In the matter of a Regulatory Commission of The Football Association

Between:

The Football Association

and

(1) Gillingham Football Club Limited

(2) Paul Scally

Reasons for Regulatory Commission Decisions 15 April 2015 and 29 July 2015

Introduction and background

1. These are the written reasons for: (i) the 15 April 2015 decision of this FA Regulatory Commission finding charges of misconduct in breach of FA Rule E3(1) proven against Gillingham FC and Mr Paul Scally, the Gillingham chairman since 1995; and (ii) our 29 July 2015 decision on the penalties to be imposed on Gillingham FC and Mr Scally.

2. The Commission members are Nicholas Stewart QC (chairman), Mr Brian Jones and Mr Stuart Ripley. Our written reasons are requested under 9.3 of the *Regulations for Football Association Disciplinary Action* ("the Disciplinary Regulations")[1].

3. We held an oral hearing at Wembley Stadium on 14 and 15 April 2015 and informed the parties at the end of the hearing that we found the charges proven. Our written reasons were sent to the parties on 6 May 2015 and are contained in paragraphs 1 to 42 of this document, with minor changes not affecting the substance of our reasons. We then invited written submission on the issue of penalty, which were supplemented by oral submissions at a video/telephone hearing on Monday 27 July 2015. Our decision on penalties and costs was made on 29 July 2015. This document includes (from paragraph 43 onwards) a record and explanation of that decision.

Preliminary hearing in March 2015

4. The FA was represented at the hearing on 14 and 15 April 2015 by counsel Mr Max Baines. Ms Jane Mulcahy QC was counsel for both Gillingham and Mr Scally (who was present at that hearing). There had been a hearing of preliminary issues on 16 March 2015 ("the March Hearing"), which by agreement of the parties were decided by the chairman of the Regulatory Commission on his own. The result of that hearing was that the proceedings continued against both Gillingham and Mr Scally to the full hearing in April. The details of the decision on the preliminary issues are sufficiently recorded in these reasons and do not need to be set out separately. Counsel made written and oral submissions for the preliminary hearing and the April hearing; and then for the hearing on penalty and costs on 27 July 2015. We are very appreciative of those clear and helpful submissions.

5. The Participants Gillingham and Mr Scally[2] had each been charged by The Football Association by letter dated 23 September 2014 with misconduct for breach of FA Rule E3(1) as a result of a judgment made against both of them by an Employment Tribunal in

[1] *The FA Handbook, Season 2014-2015*, pages 336-345.
[2] Each is clearly a "Participant" as defined in FA Rule 2 at page 91 of the *FA Handbook 2014-2015.*

Ashford, Kent, on 27 July 2012. The Employment Tribunal case concerned the dismissal of a Gillingham player Mr Mark McCammon by letter dated 31 January 2011. The Employment Tribunal held that Mr McCammon had been unfairly dismissed and that his dismissal was an act of race victimisation by both his employer Gillingham FC and its chairman Mr Scally. On 3 September 2013 the Employment Appeal Tribunal dismissed an appeal so those decisions of the Employment Tribunal stand.

6. A crucial aspect of these FA Regulatory Commission proceedings is the FA's reliance on Regulation 6.9 of the Disciplinary Regulations[3]:

> "Where the subject matter of a complaint or matter before the Regulatory Commission has been the subject of previous civil or criminal proceedings, the result of such proceedings and the 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. For these purposes, civil proceedings include disciplinary or regulatory proceedings, whether public or private in nature."

7. At the March hearing Ms Mulcahy argued for the Participants that on such a serious issue as race victimisation it was important that the FA should investigate and independently verify the conduct in question and that the FA should be required to substantiate its case on the available evidence and not just on the basis of the presumption in Regulation 6.9. The Regulatory Commission chairman ruled against that submission. He held that the FA was fully entitled to rely on the presumption in Regulation 6.9 and there was nothing improper or unfair in its doing so. An essential purpose of Regulation 6.9 was to avoid the need for the FA to engage in a rehearing of evidence so as to establish its case. The FA would therefore prove its case on breaches of Rule E3(1) unless the Participant challenged the findings on which the FA relied. In many cases that would amount to a significant saving of time and resources. Without 6.9, for example, a Participant who had no serious answer at all to the charges and the previous findings could always force the FA to a full hearing in order to prove its case.

[3] *FA Handbook 2014-2015*, p.341.

