughout the season and if Mr Carpenter's coaching was truly problematic we would have expected some discourse between the two notwithstanding that Ms Wheatley was entitled to rely upon Mr Bayer for day to day "supervision" of Mr Carpenter.

126. We make it clear, too, that we do not accept that Ms Wheatley and Ms Bayer had reached the view by mid-season that Mr Carpenter would not be engaged for the 2014/15 season. Upon close analysis, Mr Bayer's witness statement of 7 May 2015 does not say that; at its highest, it suggests that he was aware in mid-season of the likelihood of a parting of the ways at the end of the season. His evidence to the ET would have been that it was events in Lyon and the views of Mr Carpenter's assistant, as expressed to him at the end of the season, that finally persuaded him that Mr Carpenter should not be engaged for the 2014/15 season – see paragraph 77 above.

127. In our view, the likelihood is that the decision to dismiss Mr Carpenter was substantially influenced by two factors; first his disclosure that he may be suffering from autism; second his presentation, demeanour and attitude at the meeting on 9 May 2014. It may be, too, that Mr Bayer was to a degree unhappy about what he regarded as some unwelcome events during the tour in Lyon. However, since we have heard no evidence from anyone who was on tour (apart from Mr Carpenter) there is no proper basis upon which we could find this to be a significantly influential factor. We are not prepared to hold that the Club has proved by clear and convincing evidence that the sole or even a significant factor leading to Mr Carpenter's dismissal was his inability or refusal to espouse the coaching philosophy of the Club. Stripped to its essentials in 2007 Ms

Wheatley wrote in complementary terms about Mr Carpenter's abilities as a coach; in 2013 Mr Bayer did the same. Following his dismissal they were both prepared to sign up to two letters which described his coaching attributes very positively. In our view those documents are likely to be a much more accurate guide to Mr Carpenter's coaching abilities than the generalised accounts of his deficiencies produced in the witness statements for the ET proceedings and Ms Wheatley's evidence before us.

128. It is common ground before us that no one at the Club knew that Mr Carpenter suffered from autism at any time before his dismissal. The diagnosis of autism was not established until November 2014. The fact that it took that length of time was touched upon in the evidence but the reality is that the diagnosis would have been made within a relatively short period had the Club chosen to engage an appropriate medical practitioner once notified by Mr Carpenter of his belief. The Club through Mr Bayer knew of the possibility in early March 2014. However, at that point Mr Bayer was asked to keep the information confidential and he is not to be criticised for complying with that request. We proceed on the basis that Ms Wheatley did not know of the possibility that Mr Carpenter was autistic until late April 2014. Had she taken the step, then, of arranging a medical consultation it seems likely that a diagnosis would have been made before the start of the next season. However, no one at the Club took any step of any kind to ascertain whether Mr Carpenter was suffering from autism prior to his dismissal.

129. What followed from Ms Wheatley becoming aware that Mr Carpenter may suffer from autism was the meeting of 9 May 2014. We have described what occurred in brief at paragraph 88 above. As we have said, it was the disclosure of the possibility of autism and the meeting which, in our view, convinced Ms Wheatley that Mr Carpenter should be dismissed.

130. However, we accept that before taking that step Ms Wheatley sought advice from the HR department of The Arsenal Football Club PLC. There is no written record of the advice which she received. A telephone conversation took place in the morning of 14 May 2014 during which, we accept, Ms Wheatley explained that she was proposing to terminate Mr Carpenter's contract with the Club. We accept, too, that she revealed that she had received information from Mr Carpenter to the effect that he may be autistic. Ms

Wheatley told us that the advice which she received was that Mr Carpenter was not an employee of the Club but rather a self-employed contractor and that, in consequence, Ms Wheatley could quite legitimately give him 4 weeks' notice to terminate his contract for any reason whether good or bad. She was probably told that his disclosure that he may be autistic made no difference to the Club's ability to dismiss him if it so chose.

131. No doubt fortified by the advice which she had received, Ms Wheatley dismissed Mr Carpenter. In her answers to Ms Gallafent's questions Ms Wheatley gave us the distinct impression that had she known that, in truth, Mr Carpenter was an employee she would not have acted as she did. In our view Ms Wheatley acted as she did because, erroneously as it turned out, she genuinely believed that Mr Carpenter was self-employed and that legally she was entitled to terminate his contract by giving the appropriate period of notice.

132. We rather suspect that Ms Gallafent QC hit the nail on the head when she suggested to Ms Wheatley in cross-examination that Mr Carpenter's disclosure made everything "too complicated". We do not think that Ms Wheatley deliberately rode rough shod over Mr Carpenter's rights; rather we consider that she opted for a solution which upon the advice which she had received was legally open to her.

133. However, we think it of some importance to record that the fact that Ms Wheatley sought advice about Mr Carpenter's contractual status in the context that he may be autistic tends to undermine her assertion that the receipt of that information played no significant part in her decision to dismiss him.

134. It follows from the views which we have expressed above that the Club has failed to discharge the onus upon it of proving on balance of probability by clear and convincing evidence that it did not discriminate against Mr Carpenter in the respects described in the Explanatory Note which accompanied the charge.

135. We have reflected upon whether we need to analyse in this decision the specific ingredients of sections 13, 15, and 20/21 of the Act and whether each is made out in the

context of our factual conclusions. In our view such an analysis is not necessary. From the commencement of the ET proceedings the Club has always understood it might be held to have committed the statutory torts specified in those sections. When it chose to admit liability in the ET proceedings it did not seek to qualify its admission by reference to any of the statutory provisions. In these proceedings it has denied misconduct, at least primarily, upon the basis that Mr Carpenter's disability played no part in any of the actions which it took or any of the decisions which it made. However, we make it clear for the avoidance of any doubt, that we consider that the Club has failed to establish on balance of probability by clear and convincing evidence that it did not infringe section 13 of the Act.

