IN THE MATTER OF THE REGULATORY COMMISSION

OF THE FOOTBALL ASSOCIATION

BETWEEN:

THE FOOTBALL ASSOCIATION

-and-

PETER BEARDSLEY

DECISION AND WRITTEN REASONS OF THE REGULATORY COMMISSION

HEARING

The hearing on liability took place in Wembley Stadium on 23, 24 and 25 July 2019. The composition of the Regulatory Commission was the Rt Hon Lord Dyson, Chairman, Gareth Farrelly and Tony Agana. Mr Beardsley's leading counsel was Mr Nick De Marco QC. Leading counsel for The FA was Ms Kate Gallafent QC.

INTRODUCTION

1. Mr Beardsley has had a high-profile professional career in football for almost 40 years. He played for England 59 times and played for many famous clubs. Since retiring as a player, he has undertaken many football-related roles including coaching at Newcastle United ("the Club"). He was employed as the Club's Under 23 Manager and Coach between 2014 and 2018. His duties in this capacity were to coach and train the young players

with a view to their being retained by the Club and potentially promoted to play in the first team.

2. A number of allegations were made against Mr Beardsley in 2017 and 2018 by some of the young players. These comprised four allegations of gross misconduct in the form of offensive and unacceptable comments to young black players and two further allegations that were dependent on one or more of the four allegations being proved.

3. These allegations led to a one day Club Disciplinary Meeting on 8 May 2018 which was held by Lee Charnley, the managing director of the Club. In a reasoned decision following the consideration of oral and written evidence, Mr Charnley found the first, third and fourth (but not the second) allegations proved and the fifth (but not the sixth) allegations proved as well. The fifth allegation was that, if any of the four allegations was made out, Mr Beardsley's conduct was in serious breach of the Club's Equality Policy and/or Anti-Harassment Policy and/or the Premier League's guidance for safer working practices with regard to safeguarding vulnerable groups.

4. The allegations that were proved were that:

   (i) Mr Beardsley made the comment "*You should be used to that*" to one or more black players of African origin at the U23 team-building event at Go Ape in October 2017. This was said to be an offensive and unacceptable comment and/or a negative racial stereotype that Black Africans would be used to and/or good at climbing trees and/or may amount to racial harassment.

   (ii) Mr Beardsley questioned the legitimacy of the age of one or more persons of black African origin by stating "*it's cos you're not 18*" and/or words to the effect of "*he's not 18*" to or about one or more players of black African origin. This is alleged to be an offensive and unacceptable comment and/or negative stereotype that players of black African origin commit fraud as to their true age and/or may amount to racial harassment. One occurrence of this allegation is a comment alleged to have been made to a 17 year old minor.

   (iii) Mr Beardsley called A, a player of black African origin, a monkey during a game of head tennis. Calling a person of black African

origin a monkey is alleged to be an offensive and unacceptable comment and/or a derogatory term on racial grounds and/or may therefore amount to racial harassment.

(iv) Mr Beardsley's conduct and behaviour was in serious breach of the Club's Equality Policy and/or Anti-Harassment Policy and/or the Premier League's guidance for safer working practices with regards to safeguarding vulnerable groups.

5. A further hearing was held to decide what sanction should be imposed.

6. On 9 July Mr Charnley wrote to Mr Beardsley stating that, in view of the seriousness of the matter, it had been decided that his employment with the Club should be terminated for gross misconduct without notice. Mr Charnley said that, in making the comments referred to at para 4(i) to (iii) above, Mr Beardsley knew that the comments were unacceptable.

7. Mr Beardsley appealed. His appeal was dismissed on 26 October 2018 in a fully reasoned decision.

8. On 21 March 2019, the FA charged Mr Beardsley with misconduct for three breaches of FA Rule E3 in respect of the decisions arising from the Club's disciplinary proceedings. These were that:

(i) On a date in October 2017 at a Newcastle United FC Under 23 event at Go Ape, in stating "*you should be used to that*" to one or more players of black African origin, you used language which was abusive and/or insulting contrary to Rule E3(1), It is further alleged that this breach of Rule E3(1) is an 'Aggravated Breach', as defined in Rule E3(2), as you made reference to ethnic origin and/or colour and/or race and/or nationality. **[NB: this is Allegation 1 in the disciplinary proceedings].**

(ii) On dates unknown, by questioning the legitimacy of the age of one or more players of black African origin, you used language which was abusive and/or insulting contrary to Rule E3(1). It is further alleged that this breach of Rule E3(1) is an 'Aggravated Breach' as defined in Rule E3(2) as you made reference to ethnic origin and/or colour and/or race and/or nationality **[Allegation 3 in the disciplinary proceedings].**

(iii) On a date unknown, in referring to the player A as a "monkey", you used language which was abusive and/or insulting contrary to Rule E3(1). It is further alleged that this breach of Rule E3(1) is an 'Aggravated Breach' as defined in Rule E3(2), as you made reference to ethnic origin and/or colour and/or race and/or nationality **[Allegation 4 in disciplinary proceedings].**

9. It was further alleged by the FA that this conduct brought the game into disrepute contrary to FA Rule E3(1).

PRELIMINARY POINTS

Does Regulation 24 apply?

10. The FA relies on Regulations 23 and 24 of its Disciplinary Regulations which provide:

> *"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 shall not prevent or fetter The Association conducting proceedings under the Rules.*
>
> *24. The result of those proceedings and findings upon which such 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"*

11. Mr De Marco QC submits (i) that Regulation 24 does not apply in this case, alternatively (ii) that we should disapply it.

12. As regards (i), he states (correctly) that Regulation 23 is concerned with proceedings which have not yet taken place and submits for that reason that Regulation 24 only applies to proceedings which have not been determined. In our view, this submission is plainly wrong. Regulation 24 governs the position once proceedings (which at one time lay in the future) have culminated in a result. That is precisely what has happened in this case.

13. As regards (ii), Mr De Marco submits that we should disapply Regulation 24 on the grounds that Mr Charnley's decision is flawed in a number of respects and that we are in a better position than he was to determine the three charges. For example, he only heard oral evidence from 2 witnesses whereas we have heard evidence from 12 witnesses. We consider that this submission is misconceived. The language of Regulation 24 is quite clear. The result of the disciplinary proceedings (ie the decision) and the findings on which it is based are presumed to be correct and true unless it is shown by clear and convincing evidence that this is not the case. The focus is, therefore, exclusively on the result and the findings. It is not on the quality of the findings or the result or the fairness of the proceedings which led to the findings or the result. If the quality or fairness of the result or the findings were relevant to whether Regulation 24 applies, that would have been stated expressly. If that had been the intention of the draftsman, the language of Regulation 24 would have been very different from what it is. Nor do we consider that there is any basis for reaching the conclusion for which Mr De Marco contends by some kind of implication. It would give rise to undesirable uncertainty as to whether Regulation 24 applied in any particular case. There is no reason not to give the words of the regulation their plain and ordinary meaning. There is no basis for disapplying Regulation 24.

14. There is disagreement as to how Regulation 24 works in this case. It is clear on the face of the regulation that the three charges that Mr Beardsley faces in the current proceedings are proved unless he shows by clear and convincing evidence that the result reached by Mr Charnley and his findings are not correct and true. It is not in dispute that the burden of rebutting the presumption is on Mr Beardsley. But there is disagreement as to whether the standard of proof is the balance of probabilities (as Mr De Marco contends) or some higher standard (as Ms Gallafent contends). There is also disagreement as to whether the flaws and weaknesses in the disciplinary process that was conducted by Mr Charnley which are relied on by Mr De Marco in support of his submission that Regulation 24 should be disapplied are relevant to *how* Regulation 24 should be applied.

Standard of proof in rebutting Regulation 24 presumption

15. We do not propose to rehearse the detailed submissions that were made by the Parties on this issue in May 2019. Suffice it to say that Mr Beardsley's

position was that the burden on Mr Beardsley to rebut the presumption is to do so on the balance of probabilities. This is the civil standard of proof which is flexible in its application. The FA's position is that the standard of proof that Mr Beardsley has to satisfy is higher than the balance of probabilities, but lower than beyond reasonable doubt.

16. On 17 May 2019, Lord Dyson earlier ruled in favour of Mr Beardsley on this issue. In doing so, he accepted the submissions advanced by Mr De Marco. The civil standard of the balance of probabilities is applied flexibly: see, for example *R (N) v Mental Health Review Tribunal (Northern Regions) and Others* [2006] QB 468 at paras 62 to 64. Thus as Richards LJ said at para 62, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. In our view, this flexibility is reflected in the language of Regulation 24. The words "clear and convincing evidence" serve the purpose of requiring evidence to have that quality before the presumption is rebutted on the balance of probabilities. These are ordinary words. If we are not persuaded that the evidence relied on by Mr Beardsley is clear and convincing, then he will not have rebutted the presumption on the balance of probabilities.