8. Regulation 6.9 does therefore clearly throw the onus on Participants of rebutting the findings of the previous court or tribunal. However, it does not require new evidence in the sense of evidence which was not before the previous court or tribunal. It does expressly require "clear and convincing evidence" that the findings on which the decision of the previous court or tribunal was based were wrong.

9. Mr Baines argued for the FA that 6.9 did not allow a Participant to attempt to rebut the previous findings only by the same evidence on which those findings were reached. The Regulatory Commission chairman ruled against that submission as well. He noted that Regulation 6.9 was very wide in its ambit. The previous findings on which the FA might rely did not have to be findings of bodies with the status of an Employment Tribunal or the Employment Appeal Tribunal. Regulation 6.9 applied in terms also to private disciplinary proceedings, without any express limit or any implied limit that I can fathom. Entirely within the clear wording of Regulation 6.9, it would be possible for the FA to rely on findings of a very serious nature by an inexperienced and possibly not particularly well qualified private tribunal. There being no express prohibition in the wording of 6.9 against challenging the presumption by using exactly the same evidence as on the earlier hearing by the different tribunal, he saw no basis for implying any such prohibition.

10. A Participant is entitled to insist on having the FA Regulatory Commission reach its own conclusions on the evidence, although the clear effect of 6.9 is that the starting point for the Regulatory Commission is not the usual one of total presumption in favour of the Participant with the FA having to prove every ingredient of the offence if the charge is to stick. The starting point is the presumption that the previous findings are correct.

11. Gillingham and Mr Scally were therefore free to rely upon evidence already adduced before the Employment Tribunal. In fact there was some additional evidence and we heard oral evidence from several witnesses as mentioned below.

12. Ms Mulcahy made a separate application at the March hearing for dismissal of the charge against Mr Scally. She submitted that there was no need to proceed against Mr Scally as well as against Gillingham FC. That was not a relevant test for this

Regulatory Commission, so the chairman rejected that application. The FA had decided to charge Mr Scally and whatever the eventual outcome when the matter came before the full Regulatory Commission, there was nothing oppressive about continuing with the case against him. The Employment Tribunal had made a finding that he had unlawfully victimised the Player and that was quite sufficient for a charge to be brought and for Regulation 6.9 to be used by the FA. In the end, the charge has been found proven against Mr Scally anyway.

Events leading to dismissal of player and Employment Tribunal proceedings

13. Mr McCammon had been a Gillingham employee under a playing contract from the start of the 2008-9 season. The key events in this case started with a heavy snowfall in the Gillingham area on Tuesday 30 November 2010 and led to Mr McCammon's dismissal as a Gillingham employee by a letter dated 31 January 2011, following an internal disciplinary hearing on Friday 28 January 2011. The dismissal letter, which was signed by Mr Scally as Gillingham chairman, began:

> "Dear Mr McCammon,
>
> I write further to the formal disciplinary meeting which took place at Gillingham Football Club on Friday 28 January 2011.
>
> I confirm that the allegations made against you were as follows:-
>
> 1.That on 30 November 2010, at the Club premises, you acted in a manner that was aggressive, violent and threatening towards the Team Manager.
>
> 2.That on 30 November 2010, at the Club premises, you made very serious accusations of racism against both the Team Manager and the Assistant Manager."

It was then stated that the allegations had been upheld, that the Gillingham Board had made a finding of gross misconduct and that Mr McCammon's playing contract was terminated with immediate effect.

14. It was that dismissal which the Employment Tribunal held to have been unfair. Importantly, it also held that the second reason – Mr McCammon's making of allegations of race discrimination against the managers – was a principal reason for the dismissal.

15. It is clear to this Regulatory Commission that neither the Gillingham first team manager Mr Andy Hessenthaler nor his assistant Mr Nicky Southall was guilty of any actual race discrimination. It is only fair to them to make that clear. The same goes for Mr Scally, who we also do not consider to have been motivated by any idea of discriminating against Mr McCammon on racial grounds. However, that is far from being the end of the matter as far as the responsibility of Gillingham and Mr Scally is concerned. Their treatment of Mr McCammon was unlawful and fell seriously short of the standards expected from a football club and its chairman.