136. Additionally, however, we think it important to record in respect of section 13 that we would find on the evidence before us and irrespective of any presumption that the Club had constructive knowledge that Mr Carpenter was autistic before it took and implemented the decision to dismiss him. Mr Carpenter was its employee. The Club should have taken appropriate steps to obtain an accurate diagnosis in relation to his potential disability or encouraged and assisted Mr Carpenter to obtain a diagnosis for himself. In our view, by dismissing him when it did and for the reasons which we have explained, the Club treated him less favourably than it would have treated an employee without disability.

137. Finally we should record our thanks to leading counsel for the assistance they provided to us with their oral and written submissions. We have not thought it appropriate to record those submissions as a discrete section of our decision on the issue of liability. All our main conclusions, however, have been made after very careful consideration and analysis of all their principal points.

SANCTION

138. Paragraph 40 of the FA's Disciplinary Regulations (FA Handbook 2019/20, pp. 143-144) ("The Regulations") lists the sanctions available to the Commission in this case. In her submissions on behalf of the FA, Ms Gallafent QC invites the Commission to consider

imposing three different forms of sanction upon the Club, all of which, she submits, fall within Paragraph 40 of the Regulations. Her first suggestion is that we should consider imposing a deduction of points upon the Club. The FA accept that such a points deduction could only be made against the Club's First Team and that it would take effect in this season (albeit the season is currently suspended). The next suggestion is that the Commission should impose a substantial fine. The third suggested sanction is that we should impose upon the Club a requirement that individuals involved in Mr Carpenter's case (identified by the FA as Ms Wheatley, Ms Pitrakou and Ms Boog-Allan) should undergo an education programme in relation to discrimination under the supervision of the FA.

139. Ms Mulcahy QC does not dispute that the suggested sanctions fall within the list of sanctions contained within paragraph 40 of the Regulations. She accepts that *"the relevant senior management involved with the women's academy (including Clare Wheatley) should participate in an education programme in relation to discrimination"*. She accepts, too, that a fine which is proportionate *"to the financial position of the Club"* would be unobjectionable. However, she resists the suggestion of a sporting sanction absolutely.

140. We deal with each of the proposed sanctions in turn.

141. We are firmly of the view that it would not be appropriate to direct a deduction of points against the First Team of the Club. We do not consider it would be proportionate, just and/or reasonable to impose a sanction which would impact most severely upon personnel within the Club who had and have no connection with the misconduct proved against the Club. The discrimination which we found proved against the Club was, in reality, brought about as a consequence of the actions of a very few people then associated with the Club. Although Ms Wheatley now has an important position in relation to all the teams at the Club, in May 2014 she was employed as the Development Manager of the Club. In that capacity, as far as we are aware, she had no relevant connection with the Club's First Team. Perhaps more importantly, we tend to accept the proposition advanced on behalf of the Club by Ms Mulcahy QC that, save in those cases

in which the Regulations themselves dictate otherwise, a sporting sanction against a Club is usually reserved for acts of misconduct which results in some unjustified competitive advantage to the Club. Obviously, that is not the position in the case.

142. In reaching our conclusion that a sporting sanction is not justified we have also considered with care the decision and reasons of the Regulatory Commission in *FA v Gillingham and Scally (29 July 2015).* That, too, was a case in which the Commission found discrimination proved against a Club. It had the additional feature that the FA had brought a charge of discrimination against the Chairman of the Club which the Commission found proved. As in this case, the FA raised the possibility of a sporting sanction without expressly contending for one. The Commission considered that the case before it was a serious case of misconduct by reason of discrimination and it expressed the view that a sporting sanction might, in some cases, be appropriate to mark the seriousness of the misconduct proved in a particular case. Nonetheless, the Commission rejected the need for a sporting sanction and acknowledged expressly that one of its reasons for reaching this conclusion was that the Club had not derived any competitive advantage as a consequence of its misconduct. In our view, this decision and the reasons for it do not point towards the imposition of a sporting sanction. Rather, on balance, we consider the thrust of the submissions advanced by Ms Mulcahy QC as to why a deduction of points against the Club's first team should not be made derives some support from the reasoning and decision in *Gillingham*.

143. For the avoidance of any doubt we also reject the suggestion advanced on behalf of the FA that in determining sanctions we should proceed on the basis that the facts of this case bring it close to the sanction regime which would be appropriate had the Club been found guilty of an offence contrary to Rule E3(2) as opposed to E4. Rule E3(1) prohibits a participant from acting improperly or acting in such a way so as to bring the game into disrepute and Rule E3(2) provides that a breach of E3(1) is an *"Aggravated Breach"* where it includes *"a reference, whether express or implied, to .....disability."* If such misconduct is proved a sporting sanction is mandatory. The plain fact is, however, that it was the FA which decided which charge was appropriate in this case. Presumably, it considered whether to pursue a charge under Rule E3 as well as E4 and, we infer, it decided against that course of action. We do not find that surprising; in our view a charge

pursuant to E4 was clearly the appropriate charge in this case. That being so, however, we decline to take account of the sanctioning regime for breaches of E3(2) when determining whether to direct a points deduction against the Club's First Team.

144. Finally, we should say that we have considerable doubt about whether it would be consistent with good sanctioning practice to single out a particular section of the Club for a specific sanction when that section of the Club was entirely blameless in relation to the conduct of which complaint is made. Be that as it may, we are entirely satisfied that no points deduction should be directed against the Club's First Team.

145. We have no doubt that it is appropriate to impose a fine upon the Club. In order to determine the appropriate level of fine, however, we need to address a number of issues.