17. We propose to say no more about this issue because, as will become apparent, the outcome of these proceedings does not in any event turn on whether the standard of proof is the balance of probabilities or a somewhat higher standard.

How should Regulation 24 be applied?

18. Mr De Marco submits that the presumption should be given little weight and will be easily rebutted in this case because of the weaknesses in the evidence relied on by the Club and the FA and what he contends to be the flaws in the Club's disciplinary process. In our view, it is insufficient to seek to undermine the Club's findings and decision by pointing to flaws of the kind relied on by Mr De Marco. Regulation 24 provides that the result and findings of the Club are presumed to be correct unless it is shown by clear and convincing *evidence* that this is not the case. This is clearly a reference to evidence that is placed before the FA Commission. It is not a reference to flaws in the disciplinary process of the Club or any other ground on which the findings and decision can be impugned. We are not

hearing an appeal from or conducting a review of the Club's decision. The Club's decision is presumed to be correct unless is it shown by clear and convincing evidence that it is not.

Other preliminary points

Racism

19. Mr De Marco emphasised at the very outset of his opening submissions that these proceedings are not concerned with the question whether Mr Beardsley is a racist. We entirely agree. The proceedings are concerned with and only with three very specific charges. We echo what Mr Charnley said at page 2 of his decision:

> *"It is important, therefore, that I should make it clear that this investigation has not been, and should not be interpreted as having been, an investigation into whether Peter is a racist. Nor should any of the conclusions I reach below be thought to be addressing that question. It is possible for someone who is not a racist to commit acts of racial discrimination."*

20. We have been impressed by the character evidence that Mr Beardsley has produced in his support on this point.

Credibility

21. In his closing submissions (Tr 3/132/11), Mr De Marco said that this case "*is fundamentally not about credibility*". This may be true up to a point, but there are issues of credibility that we shall need to resolve when we address the three charges. We have in mind in particular the third charge. Mr Beardsley denies in the strongest possible terms having made the "monkey" comment which lies at the heart of this charge. In his evidence to us, he said (Tr 1/214/12):

> *"No. No. No. So you are reading what you think I have said, but 100 per cent I did not call him a monkey. I have waited 20 months for this day, because I could have walked away and*

just been in the clear. I could have had a new job or anything. I have waited 20 months for this. For that alone, for that comment alone that I am accused to have said. I am not accepting that."

22. As we shall explain, this evidence is in conflict with that of other witnesses. Our resolution at least of this issue requires us to make a judgment about Mr Beardsley's credibility.

23. Ms Gallafent points to examples in the evidence which cast real doubt as to Mr Beardsley's general credibility. First, at investigation meeting 27a, it was put to him that he had called player B a "twat" and "cocky bastard". He replied:

> *"If I do its never nasty, just mickey taking. It's the context that it's said. If I do, it's not aggressively, never have I once called him these things".*

24. When cross-examined about this, he conceded that he used these words to B when the player tried to make a fool of him (1/38/22).

25. Secondly, he said he did not make these sorts of comments to many other players (Tr 1/39/4). But there is evidence from no fewer than 23 players that he did make such comments to many of the players, although it seems that he targeted B more than the others: see the schedule produced by Ms Gallafent for her closing submissions. We have no reason to doubt the evidence of the other players on this point.

26. Thirdly, Mr Beardsley changed his evidence as to what he said in relation to the second charge. We shall deal with this when we come to the second charge in detail and his alleged comment in relation to 003 "*it's because you're not eighteen*". At the meeting on 23 February 2018, he said "*I didn't say it*". In his witness statement dated 11 April 2018, he said "*I do not recall making this comment*". He said the same thing in his witness statement dated 4 May 2018. And yet in his evidence before us, he said (Tr 1/30/11):

> *"I think, on reflection—obviously you can imagine I have been 20 months in the waiting for this—I have been reflecting on lots of things and I think I did have a conversation with [003], in terms of*

there was a game going on at the time and I asked him why he wasn't playing and then he sort of, you know, was trying to give me a reason and I said 'It's probably because you're not 18'".

27. This was a remarkable shift of position.

28. Fourthly, in his witness statement dated 4 May 2018 for the Club disciplinary proceedings, Mr Beardsley said:

> *"I believe that [B], 003 and 004 ….incorrectly formed a view that they were intentionally not being selected to play and were trying to avoid being released by the Club at the end of their contracts. This was not the case. It is of particular note that some of the allegations made against me to date have been made by [B]and 003 who are managed by the same agency. It may be that the making of these allegations are an attempt to avoid their release from a Premier League team with the inevitable financial loss that would ensue. Further the making of these allegations could also lead to financial gain from media leaks….It would appear that these players (or their agents) are the source of such disclosures"*

29. He made the same point during his evidence before Mr Charnley on 8 May 2018 (p 517 of our bundle). He repeated it at para 19 of the witness statement dated 11 April 2019 that he made for the current FA proceedings. There was no evidential basis for these statements. The motivation attributed by Mr Beardsley to at least the three witnesses he named was clearly unfounded because there was no reason to believe that they thought that they would be leaving the Club at the time of their interviews. We know that 003 did not leave the Club until 1 July 2018 (several months after his interviews in December 2017 and February 2018); and 004 did not leave the Club until 1 July 2019 (many months after his interviews in December 2017 and February 2018.) Nor were other witnesses who gave evidence against Mr Beardsley (015, 018 and 019) told before their interviews that they were to be released from the Club.

30. Mr Beardsley was pressed on this in cross-examination. He could not explain why the three black players he had identified had made up allegations motivated by financial greed, but none of the white players had done so. But he did not retract his allegation of collusive making up of allegations. And yet Mr De Marco has distanced himself from this evidence

of Mr Beardsley. He submits that it is not evidence on which Mr Beardsley can rely and Mr De Marco does not rely on it in advancing Mr Beardsley's defence. He does not allege that there was a conspiracy by the players to make up lies against Mr Beardsley because they were disaffected.

31. Mr De Marco submits that it is understandable that, when Mr Beardsley saw that players had said things about him which he believed to be untrue and which had caused his life to be turned upside down, his reaction was to think that people were making the allegations up (Tr 3/135/13). Mr De Marco submits that we should not hold this against Mr Beardsley.

32. We do not feel able to take such a charitable view of this. Not only did Mr Beardsley allege that some of the players had put their heads together to tell serious and hugely damaging lies, but he advanced a florid story of greedy motives implicating the agent of two of them for which he must have known that he did not have a shred of evidence. When he was pressed about this during his evidence, he did not apologise and say that was so upset by the allegations that he had been carried away. He did not withdraw them. We infer that the decision not to rely on the allegations was taken on the basis of legal advice. We regret to say that this aspect of Mr Beardsley's evidence does not reflect well on him.

Failure to report complaints

33. At para 4 of his witness statement dated 11 April 2019, Mr Beardsley says:

> *"Given the high profile nature of the roles I have fulfilled, it is inconceivable that had I made [the comments which are the subject of the charges], they would not have been reported to the Club or in the press. The reason there are no such reports is because I do not make such comments."*

34. We are not impressed by this point. Mr Beardsley is a famous footballer who has been described as a footballing "legend". There is plenty of evidence that the young players for whom he was responsible during the years 2014 to 2018 were in awe of and intimidated by him. At the Club Disciplinary Hearing on 8 May 2018 (506), 003 was asked by Mr Charnley why he did not raise the issue of Mr Beardsley's comments with the Club

sooner. He replied that he was waiting to find out whether his contract was to be extended and whether he had a future at the Club. He said: "*Last thing wanted to do was bring something up which could make the decision for the club or him*". He then said:

> *"Not going to mention names, but people are scared, they have not raised issues, a few of the lads don't want to say stuff, stuff has been said in the changing rooms, were you there, did you hear that, and they say yes but when you ask if they'll say something, no".*

Risk of contamination of the players' evidence

35. As we have said, Mr De Marco does not contend that the players who have given evidence against Mr Beardsley have colluded and deliberately conspired to give untruthful accounts of what he said. Rather, Mr De Marco submits that there was or may have been some innocent contamination of the kind discussed by Underhill J in a different context in *Saunders* [2008] EWHC 2372 (Admin) at para 13. In assessing the evidence in this case, we bear in mind the salutary warning of Underhill J. We accept that the recollection of witness X may be contaminated by what he has been told by witness Y. Witness X may in good faith adopt the account given by witness Y subconsciously believing it to accord with his own recollection when in fact it does not do so. We accept that such innocent contamination occurs. But the fact that it does occur in some circumstances does not mean that it occurred in this case.