16. The problem for Gillingham and Mr Scally is that even an unfounded allegation of race discrimination may be a "protected act" as defined in section 27 of the Equality Act 2010 and that to use a protected act as a reason for dismissal is unlawful victimisation in breach of section 29(4) of the same 2010 Act. The Employment Tribunal held that when Mr McCammon made the accusations of racism, expressly mentioned in reason 2 in the 31 January 2011 dismissal letter, that was a protected act. It followed that to dismiss him for that reason was unlawful victimisation, both by his employer Gillingham and by Mr Scally (who this Regulatory Commission can see was plainly the driving force and effective decision maker in Mr McCammon's dismissal).

17. Ms Mulcahy accepted that if she were unable to displace the Employment Tribunal's findings against her clients Gillingham and Mr Scally, both would have been in breach of FA Rule E3(1), which states as far as relevant:

> "A Participant shall at all times act in the best interests of the game and shall not act in any manner which is improper or brings the game into disrepute . . . "

It is indisputable that it was a breach of Rule E3(1) to have committed an act of victimisation, in breach of the Equality Act 2010, by dismissing Mr McCammon. That was an obvious failure to act in the best interests of football and does bring the game into disrepute.

18. We do not need to explore the events of 30 November 2010 in great detail. On behalf of the Participants we heard evidence from Mr Scally, Mr Hessenthaler and Mr Southall, who had each made written statements and, after very limited supplementary evidence-in-chief, were cross-examined by Mr Baines. On behalf of the FA we heard evidence from Mr McCammon, who confirmed his witness statement and was then cross-examined by Ms Mulcahy. Our firm conclusions, which also serve as a summary of the relevant events of 30 November 2010 are:

(1) Overnight 29/30 November 2010, as forecast, there was a heavy snowfall in the Gillingham area which did make the roads very difficult on the Tuesday 30 November.

(2) Gillingham's non-injured players had been told on the Monday that they did not need to come in for training on the Tuesday but injured players were to report for treatment.

(3) Mr McCammon, who was injured, lived about two miles from the ground with two other players who were also on the injury list. It is relevant, though not centrally, to note that those two players are of mixed race.

(4) On the Tuesday morning all three of those players contacted the club to say they could not get in for treatment because of the snow. Some other members of staff, including the stadium manager John Carter, who lived much further away in Hastings, had managed to get to work.

(5) When Mr Scally, who was in Dubai, was told all this on the telephone by the first team physiotherapist Mr Steve Allen, he asked Mr Allen to go with Mr Carter to Mr McCammon's house to check whether the three players had been telling the truth, including by taking photographs of the players' cars, and to report back to him.

(6) That was done and Mr McCammon and his housemates were caught out. It is clear to us that they were skiving and could have got to the club without any real difficulty.

(7) Anyway (and the details do not matter at all) Mr McCammon and his housemates were ordered to go in for treatment and they did arrive at the Gillingham ground around 12:45.

(8) Mr Allen was to treat Mr McCammon with ultrasound. Mr McCammon was more agitated than his housemates. He asked Mr Allen why a white player who was also injured had not been required to attend for treatment, although he lived quite near to the ground. Mr McCammon was also resentful that photographs had been taken secretly at his house and common sense tells us that his resentment would not have been mollified by the fact that the photographs had caught him out.

(9) Although there is a dispute about the exact words used in the treatment room, Mr McCammon was complaining that the other player had been let off treatment because he was white, by contrast with Mr McCammon and his housemates.

(10) Mr Allen said in his written statement that Mr McCammon said to him "little white boy Jack Payne lives two minutes away from us and I bet no one's been to take a photo of his car". Mr Allen did not give oral evidence before us so was not cross-examined, whereas Mr McCammon was cross-examined and denied using the words "little white boy".

(11) We find it probable that Mr McCammon did use the phrase "little white boy", which is Gillingham's and Mr Scally's case after all, but it is not a crucial point anyway.

(12) Mr Allen did attempt to explain to Mr McCammon why the white player had not been required to come in for treatment. We find that there were genuine non-discriminatory reasons but it is clear that he failed to convince Mr McCammon.

(13) It follows from the Participants' own case that Mr McCammon had not been convinced, as shortly afterwards Mr McCammon burst into the First Team Manager's office and came out with an angry outburst which included a direct and unequivocal allegation of racist behaviour by the First Team Manager Mr Andy Hessenthaler. Mr McCammon says, "I complained to him that he was racially intolerant as there seemed to be no other excuse for the way we were treated on that day in comparison to other players". Mr Hessenthaler's version is that when Mr McCammon burst into his office he looked very angry and aggressively shouted at Mr Hessenthaler, "What are you playing at?" and that he then pointed at Mr Hessenthaler and his assistant Mr Nicky Southall and said, "You two are racists and this is racist behaviour."