146. First, we consider the relationship between the Club and The Arsenal Football Club PLC. In 2014/15 the Club was a limited company registered under the title of Arsenal Ladies Limited. That company was a wholly owned subsidiary of The Arsenal Football Club PLC. The Club is still a limited company (albeit it is registered under a different title). It is still wholly owned by The Arsenal Football Club PLC. From the evidence we heard at the liability hearing it is clear that the Club was and still is able to call upon expert advice from employees of The Arsenal Football Club PLC about matters relating to its operation and it is clear it was and is able to seek advice on human resources matters from personnel engaged by the Arsenal Football Club PLC. Less importantly, perhaps, Ms Wheatley was at the material time and still is an employee of The Arsenal Football Club PLC. That appears to be common ground from the parties' respective submissions on sanctions although Ms Wheatley has always been given the job title of the Club's Development Manager (at the material time in 2014) and thereafter, the Club's general manager. In summary, there is clearly a close connection between the Arsenal Football Club PLC and the Club – the former owns the latter – yet in law both are separate legal entities.

147. On the basis of these uncontested facts Ms Gallafent QC invites us to treat the Club for the purpose of assessing an appropriate fine as if it was akin to a male club of the Premier League. Ms Mulcahy QC submits that is completely wrong and that we should ignore the close connection between the two clubs and focus only upon the financial means of the

Club as evidenced by the accounts submitted with the Club's written submissions on sanctions and such other information provided about the Club's finances.

148. We do not accept either of the contentions made by leading counsel. In our view it would not be right to treat the Club as being akin to a Premier League club since that would imply that it had the ability to direct for itself how to spend the very substantial annual income which is earned (in normal circumstances) by such a club. That is clearly not the case for the Club. Equally it would be wrong to ignore as irrelevant the close connection between the two clubs. That would mean that the Club was entitled to enjoy the many benefits of such a connection (including substantial financial benefit) as and when such benefits were conferred upon it yet be treated as devoid of such benefits when consideration is being given to an appropriate financial sanction for a significant breach of the Rules. In our view, that cannot be right. We take the view that when determining the appropriate financial sanction which the Club should face in this case the Commission should certainly start on the basis of the resources strictly available to the Club as a separate legal entity. However, we should not be deflected from imposing an appropriate level of fine simply because the accounts of the legal entity might suggest that payment of such a fine from resources owned by the Club would be onerous when, as here, the Club is very likely to be given access to resources which are legally owned by The Arsenal Football Club PLC. To hold otherwise would lead to a triumph of form over substance and, further, open the way to all sorts of financial arrangements being made amongst clubs and their owners so as to make it more difficult for a Regulatory Commission to impose substantial fines when such a course is appropriate.

149. We next consider the contention by the FA that the Club unreasonably contested the charge brought against it and that, in consequence, the financial penalty we impose upon the Club should be increased to reflect that conduct. In summary, it is submitted that the Club (i) unreasonably maintained a position in these proceedings that it decided to admit liability in the ET proceedings only on the morning of the hearing (ii) unreasonably presented its case in such a way that Mr Carpenter had to undergo the stress associated with giving evidence and (iii) unreasonably maintained its position that the reasons for dismissing Mr Carpenter related solely to his abilities as a coach. Ms Gallafent QC submits that important aspects of the Club's case were substantially undermined by

documents which the Club itself disclosed in these proceedings and that it should have acceded to the FA's request, contained in its letter of 13th February 2020, that the Club should admit the charge.

150. As we think must be clear from our reasons for upholding the charge, the crucial aspects of the Club's defence were difficult to maintain given the presumption which was operating in this case and the documents which came to light during the process of disclosure. We accept and, indeed, find that this was a strong case against the Club. It is true, as Ms Mulcahy QC reminds us, that the Club may have avoided disclosure of some of the documents on the grounds that they attracted legal professional privilege and that by waiving privilege the Club was co-operating with the regulatory arm of the FA in an open and transparent fashion. That is much to its credit. However, to repeat the case against the Club was strong.

151. Yet it is a large step from a finding that the case against the Club was strong to a finding that the Club acted unreasonably in defending the proceedings. Notwithstanding the features to which the FA have drawn attention we are not persuaded that we should conclude that the Club acted unreasonably in defending the proceedings. The Club has been advised throughout by lawyers of considerable experience and quality. We cannot and should not second guess what discussions occurred about the course which the Club should adopt either before or after receipt of the letter of 13th February 2020 and, of course, there is no obligation upon the Club to disclose the substance of such discussions.

152. However, we are also of the view that even if it was unreasonable of the Club to have defended the proceedings that is not a reason to increase the financial penalty which should be imposed upon it. We have very considerable doubt about whether it is ever permissible for a Regulatory Commission to increase a sanction (whether financial or otherwise) to mark its disapproval of a participant's unreasonable failure to admit a charge. No case either before a Regulatory Commission or before an Appeal Board was brought to our attention in which such a course has been adopted. No case in the High Court of England and Wales (or above) was cited to us which throws any light on the issue. Certainly, an increase in sentence to reflect the view of the sentencing judge that an accused had unreasonably defended proceedings would be an alien concept in the

criminal courts. However, regardless of whether circumstances might exist in the regulatory context in which an increase in sanction might be justified to mark unreasonable conduct during the course of the proceedings on the part of the participant this is not such a case. In our view, if the Club did behave unreasonably by contesting the charge it will be "penalised" by the costs regime which applies in this case. The Club will be responsible for its own, no doubt, substantial legal costs which would have been significantly less had it chosen to admit the charge. Our very strong provisional view is that the Club will have to meet the costs incurred in relation to the holding of the Regulatory Commission. Such costs will, no doubt, be far greater following these contested proceedings than would have been the case had the Club admitted liability.