Anonymity

36. We ruled that we would anonymise the players who gave evidence before us and who are referred to by name in the papers. This is because we were satisfied that they had genuine and well-founded fears that, if they gave evidence against Mr Beardsley, they might suffer adverse consequences in the football world and/or in the local community and/or in the media. We have referred to the players by using the numbers that were used in the disciplinary investigation and, where there were no such numbers, by using a letter.

THE FIRST CHARGE

Preliminary points

37. This is the charge set out at para 8(i) above. The charge concerns a comment allegedly made by Mr Beardsley at the U23 team building event at Go Ape in October 2017. It is not in issue that Mr Beardsley was present and that about 24 young players and staff were present too. There was some confusion in the evidence before us as to the stages of the event. In the end it became clear that there were three stages. First, the introductory stage when all the participants arranged themselves into a semi-circle and were told what to expect. Secondly, the practice stage when in groups of four they practised clipping on and unclipping themselves on to the line. This is what has also been referred to as "the warm up phase". Thirdly, the main stage when one by one they clipped on and went up on to a zip line among the trees and then completed the course.

38. The decision of Mr Charnley on the allegation which is reflected in this first charge before us included:

> "*There is ample evidence to suggest this comment [sc 'you should be used to that] was made and I do find that it was made. Peter Beardsley denies making this comment and his barrister pointed out that 16 out of 24 attendees did not hear the comment. However, the fact that a person did not hear the comment does not mean that it was not made. A number of people confirm that they did hear the comment. Notably, [003] said that he heard the comment. He attended the disciplinary meeting and I found his evidence to be very believable. Various witnesses also state that they heard this comment. These are [004], [011], [012], [018], [019], and [one other].*
>
> *……However, what became clear in the hearing was that there was a warm up session and a main session. Based on the evidence of [003] and [004] I find that the comment was made in the warm up session…."*

39. Ms Gallafent submits that Mr Beardsley has not shown by clear and convincing evidence that these findings are not correct and true.

40. In summary, the evidence before Mr Charnley (supplemented by the additional evidence that we have received) falls into the following categories. Some witnesses say that they heard Mr Beardsley say to one or more young black African players with reference to climbing "*you should be used to that*". Others say that they heard him say "*you should be good at that*". Mr Beardsley says that he said (or may have said) "*you will enjoy this*". Finally, some witnesses said that they could not recall any comment being made by Mr Beardsley. Before we set out the key elements of the evidence and make our decision, we need to deal with a preliminary point on the wording of the charge which clearly states "*you should be used to that*". Ms Gallafent's primary case is that Mr Beardsley has not rebutted the presumption that Mr Charnley's finding that this precise comment was made is true and correct. But in case we were to conclude that Mr Beardsley's comment was "*you should be good at this*", she applied for permission to amend the charge so as to read "*in stating 'you should be used to that or words to that effect'".*

41. Mr De Marco opposes this application on the grounds that it is unfair and, if granted, would cause prejudice to Mr Beardsley. When Lord Dyson asked him to identify the prejudice and in particular to say in what way Mr Beardsley would or might have conducted his defence differently if he had known from the outset that he was facing a charge in this amended form, Mr De Marco responded that he was unable to say and that this was an impermissible inquiry to make.

42. We do not agree. The key question is whether a late amendment to a charge will or may cause prejudice. It is not only permissible but necessary to investigate the issue of prejudice. We accept that, if there is any reasonable doubt as to whether prejudice will be caused, permission to amend is most unlikely to be granted. But we do not see how Mr Beardsley will be prejudiced by this amendment. In the context of this case, the difference between "*you should be used to that*" and "*you should be good at that*" is of no materiality. We accept that in some contexts, there would or might be a real difference between the two comments. But in the context of the Go Ape event, at which young black footballers were about to climb up into the trees, the comment directed to them "*you should be used to that*" would have been understood in the same way as the comment "*you should be good at that*". Both would have been considered to be abusive and insulting and

expressions of a negative racial stereotypical nature about young black boys climbing trees.

43. In our view, it is unrealistic to suppose that Mr Beardsley's defence would have been conducted differently from the way it has been conducted if he had been facing a charge in the amended form. By definition, the addition of "*or words to that effect*" does not change the meaning of the charge.

44. As will become apparent, the real issue in relation to the first charge is whether Mr Beardsley said (i) "*you should be used to that/you should be good at that*" or (ii) "*you will enjoy that*".

The evidence on the first charge

45. The evidence has been the subject of detailed analysis by counsel in this case. We start with the evidence about the comment allegedly made by Mr Beardsley. 004 said in his interview on 13 December 2017 that at the practising stage Mr Beardsley said "*you should be used to that*". 003 said when he was interviewed on 11 December 2017, on being asked to give examples of Mr Beardsley's racist terms, said:

> *"When we were at Go Ape he said to us 'we should be used to that' which I took to be a reference to climbing the trees, but Peter said 'I'm not being funny' and tried to explain it was a reference to climbing mountains, but at the time we weren't climbing mountains, we were climbing a tree. 'I'm not being funny is all he ever says after he makes a comment."*

46. In a second interview on 13 December 2017, 003 said that the comment was made at the start of the course. He added that he was disgusted by it. He was asked many questions about this when he gave evidence to Mr Charnley. His evidence in relation to the first allegation (which corresponds with charge 1 in these proceedings) is transcribed at page 497 to 500 of our bundle. Most of the questions were directed to when, where and to precisely whom the comment "*you should be used to that*" was made. At the end of his evidence to Mr Charnley in relation to the first allegation (500), 003 referred to a comment that he said was made by Mr Beardsley "*at the start*". 003 told us that this comment was made during a conversation between 004 and Mr Beardsley "*about something similar in South Africa*". He said that

in that conversation, Mr Beardsley said to 004 "*you'll enjoy this*". We did not find this part of 003's evidence easy to follow. But it is quite clear that he was continuing to maintain in his second interview that Mr Beardsley had said "*you should be used to that*".

47. 003 told us that after Mr Beardsley had made his comment, "*we sort of just looked shocked and just literally just looked at him and then obviously he went on to respond by saying 'I'm not being funny, there is loads of mountains up there'"* (Tr 2/177/22). At Tr 2/180/3, he said that he thought the comment was "*you should be good at this*". He rejected the suggestion put to him by Mr De Marco that Mr Beardsley had said words to the effect of "*you will enjoy this".* He said:

> *"No. I think 'You will enjoy this' and 'You should be good at this' is two different things. If I heard 'You will enjoy this' there is no harm in that".*

48. At his interview on 23 January 2018, 011 said that he remembered hearing Mr Beardsley make a comment something like "*you lot should be good at this*", but he could not remember the exact words. In his evidence before us, he said it was possible that Mr Beardsley had said "*you should enjoy this*", but it was more something along the lines of "*you lot should be good at this".*

49. At his interview on 25 January 2018, 019 said he heard Mr Beardsley make the comment "*you should be used to this*" to a black player who was waiting to begin the activities. When asked some further questions by Jenni Kennedy on 13 March 2019, 019 said that he heard Mr Beardsley say "*you lot should be good at this*". When cross examined about this before us by Mr De Marco, 019 said that he could not recall whether the comment was "*you should be used to this"* or "*you lot should be good at this*". But it was definitely not "*you will enjoy this*": see Tr 2/145/16-25. He was asked why he was sure about this. He replied that it was because at the time he remembered thinking "*Oh, that didn't sound great*"; and if he had said "*you will enjoy this*", he would not have thought that. He explained that to say "*you will enjoy that*" was "*just a normal thing to say. You could say that to anyone".*

50. In his interview on 23 January 2018, 012 said that during the warm up activities Mr Beardsley made the comment "*you should be used to this*" to

a black player waiting to begin the activities. He added that he remembered thinking at the time "*oh you can't say that*". In his evidence to us, he said that Mr Beardsley had said that the words he remembered were "*you should be good at this*". When he was asked whether it was possible that Mr Beardsley had said "*you should enjoy this*", he twice replied emphatically "*no*".

51. In his interview on 25 January 2018, 018 was asked whether he heard Mr Beardsley say "*you should be used to this*". He replied that he didn't hear the exact words but could remember thinking at the time "*you can't say that*". He regarded it as a racist remark. When asked in cross examination before us whether Mr Beardsley might have said something like "*you should enjoy this*", 018 replied that he could not remember.