19. Having reached those conclusions, none of which we regard as in the slightest degree open to doubt, we see no need whatever to go into the whole question of

exactly who said what in the manager's office, who was or was not unduly aggressive and whether, for example, a table with or without a computer was tipped over.

20. The Employment Tribunal expressly found that the evidence of the events of 30 November 2010 was so unreliable that it could not find that the Complainant Mr McCammon had made his complaints in a violent and aggressive manner. Its judgment (see paragraph 66 of the Employment Tribunal written judgment 27 July 2012) stated:

> "All that the Tribunal could reliably conclude from the evidence was that the Claimant was involved in a heated argument with Mr Hessenthaler in his office with both swearing and shouting taking place on both sides. There was insufficient evidence for the Tribunal to conclude that the Claimant made his accusations of racial discrimination in a manner which amounted to bad faith."

21. The Employment Tribunal took a very sceptical view of the witness statements produced on behalf of Gillingham and Mr Scally, which they expressly held had been copied one from the other. We take a less sceptical and we think more realistic view: witness statements drafted by solicitors referring to the same incident in Mr Hessenthaler's office were almost bound to be closely similar but with differences. However, this does not help the Participants in the proceedings before this Regulatory Commission. Whether or not we accept all the Participants' own evidence before us, we see no realistic basis for concluding that on 30 November 2012 Mr McCammon made his allegations of racial discrimination in bad faith.

22. What is crystal clear about the events of 30 November 2010 is that Mr McCammon made direct allegations of race discrimination by Mr Hessenthaler and Mr Southall and that he made them vehemently and angrily after going straight from the treatment room to Mr Hessenthaler's office for the very purpose of taking that matter up with him. It follows equally clearly that when he made those allegations, he really meant them. It is impossible to suppose that in those circumstances the allegations were calculated or contrived or that Mr McCammon did not believe them himself. We go further even than the Employment Tribunal. In our firm view it is not just that there is insufficient evidence to conclude that Mr McCammon made his accusations of racial discrimination in a manner which

amounted to bad faith. We regard the overall evidence as showing clearly that he did not make them in bad faith.

Our findings on rule 6.9 of the Disciplinary Regulations and the FA charges

23. It then follows at least equally clearly that for the purposes of Rule 6.9 of the Disciplinary Regulations there is no clear or convincing evidence to displace the Employment Tribunal's conclusion that the Respondents Gillingham and Mr Scally had failed to establish bad faith on Mr McCammon's part. That means that in this Regulatory Commission decision, as in the Employment Tribunal, Mr McCammon's allegations on 30 November 2010 must be taken as a "protected act", so that it was unlawful victimisation to have given as a reason for Mr McCammon's dismissal that he had made those allegations.

24. That leaves only one possible answer to these FA charges, which is that reason 2 in the dismissal letter did not correctly state the true reason for Mr McCammon's dismissal. To succeed on this point, the Participants would have needed to produce clear and convincing evidence to this Regulatory Commission that the true reason was neither:

(1) simply making the allegations on 30 November; nor

(2) making those allegations when they were false,

but was:

(3) that Mr McCammon made his allegations on 30 November 2010 in bad faith, which means that he knew they were false or did not believe them to be true.

25. The Employment Tribunal (see paragraph 70 of its written judgment) found that the Respondents Gillingham and Mr Scally were "in no position to assert that the accusations were either false, or that the Claimant [Mr McCammon] did not believe them to be

true, because there was no investigation whatsoever into the accusations". They found that "Mr Scally had discounted them from the start as without merit and not worthy of investigation."

26. However, though we note those conclusions, particularly for the purposes of Rule 6.9, we have considered all the material before this Regulatory Commission to see if there is clear and convincing evidence that the true reason for Mr McCammon's dismissal was (and this is an accurate shorthand statement) that he had made the allegations on 30 November when he did not believe them himself. That is the key question.