153. What then are the main factors to be taken into account in fixing an appropriate level of fine? Any case of discrimination by a club on the ground of disability (or for that matter any other ground) constitutes a significant offence and, subject only to adjustment to reflect the club's <u>true</u> ability to pay, a fine is likely to be measured in tens of thousands of pounds. In saying that we acknowledge that there are no guidelines issued by the FA for breach of Rule E4. Nonetheless, we are confident that Regulatory Commissions and Appeal Boards would consider a fine of that magnitude to be appropriate for a breach of E4 unless the circumstances are very unusual. That was certainly the view taken by the Commission and on appeal by the Appeal Board in the case of *Gillingham*. While the facts in *Gillingham* are sufficiently different from the facts in the present case for us to be cautious about using it as a direct comparison we are satisfied that the level of fine thought appropriate *in Gillingham* by the Commission and Appeal Board represents a reasonable indicator as to the level of fine appropriate in this case. We do not consider that there are particular aggravating features in this case i.e. features arising independently of the facts giving rise to the charge of discrimination. We accept that there are a number of mitigating circumstances. First, the Club has enjoyed an unblemished disciplinary record over many years. Second, once it had been told by the ET that Mr Carpenter was its employee, the Club attempted to settle Mr Carpenter's claims appropriately. As is almost inevitably the case in disputes of this sort, the Club attempted to negotiate more favourable terms than it conceded eventually. Ultimately, however, the Settlement Agreement was a fair and appropriate settlement of Mr Carpenter's claims. Third, the Club committed a breach of Rule E4 by reason of the decision-making of Ms Wheatley. It seems to us to be important in these circumstances

to take account of the fact that Ms Wheatley had an unblemished disciplinary record over many years. Further, while we have found that Mr Carpenter's dismissal came about substantially because of his disability we have also made findings about Ms Wheatley’s conduct which mitigate the seriousness of what she did – see paragraphs 130 to 132 above. In our view these features cumulatively are important mitigating factors.

154. In her written submissions, Ms Mulcahy QC argues that there can be no doubt that the game, and perhaps even more so the women’s game, will be very vulnerable to the economic downturn which must inevitably follow the outbreak of Covid-19 and that this is a factor which should lead to a reduction in the level of the fine we impose in this case. We are not disposed to accept that proposition. The fine imposed by a Regulatory Commission should be that which is appropriate to mark the seriousness of the offence and the mitigating features in the case. It does not seem to us to be permissible to reduce the fine which would otherwise be appropriate unless there is clear and convincing evidence that the ability of the Club to pay that fine has been substantially compromised by economic factors outside its control. There is no evidence before us to that effect once it is accepted that the Commission can look beyond the accounts of the Club when making an assessment of its ability to pay an appropriate fine. We accept the likelihood of a sharp economic downturn in the coming months but we are not persuaded on the available evidence that such a downturn will have such an impact on the Club that it cannot pay an appropriate fine.

155. We have taken into account two other linked factors in assessing the appropriate level of fine. First, the Club’s willingness to engage with the FA over an education programme relating to discrimination for certain individuals associated with the Club. As appears from the paragraphs below some care will be necessary when formulating the words of the sanction but that should not be insurmountable. Second, the Club has said that it proposes to arrange independent training relating to discrimination which is to be provided by independent lawyers.

156. In all the circumstances we have reached the conclusion that a fine of £50,000 is proportionate and justified in this case.

157. We should record for completeness that in her written submissions Ms Mulcahy QC drew our attention to the power to suspend sanctions. We do not dwell on this aspect, however, because Ms Mulcahy QC did not make a specific suggestion as to how we might exercise that power. It seems to us that in this case the power could be used, sensibly, only to suspend in part the payment of the fine. In all the circumstances of the case, however, we do not consider that to be an appropriate course.

158. We turn to the third proposed sanction. At first blush the parties appear to be at one about the suggestion that certain individuals should be directed to attend an educational course. However, the language used by the parties in their written submissions is worth close analysis. Ms Gallafent QC *"invites the Commission to require the Club to require the individuals concerned in Mr Carpenter's case (Ms Wheatley, Ms Pitrakou and Ms Boog-Allen) to undergo an education programme in relation to discrimination…the details of which will be provided by….the FA."* Ms Mulcahy QC writes that *"the Club agrees that the relevant senior management involved with the women's academy, including Ms Wheatley, should attend an education programme in relation to discrimination"* – see paragraph 30 of her written submissions. Both the FA and the Club agree that Ms Wheatley should attend the course but it is not obvious that there is agreement about who else should attend. We draw attention to this not to be obstructive but, rather, to demonstrate that the framing of this sanction is not without difficulty.

159. Regulation 40 empowers a Regulatory Commission to impose *"any one or more of the following penalties or order on the Participant charged"*. Regulation 40.9 permits the Commission to impose *"such further or other penalty as it considers appropriate"*. We are satisfied that Regulation 40.9 is sufficiently widely drawn so as to allow the Commission to make a direction against the Club that it must ensure, for example, that certain of its employees attend a course. However, we cannot make an order against any of the individuals themselves – none were *"Participants charged"* in this case. Further, in the absence of clear evidence that the individuals concerned consent to their attendance at the course, it would be wrong in principle, in our view, to direct the Club to ensure the attendance of named individuals at a course unless the Club has the means of enforcing their attendance. As we understand it none of the individuals named by Ms Gallafent QC are employees of the Club. Having received and considered brief written submissions on

behalf of the Club and the FA we are satisfied that the sanction set out at paragraph 162(3) below together with the provision at paragraph 162(4) provides both a suitably worded sanction and a means by which any disagreements between the FA and the Club can be resolved.