52. A gave a statement dated 12 April 2019 (90) in which he said at para 3 that Mr Beardsley was talking to 004 at the Go Ape event. He heard Mr Beardsley say something like "*you should be good at this*", but he could not say in what context that was said. The statement did not concern him. When it was suggested to him by Mr De Marco that Mr Beardsley had said "*you should enjoy this*", he said: "*No. I'm not sure, but I did hear him saying 'you should be good at this', but I don't think he would have meant it in that way".* He then said that he could not remember the exact words that had been used: Tr 2/31/3-9.

53. A further witness was interviewed on 9 February 2018 (333). He described being present at the Go Ape event and said that he heard Mr Beardsley say "*you should be used to this*" to a black player who was waiting to begin the activities. The witness said that he thought that the player was scared of heights and that it was in that context that Mr Beardsley had made the comment.

54. And finally to Mr Beardsley himself. In his interview on 8 January 2018, he denied saying "*you should be used to this*" (184). He continued:

> *"I remember making a comment to one of them, I asked one of them if they had anything else like this in South Africa, and he said 'we just go outdoors' referring to him and his brother. At that point I might have said 'You'll enjoy this'".*

55. In his evidence before us, Mr Beardsley now said that he definitely had said "*you will enjoy this*". *"I tell you as a fact now I did say that*" (Tr 1/83/17). He did not explain why his recollection in July 2019 of an event in October 2017 was to be preferred to his recollection in January 2018.

Our conclusion on the first charge

56. In our summary of the evidence, we have concentrated on what the witnesses say about the words used by Mr Beardsley. There is a great deal of evidence about who was standing where at different stages of the event and various forensic points have been made to us about that. But we have been able to reach a clear conclusion on the words used by Mr Beardsley without making detailed findings about these other matters. We acknowledge that there were discrepancies between what was said by some of the witnesses in relation to them. This is not at all surprising. Indeed, the fact that their evidence was not identical in every particular is a strength rather than a weakness in it.

57. The starting point is Mr Charnley's finding that Mr Beardsley said "*you should be used to that"*. This finding is supported by the majority of the witnesses who have given evidence on the details of Mr Beardsley's comment, namely 003, 004, 019, 012, 018 and the witness referred to at para 53 above. It is true that witness 019 also says that Mr Beardsley might have said "*you should be good at it*". Witness 011 and A support "*you should be good at it*". We found the witnesses who gave evidence against Mr Beardsley to be honest. Most of them were clear and articulate. It is a striking feature of the evidence that a number of the witnesses gave convincing reasons for insisting that Mr Beardsley did make the comments that they attributed to him. We have in mind the description by 018 and 019 of their reactions to Mr Beardsley's comment. We have no hesitation in concluding that Mr Beardsley has not rebutted the presumption that Mr Charnley's finding is correct and true. On the basis of the oral and written evidence before us, we would have made the same finding for ourselves if the presumption had not applied. On that footing, there was no need for Ms Gallafent to apply for an amendment of the charge.

58. For completeness, we go further and say that in our judgment there is no material distinction in the context of the Go Ape event between "*you are used to it*" and "*you should be good at it*". The material distinction is

between these two comments and "*you should enjoy this*. There is almost no support in the evidence for Mr Beardsley's claim that he said "*you should enjoy this*".

59. It (rightly) does not seem to be in dispute that, if the alleged words or words to that effect were said, they were abusive and/or insulting because they implied that black Africans were accustomed to climbing trees. No doubt that is why Mr Beardsley gave the evidence that we have rejected that he had done no more than make the innocent remark "*you should enjoy this*".

60. It follows that the first charge is proved in its unamended version as well as in its amended version.

THE SECOND CHARGE

61. This is the charge set out at para 8(ii) above. It was amplified in the Explanatory Note that accompanied the FA's charges in these terms:

> *"That PB questioned the legitimacy of the age of one or more persons of black African origin by stating 'It's 'cos you're not 18' and/or words to the effect of 'he's not 18' to or about one or more players of black African origin.*
>
> *This was alleged to be an offensive and unacceptable comment and/or a negative racial stereotype that players of black African origin commit fraud as to their true age and/or may amount to racial harassment. One occurrence was alleged to have been made to a 17 year old".*

62. The 17 year old mentioned in this Note was 003. Mr Charnley said:

> *"I consider this allegation is well founded and therefore is upheld.*
>
> *I found this allegation the most difficult on which to reach a conclusion. Peter Beardsley denies making this comment and, in addition to this denial, his barrister pointed out that [003] was 17 at the time the comment was made and therefore if the comment was made it was factually correct.*

I do not accept this explanation. The context is that this is a football team of under 18 players. To suggest that it is not offensive because it is factual completely ignores and overlooks the fact that [003] was a second year scholar and therefore that was the team he would be picked for.

[In the fourth paragraph, he explains why he finds that the comment was made].

…When questioned regarding this allegation. [003] confirmed that this comment was unwanted and that he considered it to be offensive and unacceptable. He also considered it to be racist because there were a lot of allegations questioning the age of black players going around at the time. He confirmed he considers it a stereotype to do with race and foreign people who come to this country. He said he was disgusted by this.

This is a well-known racial stereotype in football. In advance of the meeting, Peter Beardsley accepted this comment would be capable of being a racial stereotype. Having found that Peter Beardsley did make this comment, that [003] was offended, that [003's] reaction was that he was disgusted, and given the fact that this is a racial stereotype, I find that the comment was unwanted, related to race, violated [003's] dignity and/or created a hostile, humiliating and/or offensive environment so as to amount to harassment.

For the reasons I have already explained for allegation 1, I make no finding as to whether this was intentional on the part of Peter Beardsley".

The evidence on the second charge

The evidence before Mr Charnley

63. In his interview on 11 December 2017 (162), 003 said there were plenty of examples of Mr Beardsley being racist including:

> *"last season I wasn't in U18 squad and the next day he was quizzing me about not being in the squad, and he said 'That's because you are not 18'. I took this to be a reference to players of African origin forging papers regarding their age, and I took it because I am big, that I was older, the same was said to [another player]"*

64. In the meeting on 13 December 2017 (170), 003 said that he was shocked by this comment. He took it to be a reference to "*some kind of fraudulent activity or identity."*

65. At the hearing before Mr Charnley, 003 accepted that he was 17 years of age at the time of the alleged comment. It was put to him by Mr Flynn (counsel for Mr Beardsley) that Mr Beardsley had not made the comment. 003 said "*100% it happened, this is one of the strongest things that hurt me".*

66. Other witnesses gave similar evidence during the Club's investigations. It is sufficient to refer to what 015 said in his interview on 25 January 2018 (271). He was asked whether he had heard Mr Beardsley say "*that's because you are not 18*" to any player in order to question the legitimacy of their age and personal credentials. He replied:

> *"Last year was the most recent, which was the one that stands out, he said to one of the players on the pitches and was to do with why they were not in the U18s, and it was to 003. We were walking back in, off the pitches, and I can't remember the context as to why he said it, but it stood out in my memory and I remember being startled by it, and thinking it wasn't right."*

67. At his interview of 8 January 2018 (184), Mr Beardsley said that the person he thought had said that he (Mr Beardsley) had made the comment "*it's because you're not 18*" didn't have international clearance. It became clear during his rather confusing evidence before us that he (wrongly) thought that the person concerned was 004, not 003. Mr Beardsley did not at this stage admit that he had made the alleged comment.

68. When interviewed on 23 February 2018, Mr Beardsley was told that four witnesses had heard him make the comment "*that's because you're not 18*"

(341). His response was "*No other comment than I didn't say it and I would say the witnesses are mistaken".*

69. In his witness statement dated 4 May 2018, Mr Beardsley said (436):

> *"I do not recall making this comment but if I did say that [003] was not 18, then that was correct. His age may have explained why he was not playing (i.e. that he was a younger player)."*

The evidence before the Commission

70. But at the hearing before us, Mr Beardsley said that he did now remember making the comment to 003. This was a striking *volte-face.* He now said that he "*definitely*" did make the comment to 003 (Tr 3/164/18). When asked by Ms Gallafent to explain why he had not recalled this when he was interviewed in February 2018, he replied:

> *"So now I have looked at all my facts and figures and I can take you to exactly where we were, but there were no other witnesses and there was a game going on at the time".*

71. He said that it was only when he looked at the evidence again about three months ago when starting to prepare for this hearing that he realised that after all that he had made the comment (Tr 1/171/2-9). A little later in his evidence he said that he remembered the comment about a month ago. He first told Mr De Marco on the day before the hearing. He did not tell anyone before then because he did not think it was relevant.