27. In the Participants' evidence and in Ms Mulcahy's thorough and skilful submissions on their behalf, much was made of a failure by the solicitors then acting for Gillingham to draft the dismissal letter in terms which correctly represented the instructions given to them by Mr Scally on behalf of the Club. On 31 January 2011, which was after the internal disciplinary hearing, Mr Scally emailed to the solicitor handling the matter Mr Scally's own draft wording of a dismissal letter, asking the solicitor "are you ok with something like this. I need to get it emailed to him [Mr McCammon] today, and also sent from the Club in hard copy". We do not need to set out the whole of that draft. The crucial passage, referring to the disciplinary hearing on Saturday 29 January 2011, was (setting it out here exactly as in Mr Scally's email):

> "The Directors, having taken account of all the witness statements, and the evidence of those present, have reached the unanimous view that you did in fact behave in an aggressive, violent and threatening manner towards the team managers that day, and were also of the view that you are guilty of suggesting to the Manager, and a member of the Clubs coaching staff that they were Racists, allegations that are wholly untrue and unacceptable."

28. The point made forcefully by Mr Scally in his evidence before us and by Ms Mulcahy in her submissions is that the words "allegations that are wholly untrue and unacceptable" were omitted from the letter drafted by the solicitors, signed by Mr Scally on behalf of the club and sent to Mr McCammon.

29. The Employment Tribunal (see paragraph 68 of its written judgment) found it notable that the dismissal letter itself simply referred to "very serious accusations of racism" and that the phrase was not qualified, for example by any reference to "false accusations" or "accusations which you did not believe to be true" or "accusations made in bad faith". In paragraph 75 of its judgment the Employment Tribunal remarked with apparently dry understatement, "It is rare that a letter of dismissal states that a protected act is the reason for dismissal, especially when the Respondent has had the benefit of legal advice".

30. On this issue, this Regulatory Commission has received more evidence than was before the Employment Tribunal. We see the clear failure of the solicitors to incorporate an apparently important phrase in Mr Scally's draft. However, we do not see this as making any difference in the end.

31. Even without those missed words from Mr Scally's draft, we should have been prepared to take them as clearly implicit in the dismissal letter. We do not think that anyone who read reason 2 in the dismissal letter would fail to appreciate that the club was saying that the "very serious accusations of racism" were false. It would have made no sense at all to write in those terms unless the club was rejecting the accusations.

32. However, that does not get the Participants home in their defence before this Regulatory Commission and nor would it have got them home on the victimisation issue in the Employment Tribunal even if that tribunal had received all the evidence we have had.

33. There is no evidence which satisfies us that the club's (and Mr Scally's) true reason for dismissing Mr McCammon was that he had made the allegations on 30 November when he did not believe they were true (which would mean they were in bad faith and that his making them was not a "protected act" at all). In fact we find the evidence clear and convincing the other way.

34. Mr Scally's own evidence in cross-examination before this Regulatory Commission is particularly telling. We have scrutinised what he said in his evidence. We note

specifically that Mr Scally did say, for example, that he and those at the club didn't believe the words 'you're a fucking racist' had any credibility *or that Mr McCammon believed them at all*". He also asserted that when Mr McCammon had emailed to Mr Scally on 30 November 2010 saying that he was asking for some simple answers as to why some players had been treated differently, that suggested to Mr Scally a man who had made malicious accusations and was subsequently trying to justify them and turn them into genuine allegations.

35. Mr Scally also told us that between the 30 November and the disciplinary hearing on 29 January 2011 he had spoken to the Professional Footballers' Association, apparently on several occasions, who had said it was hot air and not a genuine allegation of racism. We did not have any evidence from anyone from the PFA and should not feel able to regard Mr Scally's evidence of those conversations as clear or convincing, particularly on the question of Mr McCammon's genuine belief in his allegations at the time he made them on 30 November 2010. Mr Scally also said that if Mr McCammon had had a genuine grievance he would have followed it up.

36. In fact Mr McCammon had followed the matter up, by emails on 5, 20, 21 December 2010 to Gwen Poynter (the Gillingham club secretary) and on 30 December 2010 to Mr Scally, though we do not need to place weight on those emails. More to the point is what Mr Scally also said in his own evidence to this Regulatory Commission. When Mr Baines put to him paragraph 19 of Mr Allen's statement (covering points (8) to (12) in paragraph 17 of these reasons) Mr Scally's answer was that Mr McCammon must have perceived what was described there and that maybe he had perceived he was being treated differently but that didn't excuse him calling the staff racist. Mr Scally continued by saying that there had never been anything Mr McCammon could discuss with Mr Scally that showed he was being treated differently. However, that very last comment highlights the crucial distinction: The point is not whether in fact there was, as it turned out, evidence to support the truth of the allegations. It was whether Mr McCammon had genuinely believed them when he made them on 30 November.