160. We stress that the imposition of a sanction such as proposed in the paragraph above is, in our view, important for two reasons. First, it is, without doubt, a sanction which is particularly appropriate given the circumstances of the misconduct as we found them to be. Second, the willingness of the Club to engage with an educational process is a clear sign that it recognises the mistakes it made in this case and it constitutes a clear signal that the Club is determined to prevent such mistakes occurring again.

161. Finally, we wish to make it clear that Ms Mulcahy QC is wrong to assert (as she does in her written submission on sanction) that we have found proved against the Club only that part of the FA's case which was that the Club had breached section 13 Equality Act 2010. At paragraph 134 above we make it clear that all aspects of the FA's case had been proved. Our focus, thereafter, on section 13 of the 2010 Act was to make it as clear as possible that we had found proved the most serious aspect of the FA's case.

162. In the light of the foregoing the Commission orders:-

(1) The charge brought by the FA against Arsenal Women Football Club Limited is proved.

(2) Arsenal Women Football Club is fined £50,000. The Club having consented to the FA debiting any financial penalty from its account the fine shall be paid upon receipt by the Club of an administration and fines invoice drawn up by the FA and in accordance with the instructions set out in the invoice.

(3) The Club shall within 14 days of the date hereof supply the FA with a list of personnel which it considers should attend an education programme designed to deliver such training as is thought appropriate by the FA so as to minimise the risk of future

breaches of Rule E4. It shall also within the same time period notify the FA whether such personnel consent to attending the programme and, if not, what steps the Club proposes to take to compel the attendance of the personnel chosen. Thereafter, the Club shall ensure that the personnel specified shall attend at the said educational programme upon a date specified by the FA.

(4) Liberty to apply to the Commission in relation to the implementation of paragraph (3) above.

(5) The Club shall pay the whole of the costs incurred in relation to the holding of this Regulatory Commission unless within 5 days of the date hereof the Club files and serves a written notice of objection to the making of such an order and the reasons why. Thereafter, the FA, if it so chooses, may respond in writing within 5 days of the receipt of the notice of objection and the Club may, if it so chooses, reply within 3 days of the receipt of the FA's response. The Commission shall, thereafter, determine the issue of costs by reference to these written submissions. Any costs payable by the Club shall be paid following the issue by the FA of an administration and fines invoice and in accordance with any instructions contained within the invoice.

Sir Wyn Williams
Phillippa Kaufmann QC
Ifeanyi Odogwu

15 May 2020

Appendix A

IN THE MATTER OF A REGULATORY COMMISSION OF THE FOOTBALL ASSOCIATION

B E T W E E N:-

THE FOOTBALL ASSOCIATION

-and-

ARSENAL WOMEN F.C.

DECISION

Introduction

1. I have been duly appointed as the Chair of a Regulatory Commission of the Football Association which has been convened to determine a charge brought by the Association ("the FA") against Arsenal Women FC ("the Club").

2. The charge is specified in a letter dated 12 August 2019 as being "*misconduct for a breach of FA Rule E4*". Particulars of the breach are as follows:

> "*It is alleged that, in dismissing Mr Robin Carpenter on 14 May 2014, the Club carried out an act of discrimination by reason of disability which was not otherwise permitted both by law and the Rules or regulations of the FA.*"

The letter specifying the charge enclosed an Explanatory Note which contained further information about the charge at paragraphs 6 and 7 which read as follows:

> "*6. The FA avers that, in dismissing Mr Carpenter, Arsenal discriminated against him in that:*
>
> *(a) It treated Mr Carpenter less favourably than it treated or would have treated others because of his disability, pursuant to Section 13 of the Equality Act 2010 ("Direct Disability Discrimination"); and / or*

> (b) *It treated Mr Carpenter unfavourably because of something arising in consequence of his disability, pursuant to Section 15 of the Equality Act 2010 ("Discrimination Arising from Disability").*
>
> *In this regard, the FA further avers that Arsenal cannot show that:*
>
> (i) *its treatment of Mr Carpenter was a proportionate means of achieving a legitimate aim; and*
>
> (ii) *it did not know, and could not reasonably have been expected to know, that Mr Carpenter had the disability; and / or*
>
> (c) *in circumstances where it had in place a provision, criterion or practice which put Mr Carpenter at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it failed to take such steps as it would have been reasonable to have taken to avoid the disadvantage, pursuant to Sections 20 – 21 of the Equality Act 2010 ("Failure to Make Reasonable Adjustments").*
>
> 7. *In respect of each of the alleged acts of discrimination set out .....above, the FA avers that, at the material time:*
>
> (a) *Mr Carpenter was disabled; and*
>
> (b) *Arsenal had actual or constructive knowledge of Mr Carpenter's disability.*"

3. As well as explaining the basis of the charge, the Explanatory Note made reference to Regulations 23 and 24 of the FA's Disciplinary Regulations. These Regulations are in the following terms:-

> "*23. The fact that a Participant is liable to face or has pending any other criminal, civil, disciplinary or regulatory proceedings (whether public or private in nature) in relation to the same matter should not prevent or fetter the Association conducting proceedings under the Rules.*
>
> *24. The result of those proceedings and findings upon which such a result is based shall be presumed to be correct and true unless it is shown, by clear and convincing evidence, that this is not the case."*

4. Under the heading "*Matters relied upon pursuant to Regulation 24*", the Explanatory Note continued:-

> "*10. The FA puts Arsenal on notice that it will seek to rely on the following matters pursuant to Regulation 24:*

> (a) *The Judgment of Employment Judge Southam, dated 6 November 2014 in the Employment Tribunal proceedings, Case No. 3301310/2014… by which it was determined that Mr Carpenter was engaged by Arsenal under a contract of employment;*
>
> (b) *A letter from ASB Law, on behalf of Arsenal, to the Employment Tribunal dated 31 March 2015… by which Arsenal admitted that Mr Carpenter was disabled at the material time; and*
>
> (c) *A Settlement Agreement between Arsenal and Mr Carpenter, dated 18 May 2015 … by which Arsenal conceded and accepted liability for Mr Carpenter's claims of unfair dismissal and disability discrimination.*"