72. So Mr Beardsley now positively asserts that he made the comment to 003. He continued to deny having made a similar comment on other occasions to three other players, namely an opposition player, 019 and another Club player. In view of Mr Beardsley's admission that he made the comment in relation to 003, we do not find it necessary to examine the evidence in relation these three other players.

73. Mr Beardsley explained during his cross examination the significance of the comment that 003 had not been selected because he was not 18. The starting point is that players who were under 18 at the start of the season were eligible to play in the U18 team even if their 18th birthday fell during

the season. Mr Beardsley said that Dave Watson (who selected the team) favoured older eligible players i.e. he preferred players who were 18 to those who were 17 because they tended to be better players. Mr Beardsley explained in his evidence (Tr 1/175/18 to 177/11) that what he meant by his comment was that the reason why 003 was not selected was that he was only 17. He was not doubting 003's age.

Our conclusion on the second charge

74. We reject as incredible Mr Beardsley's account of why he changed his evidence on the central question of whether he had made the comment. First, his recollection in December 2017 to February 2018 must have been better than it was in April to July 2019. Secondly, he could not point to any external factor or trigger which explained why he suddenly and so long after the event had the revelation that the position that he had stoutly maintained for so long was wrong. Thirdly, as Ms Gallafent says, there is an obvious reason why Mr Beardsley might have changed his account. If he did not accept that he had made the comment, the weight of the evidence was such that he must have known that it was likely that the Commission would find that it was made. In that event, he would not be able to provide a convincing explanation of what he meant by the comment. We have referred at para 69 above to what he said in his witness statement of 4 May 2018. But to say that, *if he made the comment*, 003's age may have explained why he was not playing is far weaker and less persuasive than to say positively that he *did* make the statement and that it reflected Dave Watson's preference for older players. Fourthly, the suggestion that the comment had anything to do with Dave Watson's policy of choosing older players had not been made until it was made during the hearing before us. Mr Beardsley's response to this point was that he did not want to be explicit about what he meant. He didn't want to "cause the coach a problem" (Tr 1/178/19). We are not persuaded by this response. In our view, the failure to mention Dave Watson earlier was a piece of last-minute thinking on the part of Mr Beardsley.

75. Although we have rejected Mr Beardsley's account of the reason for his *volte-face,* the question remains whether the statement "*because you are not 18*" (i) was "*abusive and/or insulting*" in the sense that it amounted to an express or implied questioning of the legitimacy of 003's age or (ii) was a factually correct statement which did no more than reflect Dave Watson's

selection policy of preferring eligible 18 years old players to 17 year old players. We shall refer to these two meanings as "meaning A" and "meaning B".

76. In resolving this question, we bear in mind the important undisputed evidence that, as Mr Charnley put it, a comment which questions the age of a black player is a well-known example of racial stereotyping. Mr Beardsley accepted that it was a well-known racial stereotype in football that black players commit age fraud (Tr 1/146/25). In his evidence on 8 May, he agreed that "*the questioning of a black player's age is a negative stereotype."*

77. Mr De Marco submits quite simply that we should adopt meaning B. He says that the comment that 003 had not been selected because he was 18 was factually correct and did not expressly or impliedly question 003's age.

78. In our view, the answer to the question of which meaning to adopt lies in the context in which the comment was made. It is obvious that in some contexts the comment that a player has not been selected to play because he is not 18 will have no racial connotations at all. But the context here is that the comment was made to a black player of African origin and questioning the age of a black player is a well-known example of racial stereotyping in football. Mr De Marco's submission divorces the comment from this context.

79. It is revealing that, when he was asked by Ms Gallafent "*but [003] might have heard [the comment] as offensive, might he not?"* Mr Beardsley replied "*Absolutely, and that I can't argue with*". Equally important was the evidence given by 003 at the hearing before Mr Charnley (502) that he had taken Mr Beardsley's comment as "*a reference to forging papers*" as did his parents. When Mr Flynn pointed out that Mr Beardsley had not *said* that, 003 replied:

> *"He didn't need to say it. If it's sunny outside, don't need to tell someone to wear shorts, it's obvious, he was saying I was too young to play".*

80. We are in no doubt that the transcription is corrupt here: the word "*not*" should have been inserted before "*saying*", because otherwise the text makes no sense. 003 was clearly saying that he understood the comment as

bearing meaning B. That is consistent with his statement on 13 December 2017 (170) that he was "*shocked*" by the comment; and 015's statement on 26 January 2016 that he was "*startled*" by the comment and thought "*that wasn't right*". These were the reactions of honest intelligent witnesses which we accept as having been genuinely held at the time. In view of Mr Beardsley's answer recorded at para 79 above, he would not have been surprised that these witnesses reacted as they did.

81. We should add that, if Mr Beardsley was saying that 003 had not been selected because he was too young, one would surely have expected him to explain this to him and say that it was because of Dave Watson's policy. Far from doing that, he made no mention of this policy until the hearing before us. The nearest he got to explaining his comment was in his witness statement of 4 May 2018 to which we have referred at para 69 above This is a comment which he repeated at para 38 of his witness statement for the current proceedings made on 11 April 2019.

82. In these circumstances, we are in no doubt that meaning A is to be preferred to meaning B. We reach this conclusion without regard to what was in Mr Beardsley's mind when he made the comment. His subjective intention and motives are irrelevant.

83. We conclude, therefore, that Mr Charnley made the correct finding on the second charge, although we have analysed the issues somewhat differently from the way he did. We think we could decide this charge by holding (in reliance on Regulation 24) that Mr Beardsley has not shown by clear and convincing *evidence* that Mr Charnley's decision and findings are incorrect and untrue. Mr Beardsley has sought to meet the second charge by arguing in favour of meaning B. His argument does not depend on evidence. It depends on *interpreting* the comment which is the subject of the charge in a certain way. We did not hear submissions on the relevance and significance of Regulation 24 in these circumstances. We prefer to decide the second charge on the basis of *our* assessment of the meaning of the comment. For the reasons that we have given, we adopt meaning B and uphold the charge.

THE THIRD CHARGE

84. This is the charge set out at para 8 (iii) above. Mr Charnley said:

> *"I consider that this allegation is well founded and therefore is upheld. [……]*
>
> *I accept that Peter Beardsley denies this allegation and I accept that there is uncertainty regarding where and when it was said. However, I do not agree that he cannot respond to an allegation of calling a black person a monkey because those accusing him are not fully consistent regarding where or when it happened. That is such an offensive term that I consider he will be able to respond to state whether he has ever used that term in such a way or he has not. I accept that his evidence is that he has not, but I prefer the evidence of the other witnesses.*
>
> *This allegation was initially raised by C…., who had been told about (but had not heard) the comment. [010] then stated that he had heard the comment made in the gym during a game of head tennis. [010] gave that information when he was asked whether he could give examples of comments that he would deem to be racist or could be deemed to be racist by other people.*
>
> *[016] and [017] both state that they heard the comment made outside. Both of these witnesses stated that this was said when they were asked 'have you ever witnessed or heard PB say anything that could be racially offensive or racist?' They were asked an open question and they responded saying that they had heard him call someone a monkey. [016] and [017] both confirmed the comment was made about [A]. [A] said he did not hear the comment but said that he was told that Peter Beardsley had made the comment.*
>
> *Three people can remember this comment being made and two more (including the target [A]) also confirmed they are aware of the comment being made. I therefore find that the comment was made".*

The evidence on the third charge

The evidence before Mr Charnley

85. At an interview on 17 January 2018 (199), in answer to the question what kind of racist comments by Mr Beardsley had he been made aware of, C said: "*I know he supposedly called one of them a monkey*".

86. At an interview on 23 January 2018 (247), 010 was asked whether he had ever witnessed anything that could be deemed racially offensive or racist. When asked for an example, he said: "*We were playing in the gym, and one of the black players was dancing around and Peter made a Monkey reference, but you could take that one or two ways….I can't remember exactly [what terminology was used], but off the top of my head, it was something like 'Look at [A] being a Monkey'".* On 27 February 2018 (344), when asked when it happened, C said "*75% sure it was this season, but I can't remember exactly when".* On 6 March 2018 (356), when asked to clarify how certain he was that the comment was made in the gym, C said "*Pretty certain. 90% but unless I'm getting confused. My memory is very unclear but I do remember something happening."*

87. At an interview on 25 January 2018 (275), in answer to the question whether he had ever witnessed or heard Mr Beardsley say anything that could be deemed racially offensive or racist, 016 said:

> *"Yes. There was an incident at the start of the season where through the week they were playing head tennis after training. Peter would play head tennis against a group of players who were black, the players won this game and one of the players started jumping around celebrating, and Peter said 'Wow you really are a Monkey.'"*

88. He said that the player was A and he (016) was not sure whether A had heard the comment. Most people were watching. They included Terry Mitchell and Steve Harrison, who were members of staff. 016 confirmed on 2 March 2018 that the monkey comment was made on pitch 5 at the end of training.