37. Mr Scally was shown Mr McCammon's 30 December 2010 email to him, which referred to Mr Scally's having told Mr McCammon that "this racism thing is in your

head". He acknowledged that was another way of saying, "Mark, you're the only person who believes it", and continued, "whether he believes it or not, I don't know. I said, Mark explain to me why you're being treated differently". Mr Scally said that he had been trying to help Mr McCammon and see what his problem was. He put it as an example of a member of staff highlighting issues where their perception was not the truth.

38. There is no need to elaborate further and also no need to go into the whole detailed background of Mr McCammon's time at Gillingham, including a past issue with Mr Scally about the level of his wages entitlement, a dispute with Mr Scally about his medical treatment, an issue about blogging or negotiations started in September 2010 about the possibility of the club's buying out Mr McCammon's playing contract.

39. We also need not go into the whole question of what the Employment Tribunal found to have been serious deficiencies in the way that Gillingham and Mr Scally dealt with Mr McCammon's allegations from 30 November 2010 and the procedures leading up to his dismissal by the letter dated 31 January 2011.

40. In our firm view, in working out their reasons for Mr McCammon's dismissal, Gillingham FC and Mr Scally did not give serious thought to the question whether or not at the time Mr McCammon made the accusations against Mr Hessenthaler and Mr Southall on 30 November 2010 (which is the critical time) he believed the allegations himself. We are convinced that he did believe them. Moreover, particularly in the light of Mr Scally's evidence before us, we do not think the club or Mr Scally, so far as they thought about it at all (which we doubt), could have thought otherwise. We accept that Mr Scally was not familiar with "bad faith" as a legal term until it came up at the hearing before this Regulatory Commission in April 2015, but of course he would have understood the question whether Mr McCammon did or did not honestly believe his own allegations (which is all that bad faith is about in this context).

41. We therefore conclude that Gillingham FC's reasons for dismissing Mr McCammon did *not* include as a reason that he had made his allegations on 30 November 2010 knowing that they were false or not believing them to be true. We are not saying simply

that there is insufficiently clear and convincing evidence to rebut the Employment Tribunal's findings. We consider that all the evidence before us, including additional evidence not before the Employment Tribunal, clearly and convincingly leads to our conclusions set out in these reasons.

42. We see no evidence which supports a conclusion that there was any actual race discrimination against Mr McCammon. It is not hard to understand why Mr Hessenthaler and Mr Southall were upset and angry about the allegations and why Mr Scally as chairman of the club also felt strongly about them. Nevertheless, after the events of 30 November 2010, the way in which the club and Mr Scally dealt with the matter and the reasons for his dismissal from his employment were seriously deficient in the ways held by the Employment Tribunal. Mr McCammon's dismissal did amount to unlawful victimisation, as held by the Employment Tribunal and upheld by the Employment Appeal Tribunal. The Employment Tribunal's findings of victimisation by the Participants Gillingham FC and its chairman Mr Paul Scally therefore stand for the purposes of these Regulatory Commission proceedings. The breaches of FA Rule E3(1) by both Participants are therefore proven as charged.

Decision on penalty and costs

43. The range of specific penalties available to a Regulatory Commission under regulation 8 of the Disciplinary Regulations is wide. It includes reprimands/warnings and fines as well as sporting sanctions such as suspensions and deduction of points. There is also power under 8.1(i) to impose "such further or other penalty or order as it considers appropriate". The Regulatory Commission has a wide discretion, though it must always be exercised in a fair and proportionate way having regard to all the relevant facts and circumstances of the particular case.

44. We received clear and helpful submissions from both counsel. We are particularly appreciative that neither of them pursued what is so often done, and is so often unhelpful to FA Regulatory Commissions, which is to draw detailed comparisons with very

different cases decided by other Regulatory Commissions (and FA Appeal Boards). As far as we are aware, there are no closely comparable cases anyway.

45. Ms Mulcahy's starting point was that a warning as to future conduct was a sufficient penalty in the case of both Gillingham and Mr Scally. In other words, no sporting sanction and no fine on either. In our view that is quite unrealistic for such serious offences. There must be substantial fines as an absolute minimum, though before we turn to the level of fines we first consider the question of sporting sanctions.