5. As it was obliged to do under the Rules, the Club provided a Response dated 10 September 2019. At paragraph 8 of its Response, the Club denied the charge and sought a hearing to determine:-

> "*8.2.1 Whether the 2014/15 Documents are capable of giving rise to presumptions under Regulation 24 of the Disciplinary Regulations;*
>
> *8.2.2 If so, what relevant presumptions arise from the 2014/15 Documents and whether those presumptions are sufficient to sustain the Charge; and*
>
> *8.2.3 What if any directions should be made, having regard to the answers to the above questions and the positions of the parties, for:*
>
> *1. The provision of particulars by the FA of any allegations made other than in reliance on the 2014/15 Documents;*
>
> *2. The service of evidence by the FA in support of those allegations;*
>
> *3. The service of evidence by the Club in response to:*
>
> *i. those allegations; and*
>
> *ii. the relevant presumptions held to arise from the 2014/15 Documents.*"

6. Following the service of this Response, the Parties reached an agreement that the Chair of the Regulatory Commission should adjudicate upon the preliminary issues which had been raised by the Club. On 28 November 2019, I presided over a hearing at which the Club was represented by Ms Jane Mulcahy QC and Mr Tom Cleaver, and the FA was represented by Ms Kate Gallafent QC and Mr Dario Giovannelli.

7. Prior to the hearing, I was provided with a hearing bundle which included detailed written submissions on behalf of the Club and the FA. At the hearing, I heard oral submissions from both Leading Counsel. At the conclusion of submissions, I indicated that I would reserve my decision and provide it in writing, together with my reasons.

8. Although the primary issue with which I have to grapple relates to the proper interpretation of the phrase *"The result of those proceedings and findings upon which such result is based"* within Regulation 24 it is as well to record at this stage the salient facts which give rise to the need for a determination of the preliminary issues.

The Salient Facts

9. Mr Robin Carpenter began working as a coach at the Club in July 2007. He continued working at the Club until May 2014. By a Notice of Claim dated 19 August 2014, he commenced proceedings in the Employment Tribunal alleging that he had been unfairly dismissed on or about 14 May 2014 and, further, that he had been the victim of disability discrimination. By his Claim Form, Mr Carpenter alleged that during the whole of the time during which he was working at the Club he was engaged under a contract of employment i.e. that he was an employee. He also alleged that during this time he had been suffering from autism and he had suffered discrimination in his employment on account of that disability. The claim was issued against the Club and two of its employees, Mr Bayer and Ms Wheatley, who had allegedly been involved in discriminating against Mr Carpenter.

10. The Club filed a Response Form denying all his claims, including the assertion that Mr Carpenter was an employee of the Club.

11. On 21 October 2014, at the Employment Tribunal in Watford, Employment Judge Southam conducted a preliminary hearing to determine whether Mr Carpenter had been an employee of the Club. By a written decision dated 6 November 2014, the Judge held that at all material times Mr Carpenter had been engaged by the Club under a contract of employment and, accordingly, that he was an employee.

12. On 7 January 2015, a further preliminary hearing took place at which Judge Southam handed down many directions with a view to ensuring that Mr Carpenter's claim would be heard between 18 and 21 May 2015. At that stage, the Club was not admitting that Mr Carpenter suffered from any kind of disability.

13. The Club maintained the position that Mr Carpenter did not suffer from a disability until it had obtained its own medical evidence. However, upon receipt of such evidence, it changed its stance; in a letter dated 31 March 2015, written by ASB Law to the Employment Tribunal, the Club's solicitors confirmed that the Club admitted that Mr Carpenter was a disabled person at all material times.

14. On the day that Mr Carpenter's claim was due to be heard, i.e. 18 May 2015, Mr Carpenter and the Club signed a document entitled "*Settlement Agreement*". The document began by reciting that the undersigned (Mr Carpenter and a representative of the Club) had agreed the terms which were then set out. Paragraph 1 recorded:-

> "*1. The First Respondent shall concede and accept liability for [Mr Carpenter's] claims of unfair dismissal and disability discrimination on behalf of all three Respondents, and will pay to [Mr Carpenter] the sum of £17,200 (less any tax or National Insurance contributions due), ... within 14 days of today's date.*"

There followed a number of other terms. Importantly, they included paragraph 5, which recorded that Mr Carpenter would "*today*" withdraw the claims that he had made against the Club and, further, his understanding that such claims would then be dismissed.

15. There can be no doubt that Mr Carpenter's claims were dismissed. The Employment Tribunal issued a document dated 18 May 2015, which was sent to the Parties on 15 June 2015, which records a Judgment as follows:-

> "*The Claimant's claims are dismissed upon withdrawal by the Claimant.*"

16. It is against this factual background that I turn to the rival contentions made by the parties upon the proper interpretation of Regulation 24 of the FA Disciplinary Rules.

<u>The Proper interpretation of the phrase *"The result of those proceedings and the findings upon which such result based"* within Regulation 24.</u>

17. There was a significant measure of agreement about a number of the important principles to be applied when ascertaining the proper interpretation of this phrase. As it happens, they are conveniently set out in paragraph 16 of the Decision of an Appeal Board in the case of *FA v Fernando Forestieri*. The paragraph reads:-

> "*16. The Rules and Regulations of the FA are to be interpreted in accordance with principles which are, in our view, uncontroversial. The words of a particular provision are to be given their ordinary and natural meaning albeit that such a meaning is to be informed by what the words would mean to a reasonable person having all the relevant background information about the context in which the words are used. Further, the words of a particular provision must be read in the light of the document in which they appear. The document as a whole must be considered when the meaning to be attributed to individual parts thereof is being considered."*

18. It, seems to me, therefore, that the words of Regulation 24 which are under scrutiny in this case must be given their ordinary and natural meaning albeit that such a meaning is to be informed by what the words would mean to a reasonable person having all the relevant background information about the context in which the words are used.