89. At an interview on 25 January 2018 (279), in answer to the question whether he had ever witnessed or heard Mr Beardsley say anything that could be deemed racially offensive or racist, 017 said:

> *"There was a time when we were playing head tennis, and [A] was jumping around and he said 'Wow you really are a monkey' that's*

what I heard, but I don't think Peter meant it as racist, but it came out looking bad as he is a black player."

90. The target of the alleged comment was interviewed on 1 February 2018 (312). He said:

> *"Apparently [Mr Beardsley] said 'wow he really is a monkey'. I didn't hear what he said. I heard off another player what he said, but I didn't hear it. I can't remember who told me".*

91. As against the evidence of these five witnesses, both Mr Harrison and Mr Mitchell said that they did not hear the alleged comment and both said that, although they used to play head tennis in the gym, there came a time when this ceased and the game was only played outside (305), (308), (352) and (353). Ben Dawson (354) said that he did not think that the staff and players had played head tennis "this year" i.e in 2018.

92. Mr Beardsley said at his interview on 23 February 2018 that he did not make the monkey comment and added "*don't go into gym often so would not have happened*" (342). On 4 May 2018 (438), he again denied having made the comment and he said that he had not played ball games in the gym since they were banned. During the hearing before Mr Charnley, he said "*Monkey, not said 100%. I like a laugh. I have a laugh, but I am not critical of people".* In his oral evidence before Mr Charnley, he again denied having made the monkey comment (514).

The evidence before the Commission

93. There are two areas of evidence to consider. The first is the evidence of witnesses as to whether Mr Beardsley made the comment. The second is whether, and if so when, head tennis was played in the gym (where it is alleged that the comment was made).

94. Mr Harrison said that he had not heard the comment (93). We found his evidence on whether head tennis was ever played in the gym rather difficult to follow. Initially, he said that no-one had ever been allowed to play in the gym (Tr 2/47/19). Later, he said that it used to be played there until it was banned because of the mural and possibly also because of refurbishment

work in the gym (Tr 2/52-54). He had no recollection of playing with the U23 players in the gym (Tr 2/59/18).

95. Mr Mitchell said that he had not heard the monkey comment (96). He would have expected to hear such a comment if it had been made because they were all in such close proximity during head tennis. Head tennis games always took place outside on the grass (96). But during the course of his evidence before us, he modified his account as to where head tennis was played. He was shown the following exchange that had taken place during his interview on 2 March 2018:

> *"Do staff play head tennis with the players?*
>
> *Yes*
>
> *Do they play head tennis in the gym?*
>
> *I have never played in the gym, they used to play in the gym but since it got refurbished they haven't. It was last year when it was refurbished. "*

96. He said that the reference to "*they*" was a reference to the medical staff and part-time coaches he observed play in the gym (Tr 2/76/12). He later accepted that it also included players, but (he said) not U23 players. Later still, he said that the U23 players may have played in the gym, but he had never seen them do so (Tr 2/78/14). We did not find his evidence satisfactory, but it did not cause us to doubt that head tennis games were played between the staff and young players.

97. 015 said that some players (including A and 003) played head tennis in the gym "*quite a lot*" (Tr 2/98/6). C said that was "alarmed" by the report that Mr Beardsley had made the monkey comment (Tr 2/111/7). He could not explain why he had not reported it at the time.

98. 016 said that he was one of a group of people who sat around the edge of the pitch watching the game of head tennis between staff and players. He was pressed by Mr De Marco to concede that he did not hear Mr Beardsley make the alleged comment. The exchanges between them included the following:

" *Q. It could be that you didn't hear it properly, or that you misheard it*
A. No, I did hear it.
Q. Did you talk about the allegation to anyone else?
A. I think when we heard it, I think I was—I might have been sat next to [017] or someone else and we sort of looked at each other in a bit of disbelief.
Q……..
A. Yeah, I think it would have been—I can't remember saying anything, it is obviously a long time ago, but I can remember the sort of looking at each other like. You know—a look to say 'You cannot really be saying that.'"

99. 017 said that when he heard the monkey comment, he and A had been playing head tennis just off the training pitches against Mr Beardsley and either Mr Harrison or Mr Mitchell (Tr 3/33-34). He had never heard Mr Beardsley call a black player a monkey before. It shocked him. He said that he was shocked "*in the sense that like, you can't use the word 'monkey', but like I said, I don't believe that Peter is a racist"* (Tr 3/38/6-8). When asked by Mr De Marco whether he accepted that he may not have heard what Mr Beardsley said properly with regard to the monkey allegation, he replied: "*No, I think I heard it*" (Tr 3/41/7).

100. A said that he never heard the comment.

101. Mr Beardsley said that he never played head tennis in the gym (Tr 1/201/19). He said that the suggestion that he played tennis in the gym was a "blatant lie" (Tr 1/206/19). He repeatedly denied having made the monkey comment. We have already referred to his emphatic assertion that he did not make the comment (Tr 1/214/12-18) at para 21 above.

Our conclusion on the third charge

102. There was evidence from four witnesses which supported the finding that Mr Beardsley made the monkey comment. These were 016, 017 and 010 (who gave direct evidence of hearing the comment); and C who gave evidence of what he had heard from others. Other witnesses (including A himself as well as Mr Harrison and Mr Mitchell) said that they did not hear the alleged comment or did not recall it being said.

103. A striking feature of the third charge is that the evidence of 016, 017 and 010 was all given in response to open questions. It is true that there were some discrepancies in their evidence. The most notable of these was that 016 and 017 said that the comment was made during a head tennis game outside, whereas 010 said it was made while they were playing in the gym. There was a good deal of evidence about when head tennis was banned in the gym. We bear in mind the differences between the various accounts on this issue. In some contexts, such differences might be of real significance and might assist the resolution of the third charge.

104. We are, however, in no doubt that Mr Beardsley did make the monkey comment. First, we found the oral evidence of 016 and 017 particularly persuasive. 016 was adamant that he heard the comment. He described his reaction on hearing the comment (see para 98 above). We see no reason to reject this evidence. It is telling. To similar effect was the evidence of 017 (see para 99 above) and the evidence of C that when he heard reports of the monkey comment, he was "alarmed" by them. This is powerful evidence to set against Mr Beardsley's denial together with the evidence of other witnesses that they did not hear the comment or recall it being said.

105. Mr De Marco made much of the fact that no-one reported the comment to the staff. We can well understand why none of these young players wanted to rock the boat and complain about the behaviour of a powerful legendary person such as Mr Beardsley. The fact that they did not report this comment (or the other comments) does not cast doubt in our minds about the truthfulness of the evidence of these four witnesses.

106. It is unrealistic to suppose that the four witnesses made honest mistakes of recollection. No doubt that is why Mr Beardsley did not flinch from accusing at least the player witnesses of lying. In the oral evidence before Mr Charnley on 8 May 2018, the following exchange took place (517):

> *"LC You suggested that it may be that the reasons the allegations were made is that they were not in the team. Are there any reasons you can suggest for others supporting them?*
>
> *PB These allegations have been made because they were not picked for the first team. I won't tell you who they are but in my experience of football most people have a grievance when they are not picked, when they fail"*

107. However, this suggested motive was undermined when it was shown that all three players who gave direct evidence of the monkey comment remained with the Club for several months after the first interview at which they had given that evidence. We refer to para 29 above. No doubt that is why before the Commission, Mr De Marco did not seek to establish this or any other motive. That is why he sought to persuade us that the witnesses' evidence should be rejected because it was the result of contamination. But we cannot accept this. There is no evidential basis for the suggested basis. In our view, it is no more than a theoretical possibility. We prefer to found our decision on our assessment of the witnesses.

108. In our opinion, the four witnesses who gave evidence that the monkey comment was made were honest and credible. The fact that there were some differences of recollection between them about whether the head tennis game took place in the gym of outside does not cause us to doubt their evidence on the main issue of whether the comment was made. No motive has been established for them to tell egregious lies. As against that, we have serious reservations about Mr Beardsley's credibility which we have set out at paras 22 to 32 above. It did not help his cause that he asserted that the witnesses had a motive for lying which, when examined, was shown to be without foundation.

109. In our view, Mr Beardsley has not shown by clear and convincing evidence that the result of the proceedings before Mr Charnley and the findings on which it was based are incorrect and untrue. It follows that by reason of Regulation 24 they are presumed to be correct and true. We should add that we would in any event have reached the same conclusion as Mr Charnley on the more extensive evidence that has been placed before us. For the reasons that we have given, we are satisfied on the balance of probabilities that Mr Beardsley made the monkey comment. We uphold the third charge.

CONCLUSION ON LIABILITY

110. For the reasons that we have given, we uphold all three charges.

SANCTION

111. The provisions of the Disciplinary Regulations relevant to sanction are as follows:

"*40 Save where expressly stated otherwise, a Regulatory Commission shall have the power to impose any one or more of the following penalties on the Participant charged:*

....

40.2 a fine;

40.3 suspension from all or any football activity from a date that the Regulatory Commission shall order, permanently or for a stated period or number of Matches.

....

46 Whether or not a suspension has been imposed by the Regulatory Commission..., in respect of an Aggravated Breach that Regulatory Commission:

46.1 must order the Participant who commits an Aggravated Breach be subject to an education programme, the details of which will be provided to the Participant by the Association;

46.2 may impose a financial penalty or any other sanction that it considers appropriate.

47 Subject to paragraphs 48 and 49 below

47.1 where a Participant commits an Aggravated Breach for the first time, a Regulatory Commission shall impose an immediate suspension of at least five Matches on that Participant. The

Regulatory Commission may increase the suspension where additional aggravating factors are present.

47.2 where a Participant commits a second (or further) Aggravated Breach, a Regulatory Commission shall impose an immediate suspension of no fewer than six Matches. In determining the suspension to be imposed, the Regulatory Commission shall use as an entry point an immediate suspension of 10 Matches. The Regulatory Commission may depart from the entry point where aggravating or mitigating factors are present.

48 Where an Aggravated Breach is committed:

48.1 by a Participant for whom a match-based suspension would be inappropriate due only to that Participant's particular role in football (for the avoidance of doubt, this sub-paragraph shall not apply to a Manage, coach or Player);

.....

A Regulatory Commission will not be bound to impose an immediate suspension of at least five Matches for a first such breach, or no fewer than six Matches for a second or further such breach. Instead the Regulatory Commission may impose any sanction that it considers appropriate, taking into account any aggravating or mitigating factors present."

Our approach to sanction in this case

112. In our view, Regulation 47 applies to Mr Beardsley although he was not a manager, coach or player at the time when the charges were brought against him by The FA or at the time of the hearing. This does not appear to be disputed by Mr Beardsley.

113. It is also clear that the three Aggravated Breaches which we have found proved are to be treated as separate breaches for the purposes of Regulation 47. Thus Regulation 47.1 provides that the first breach attracts an immediate suspension of at least five matches which may be increased

where additional aggravating factors are present. In relation to the second and third breaches, Regulation 47.2 requires us to use as an "entry point" an immediate suspension of 10 matches (from which we may depart where aggravating or mitigating factors are present), but we must impose an immediate suspension of at least six matches. The upshot of this is that, if we were to decide to suspend Mr Beardsley from matches, we would be required to impose an immediate total suspension of at least 17 matches for the three breaches.

114. The following chronology of events is relevant.

9 January 2018	Mr Beardsley suspended on full pay by the Club.
9 July 2018	Dismissed by the Club for gross misconduct.
26 October 2018	Appeal against dismissal dismissed.
21 March 2019	Charges brought by the FA.
23 to 25 July 2019	Hearing on liability.

115. The parties have suggested (and we agree) that it is convenient to consider this period in three stages:

(i) 9 January 2018 to 9 July 2018: Mr Beardsley suspended by the Club on full pay during the investigation and disciplinary process;

(ii) 9 July 2018 to 21 March 2019: Mr Beardsley not suspended by the Club (his contract having ended on 9 July 2018), nor the subject of an Interim Suspension Order imposed by The FA; and

(iii) 21 March 2019 to date: although charged with an alleged act of misconduct, Mr Beardsley not the subject of an Interim Suspension Order.

116. The FA rightly accepts that, if it had imposed an Interim Suspension Order on Mr Beardsley, that period of suspension would fall to be taken into account by us in deciding what period of suspension to impose. But no Interim Suspension Order has been imposed in this case. There was a suspension by the Club in the first period and no suspension by anyone in

the second and third periods. The FA contends that no part of these three periods should be treated as or as analogous to a suspension by The FA and that they should not, therefore, be taken into account in computing the period of suspension to be imposed on Mr Beardsley.

117. Mr De Marco argues that the first period was with respect to the very same allegations that have led to the three charges and our findings of breach and that it should count in its entirety towards the suspension to be imposed under Regulations 47.1 and 47.2. He says that it is no different, in effect, from where an athlete is provisionally suspended from competing in his/her sport while an allegation of doping is investigated. As a matter of basic fairness, such periods are routinely taken into account, when imposing sanction and we should do the same here. He therefore submits that the first period should be taken into account month for month (if we suspend for a period of time) or match for match (if we suspend for a number of matches).

118. He accepts, however, that the second and third periods cannot be taken into account like for like in reducing any suspension because they are effectively periods of unemployment which are not akin to a suspension in the way the first period is. But he submits that they are relevant to mitigation generally.

119. In our view, the Regulations cannot be interpreted as meaning that a suspension by a body other than the FA (in this case, the Club) should count towards the minimum suspension mandated by Regulation 47.1 and 47.2. If *The FA* has already imposed a suspension, we accept that such suspension must be taken into account in determining the suspension to be imposed by a Regulatory Commission. But it is a big leap from this to say that a suspension by a Participant's employer or someone else unconnected with the FA *must* be taken into account. There is no warrant for this leap in the language of the Regulations. We accept that a suspension by a body other than The FA may be relevant to mitigation generally, but it cannot be relied on to count towards the minimum suspension periods mandated by Regulations 47.1 and 47.2.

120. We do, however, accept the submission of Mr De Marco that Regulation 40.3 permits us to backdate the suspension that we impose if we consider that fairness so requires. Ms Gallafent has not argued otherwise and it seems to us that the language of Regulation 40.3 is wide enough for this purpose, viz "*suspension…..from a date that the Regulatory Commission shall order….".*

Delay

121. Mr De Marco submits that there has been substantial delay on the part of The FA in bringing these proceedings that is not attributable to Mr Beardsley and that this should be taken into account in fixing the length of the suspension and/or the date from which it should run. He says that The FA was entitled to charge Mr Beardsley from 9 July 2018 relying (as it did) on Regulation 24. Instead, it waited for more than seven months before even charging him. The proceedings then took longer than they would usually have taken to reach a final determination largely because of The FA's inconsistent approach to the witnesses it required at the hearing. The substantial delay in reaching a final determination (more than one year after charges were brought) has caused Mr Beardsley considerable prejudice. If the charges had been brought in July 2018 and determined by September 2018, as they could have been, then even if Mr Beardsley had been made subject to a sanction of up to six months suspension, the period of suspension would have expired by March 2019, before the charges were in fact finally brought. Mr De Marco submits that this delay should be taken into account by determining that the period of suspension run from an earlier date, for example September 2018.

122. Ms Gallafent responds as follows. Mr Beardsley's appeal against the Club's decision was not determined until 26 October 2018. It was reasonable for The FA to await the outcome of the appeal before bringing charges against Mr Beardsley. That is because, by reason of Regulation 24, the Club's findings would be central to those charges.

123. Mr De Marco answers that The FA could have relied on the findings regardless of any appeal and that the reasonableness of The FA's decision to await the outcome of the appeal is immaterial.

124. We disagree. In our view, it is only if The FA could properly be criticised for awaiting the outcome of the appeal before bringing proceedings that the resultant delay should redound to the benefit of Mr Beardsley when we exercise our discretion in determining the length of the suspension or the date from which it should run. In our view, The FA cannot be criticised for waiting. If Mr Beardsley's appeal had succeeded, that would have been highly material to The FA's decision whether or not to bring proceedings.

He chose to appeal the Club's decision. In our view, he cannot reasonably complain that The FA did not bring proceedings before the end of October 2018.