19. Ms Mulcahy QC submits that the reasonable person armed with the requisite information would take the phrase *"The result of those proceedings"* to refer to the terms of the order of the Employment Tribunal which brought Mr Carpenter's proceedings against the Respondents to an end. Her submission is that it is the terms of the order made by the Employment Tribunal, dated 18 May 2015, whereby Mr Carpenter's claim was dismissed upon his withdrawing the same which constitutes the result of those proceedings. Essentially, her submission was that when civil proceedings are brought to an end by an Order of a competent Court, it is the order of that Court, no more and no less, which constitutes the result of the proceedings.

20. She submits further that the words "*and findings upon which such result is based*" which follow the phrase "The *result of those proceedings*" provide powerful support for that contention. She submits with some force that ordinarily the findings of a court or tribunal are expressed in a judgment provided by the Court; the result is that which is contained in the order which gives effect to that judgment.

21. Ms Gallafent QC accepts that the order of a competent court disposing of the relevant proceedings is capable of constituting the result of those proceedings. However, she submits that the word "*result*" should not be confined to a meaning which excludes all else except the terms of the order of the Court disposing of the proceedings. Such an interpretation, she submits, would, in reality, be a triumph of form over substance. She points out that an order disposing of proceedings, looked at in isolation, may produce a very misleading picture as to what has occurred, in substance, in the proceedings and that, accordingly, the phrase "*The result of those proceedings*" within Regulation 24 should be interpreted to mean the substantive outcome of the proceedings as the reasonable person would understand it to be as opposed to the terms of the order which brings the proceedings to an end and which may or may not accurately reflect the substantive outcome of the case.

22. In advancing their rival contentions both Leading Counsel made reference to earlier Decisions in which Regulation 24 and its predecessor regulation have been considered. In particular, Ms Mulcahy QC relied upon passages within paragraph 13 of the decision of the Regulatory Commission in the case of <u>*FA v Peter Beardsley*</u> and the last sentence of paragraph 18 of the Decision of the Appeal Board in <u>*FA v Fernando Forestieri*</u>.

23. I do not propose to cite the relevant passages from those decisions. In my view, limited assistance is to be gained from the expressions of view in those earlier decisions for the simple reason that the interpretation of the phrase "*The result of those proceedings*" was not the subject of detailed discussion in either case. In <u>*Beardsley*</u>, Regulation 24 was under the spotlight for a number of different but related reasons, but there was no reason for the Commission to analyse, with any precision, what the words "*The result of those proceedings*" is intended to mean. Similarly, in <u>*Forestieri*</u> there was no dispute about what constituted the result of the criminal proceedings which Mr Forestieri had faced prior to the FA Commission. The issue in that case, primarily, was the scope of the presumption which arose as a consequence of Mr Forestieri having been found not guilty of the criminal charge which had been laid against him.

24. I should say, too, that I derived very little assistance from the two decisions put before me relating to Mr John Terry. Again, the focus of the argument in that case did not centre upon the meaning of the phrase "*The result of those proceedings*".

25. In my view, the word *result* is capable of having a number of meanings. For example, in the context of a sporting contest the *result* might be described by reference to the team or individual which won or lost the game; it might be described by reference to the score line. In the context of legal proceedings, the result of such proceedings might be described quite differently depending upon the nature of the proceedings under consideration. In criminal proceedings, no doubt, the *result* would, very frequently, be described by reference to the verdict of the Court before which an accused is tried; in the case of a person who has been convicted of an offence, however, it might well be described simply by reference to the sentence imposed. In civil proceedings the *result* may be described in a variety of ways. I accept that the *result* may be described by reference to the form in which the proceedings come to an end, but the *result* might also be described by reference to whether any party is an obvious winner or loser, or whether there has been a settlement of some or all of the disputes encompassed in the proceedings.

26. Having reflected upon the submissions of Leading Counsel, I am persuaded that the phrase "*The result of those proceedings*" in Regulation 24 should not be confined to meaning the terms of the order in which civil proceedings are brought to an end. I am satisfied that the phrase, properly interpreted, permits a decision-maker seeking to apply Regulation 24 to ascertain what, in substance, the outcome of the prior proceedings had been.

27. In reaching that conclusion I have borne in mind that Regulation 23 specifies the nature of the proceedings which are to be the subject of the presumption contained in Regulation 24. In so doing it acknowledges not just that there may be different types of proceedings which might end in a *result* but also that it is permissible to interpret the word *result* with a degree of flexibility depending upon the nature of those proceedings. In my view it is important to take account of the fact that the vast majority of civil proceedings end in settlement, as opposed to an adjudication on the merits by a Court or Tribunal. Many settlements are concluded on terms which are kept private to the parties. Many settlements will be cast in terms which make it extremely difficult to conclude other than that the result of the proceedings was that parties had come to terms. However, the parties may choose to settle proceedings upon terms which are (a) not private; (b) clear as to their effect; and (c) capable of demonstrating what, in substance, constituted the result of the proceedings over and above the mere fact of settlement. In my view, it is very

difficult to see why a settlement agreement which has those characteristics should not be treated as constituting the *result* of the proceedings in question for the purpose of Regulation 24.

28. That interpretation, in my view, is supported by the policy which underpins provisions such as Regulation 24. The policy which underpins the Regulation is the laudable one of avoiding the need to prove matters which have already been considered and determined in earlier proceedings. No doubt, that is why the presumption in Regulation 24 applies not just to the *result* of the previous proceedings but to the findings upon which that *result* is based. Both Leading Counsel appeared to proceed on the basis that the word "*findings*" in the Regulation means those conclusions, either of fact or law, which underpin the decision of the adjudicating Court or Tribunal. I agree that this is the most obvious interpretation of the word "*findings*", but I do not regard that as being an indicator that the word "*result*" should be narrowly confined as suggested on behalf of the Club. Rather where such findings are ascertainable they, too, are subject to the presumption contained in Regulation 24.

29. In my view, the *result* of the employment tribunal proceedings brought by Mr Carpenter against the Club is to be found in the terms of the Settlement Agreement dated 18 May 2015. The Order of the Tribunal of the same date was a legal formality; a necessary formality under the procedural rules governing employment tribunals, but it was not the result of the proceedings. Rather, it was the legal mechanism by which the proceedings were brought to an end following a detailed agreement between the parties concerning all their legal rights and obligations to each other arising out of Mr Carpenter's claims and potential claims. I have no doubt that, in substance, it was the Settlement Agreement which constituted the result of the Employment Tribunal proceedings. To hold that it was the order of the Tribunal as opposed to the Settlement Agreement which constituted *"The result of those proceedings"* would be to ignore the reality of what occurred in the employment proceedings.

The Preliminary Issues

30. Are the documents identified at paragraph 4 above capable of giving rise to presumptions under Regulation 24?

31. On behalf of the Club, Ms Mulcahy QC concedes that the decision of Employment Judge Southam, in which he held that Mr Carpenter had been an employee of the Club, fell within Regulation 24 even if she was correct in her interpretation of the regulation. Ms Gallafent QC submits that this concession was correctly made. Accordingly, by virtue of the terms of Regulation 24 taken as a whole, the Commission will presume that it is correct that Mr Carpenter was an employee of the Club and, further, it will presume that the *findings* upon which that conclusion is based i.e. the factual and legal conclusions of Judge Southam as contained in his judgment are also correct.

32. For my part, I find it difficult to see how the finding of Employment Judge Southam did form part of the *result* of the proceedings if, as I am disposed to think, the word "*result*" in Regulation 24 is apt to describe the state of affairs as between the parties at the end of the proceedings rather than at an intermediate stage. However it matters not for two reasons. First, as it happens, I think that a respectable argument could be advanced to the effect that the decision of Employment Judge Southam did constitute *findings* upon which the *result of the proceedings* was ultimately based. Since, however, neither leading Counsel developed an argument to that effect I do not propose to develop that point any further. Second, and much more importantly, the decision of Judge Southam will, no doubt, be adduced before the Commission by the FA regardless of whether regulation 24 applies to that decision. Although the view I am about to express is a preliminary one and made without reference the other members of the Commission who will sit with me to determine the charge it is clear that there is no obvious bar to the Commission taking account of the decision of Judge Southam upon the issue of whether Mr Carpenter was an employee of the Club and I do not expect that the Parties would be surprised to learn that the Commission is likely to take a great deal of persuading that the decision of Employment Judge Southam should not be followed given the considerable degree of deference which would normally be afforded to a reasoned decision of an expert tribunal which was not the subject of an appeal.

33. I do not consider that the letter of 31 March 2015 from ASB LAW falls within the phrase *"The result of those proceedings and findings upon which such result is based."* In my view the letter simply constitutes an admission by a party about one aspect of the case for the opposing party. Accordingly, no presumption arises by virtue of Regulation 24. However, the admission contained in the letter will no doubt be relied upon by the FA

and it is difficult to see how, in the absence of cogent evidence, the Commission would be persuaded to the view that the concession was wrongly made.

34. The Settlement agreement does fall within regulation 24 since, in my view, it constitutes *"The result of [the prior] proceedings"*. Accordingly, the Commission will presume that its terms are correct and true. In particular it will presume that it is correct and true that the Club conceded and accepted liability for the claims made by Mr Carpenter in respect of unfair dismissal and disability discrimination. In the Settlement Agreement there is no qualification to the Club's acceptance of liability for the claim for disability discrimination made by Mr Carpenter. Accordingly, it seems to me that paragraph 1 of the Settlement Agreement, properly interpreted, constitutes an admission by the Club of the various allegations of discrimination made by Mr Carpenter. That, of course, is not dispositive of the issue of whether the Club is guilty of misconduct. It is open to the Club to rebut the presumption which arises by proving on balance of probability by clear and convincing evidence that it did not discriminate against Mr Carpenter *in any of the respects described in the Notice of Claim* (my emphasis).

35. I cannot help but observe that the conclusion which I have expressed in the preceding paragraph is, in a sense, of more academic than practical significance. It seems very difficult to escape the conclusion that the FA can rely upon the Settlement Agreement quite independently of Regulation 24. Once that document is before the Commission how is the Club to avoid the effect of its terms, couched as they are as an admission of unlawful discrimination by the Club, except by calling evidence which convinces the Commission that despite those terms it did not discriminate against Mr Carpenter? I say no more at this point since, for all I know, there may be some important argument yet to be deployed on behalf of the Club.

36. It was agreed at the hearing that I would deal with directions, if necessary, by a telephone hearing once the parties had digested this decision and held discussions about appropriate directions. Given that I have been somewhat longer in producing this decision than I originally anticipated (for which I apologise) the parties are at liberty to take the remainder of this month to discuss appropriate directions. Accordingly, I direct that the parties should file agreed directions by 4pm 31 December 2019 and that if no such

directions have been filed by that date the parties shall, in the first week of January 2020, liaise with Paddy McCormack to arrange a telephone conference.

Wyn Williams

10 December 2019