125. Next, Ms Gallafent says that following the determination of Mr Beardsley's appeal, The FA was made aware by the Club that Mr Beardsley intended to bring a claim in the Employment Tribunal challenging the Club's decision to dismiss him. To the best of the FA's knowledge, the claim was filed in December 2018, but was withdrawn in late February or early March 2019. The FA does not know on what basis. Mr Beardsley has not challenged these facts and has not informed us on what basis his claim was withdrawn.

126. Mr De Marco says the Employment Tribunal proceedings were not a good reason for The FA not to bring proceedings. He submits (rightly) that an employment tribunal may not substitute itself for a fact-finding tribunal. Its focus is on reasonableness and process. The FA could and should have brought the proceedings notwithstanding the Employment Tribunal proceedings.

127. What we have said at para 124 above applies with equal force here. If the Employment Tribunal had overturned the Club's decision on the grounds relied on by Mr Beardsley (whatever these were), The FA would not have been able to rely on the Club's findings in seeking to prove the charges. It was reasonable for The FA to await the outcome of the Employment Tribunal proceedings before deciding whether, and if so how, to proceed against Mr Beardsley. Once it learnt that the Employment Tribunal claim had been withdrawn, The FA lost no time in bringing charges on 21 March 2019.

128. As regards the period between 21 March and 23 July (the first day of the hearing), we make the preliminary point that this was by no means a run of the mill straightforward case. A period of four months from start of proceedings to the start of the hearing in such a case does not seem excessively long. But Mr De Marco submits that The FA's incorrect approach to the standard of proof under Regulation 24 led it to wait until after Lord Dyson ruled on this issue on 17 May 2019 before even beginning to ascertain the availability of witnesses. He contends that The FA should have decided which witnesses it intended to rely on before it brought the proceedings and that it was therefore responsible for a delay of two months.

129. On 28 May 2019, Lord Dyson directed that the hearing date be fixed. This was done the following day, based on the availability of the parties' representatives. We are not persuaded that (i) the timing of Lord Dyson's direction was affected by the date when The FA secured the availability of its witnesses, or (ii) if his direction had been made somewhat earlier, it would have resulted in the hearing starting earlier than 23 July.

130. It follows that we do not consider it appropriate to take delay into account in our decision.

Aggravating and mitigating factors

Aggravating factors

131. The FA argues that there are the following aggravating factors:

(i) The three remarks including references to ethnic origin and/or colour and/or race and/or nationality occurred over a period of months and did not arise from a particular incident or communication;

(ii) The three remarks involved a number of different players;

(iii) The players involved were all in their late teens (one of them aged 17 at the time of one of the remarks) and at a vulnerable time in their sporting careers;

(iv) Both in the Disciplinary proceedings and before the Regulatory Commission, Mr Beardsley contended that three of the black players had made up the allegations motivated by financial greed, and implicating the agent of two of them, for which he did not have a shred of evidence. When pressed on this, he did not apologise or withdraw the allegations.

Mitigating factors

132. The FA accepts that there are the following potential mitigating factors:

(i) Mr Beardsley has no record of misconduct whilst a Participant in football from the relevant season, prior to the incidents in question, or the preceding five seasons; and

(ii) Mr Beardsley has lost his job at the Club.

133. Mr De Marco adds on instructions that Mr Beardsley has not worked in football since his dismissal from the Club. He has only ever worked in football during his entire adult life and has not been able to obtain alternative employment while the charges have been hanging over him. And he has found it impossible to secure income from football "punditry". We are willing to accept that this is the case.

134. His disciplinary record until now has been exemplary. During his playing career, in which he played in more than 800 matches, he was only ever booked on six occasions and was never sent off. He has never been subject to any disciplinary charge before.

135. It is also right to repeat para 17 above. We are satisfied that Mr Beardsley is not a racist in the sense of being ill-disposed to persons on grounds of their race or ethnicity. He is now 58 years of age. It is also relevant that he has not had the benefit of training and education about offensive racist remarks and the importance of not making them.

Suspension

136. Mr De Marco has provided us with a helpful analysis of the results of sanctions for Aggravating Breaches in the seasons 2016/17, 2017/18 and 2018/19. The data he has analysed show averages and ranges. The facts of the many cases vary considerably. He says that a five match ban is by far the most common sanction and it is very rare for any ban to be more than 10-12 matches or more than 15-16 weeks. We have taken this material into account as well as all the mitigating and aggravating factors which have mentioned.

137. We regard these breaches as serious for all the reasons set out at para 131 above. We consider that his unwarranted allegation that three young black players had concocted a story for financial reasons particularly serious (see para 32 above). It must have been stressful for these young players to have

to give evidence, particularly against someone who they understandably thought of as a footballing "legend"; and even more so to have to face unfounded allegations of fabricating evidence.

138. If Mr Beardsley have accepted the charges and apologised for his behaviour, that would have afforded him considerable mitigation. By fighting the case, he has lost the benefit of that.

139. We accept that Mr Beardsley has not had the training and education that he plainly needs. It is regrettable that this should now be necessary. But the continuing prevalence of racism in its many forms in football today is the reason why we consider that racist remarks such as those made by Mr Beardsley cannot be tolerated and must be punished by a substantial period of suspension. A light penalty would send out entirely the wrong message.

140. Taking account of all the circumstances, we think that Mr Beardsley should be suspended from all football and football related activity for a period of 32 weeks from the date of the issue of this Decision. We consider that a period in excess of the equivalent of the mandatory minimum of 17 matches is called for because the aggravating factors outweigh the mitigating factors. We have considered whether we should backdate the period of suspension in the light of the fact that he was suspended by the Club and has been out of work since he was dismissed from his employment with the Club. As we have said, we accept that we have the power to backdate the suspension. But for the reasons already given, the delay between the suspension by the Club on 9 January 2018 and the bringing of the charges on 21 March 2019 was attributable to Mr Beardsley. Moreover, he was on full pay between 9 January 2018 and his dismissal on 9 July 2018. In all the circumstances, we do not consider that backdating is justified in this case.

Financial penalty

141. The FA invites us to impose a financial penalty. Mr De Marco submits that in a case such as this, where a person has lost income as a result of the allegations, a fine would not be appropriate. We have referred at para 133 above to what Mr De Marco has told us on instructions about Mr Beardsley's lack of earnings since he was dismissed and we have accepted this. But we have been provided with no evidence as to Mr Beardsley's

assets and liabilities. Nevertheless, in view of the substantial suspension that we are imposing and our decision in relation to costs, we do not think it appropriate to impose a fine.

142. But we see no reason why he should not pay the Regulatory Commission's costs. He was, of course, entitled to contest the charges. But having done so and lost, we think that he should pay these costs. There are two reasons for this. First, the costs would have been far lower than they have turned out to be if he had accepted the charges. It is significant that the issue of sanction has been dealt with on the papers and without a hearing, let alone a three day witness hearing. Secondly, he has not said that he does not have the means to pay the Regulatory Commission's costs. It is reasonable to infer from the fact that he has not done so and has chosen not to inform us about his financial situation, that he has the means to pay these costs.

OVERALL CONCLUSION

143. We regret the outcome that we have felt compelled to reach in this case. Mr Beardsley is a towering figure in football and his footballing reputation is beyond question. But on the three occasions which are the subject of the charges, he made remarks which were obviously racist and were wholly unacceptable. Even if he did not intend to do so, he plainly did cause offence. It is particularly important at a time when racism in football is prevalent that remarks of the kind made by Mr Beardsley are punished severely.

144. The Commission, therefore, orders that:

(i) Mr Beardsley shall be suspended from all football and football related activity for 32 weeks from 18 September 2019, the date of the issue of this Decision. This suspension will therefore elapse on 29 April 2020.

(ii) Mr Beardsley shall attend a FA face to face education course within four months of the date of the issue of this Decision i.e. on or before 17 January 2020. Failure to satisfactorily complete the education course before this deadline will result in Mr Beardsley's immediate suspension from all football and football

related activity, which will run concurrently with any other suspension, until the course has been properly completed.

(iii) Mr Beardsley shall pay the costs of the Regulatory Commission in a sum to be confirmed by the FA in due course. Failure to pay the costs within 30 days of the FA's notification letter will result in Mr Beardsley's immediate suspension from all football and football related activity, which will run concurrently with any other suspension, until the costs are paid in full.

(iv) Mr Beardsley shall forfeit the £100 personal hearing fee.

APPEAL

145. This decision may be appealed in accordance with the FA Non-Fast Track Appeal Regulations.

Rt Hon Lord Dyson (Chair)

Gareth Farrelly

Tony Agana

18 September 2019