46. Mr Baines, for The FA, did not ask the Regulatory Commission to impose sporting sanctions. He left it to our discretion, given that sporting sanctions are clearly available as penalties against either or both of Gillingham and Mr Scally. We have carefully considered the question and now explain why we have decided that sporting sanctions are not needed in either case.

47. These are very serious offences. The clear policy of the FA Rules, as a vital part of The FA's wider task of eliminating racism and discrimination from football, is to take a tough line on all misconduct which includes a racial element (as well as in relation to such matters as gender, sexual orientation, disability). Unlawful victimisation in relation to an allegation of racial discrimination is indisputably serious. Not only is it wrong in itself, but a finding by an Employment Tribunal against a club and its chairman of victimisation of a player is plainly something which brings the game into disrepute. We take that as our starting point.

48. A charge of misconduct for breach of FA Rule E3(1) – which is the charge here – may be accompanied by an express allegation that the breach is an "Aggravated Breach" under rule E3(2), because the relevant conduct includes a reference to ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability. That procedure is commonly used, for example, in the case of abusive words which contain a slur against a particular race or ethnic group (or, for example, against women) and in most cases (i.e. where exceptions in rule E3(4) do not apply) will carry an automatic suspension of at least five matches for a first offence. In such cases the abuse will have been consciously directed against a member or members of that group, so that in the context of race,

without entering into the irrelevant question whether the person committing the offence is or is not a racist, the conduct has clearly been racist.

49. This is not such a case and neither Gillingham nor Mr Scally has been charged with an Aggravated Breach under E3(2). That does not rule out a sporting sanction against either or both but it does leave it to this Regulatory Commission to decide if sporting sanctions are appropriate.

50. A distinction which can be drawn between this case and the sort of case mentioned in paragraph 48 is that we have expressly found that neither Mr Scally nor Mr Hessenthaler or Mr Southall was motivated by any idea of discriminating against Mr McCammon on racial grounds: see particularly paragraphs 15 and 42 above. Although the way in which Gillingham and Mr Scally dealt with the whole matter after 30 November 2010 was seriously deficient, and of course actually unlawful, Mr McCammon's initial allegation of race discrimination was wrong. Unlike Aggravated Breach cases where the improper conduct (usually of an abusive and insulting nature) in itself involves treating the particular racial or ethnic group or gender in a derogatory and disparaging way, that was not an ingredient of the misconduct by Gillingham or Mr Scally. Their fault was in the seriously deficient way in which they handled (or rather, mishandled) an allegation which they believed was unjustified and was in fact unjustified. They overrode the important protection which the law gives to an unfounded but honest complaint of racial discrimination. That was unlawful, as the Employment Tribunal held – a decision upheld by the Employment Appeal Tribunal and confirmed and adopted by this Regulatory Commission after we had heard full oral evidence from Mr McCammon, Mr Scally and others.

51. The distinction we have drawn in the previous paragraph leads us to the conclusion that sporting sanctions are not needed to mark the seriousness of the misconduct in these particular circumstances. In Gillingham's case that would in practice have meant points deductions, which we consider unduly harsh (noting that there is also no question of the misconduct having had any effect on competition with other teams). In Mr Scally's case, the steps which we do take in relation to him appear to us adequate to mark the seriousness of the offence without adding a suspension.

52. Having decided against sporting sanctions, we do consider that substantial fines are needed to mark the seriousness of the offences. As the very term victimisation indicates, the protection which the law gives to a complainant in Mr McCammon's position is a vital element of the general anti-discrimination policy of the law. It is specifically designed to ensure that employees are not deterred from raising complaints of discrimination, as long as they do not make them maliciously without a genuine belief in the complaint. Clubs have a heavy responsibility to ensure that their structures and procedures do carefully follow the law.

53. The Employment Tribunal's central finding, that Gillingham had dismissed Mr McCammon unlawfully for having made a complaint of race discrimination, is the basis of the charges under FA Rule E3(1).

54. The Employment Tribunal was rightly extremely critical of Gillingham's handling of Mr McCammon's complaint from start to finish. Gillingham had been in breach of various provisions of the *ACAS Code of Practice on Disciplinary and Grievance Procedures (2009)*. There were also serious deficiencies in the internal disciplinary hearing on 28 January 2011, which this Regulatory Commission can see fell far short of expected standards of fairness. We mention these points because we are pleased to know that since the judgments of the Employment Tribunal and the Employment Appeal Tribunal, Gillingham has taken serious steps to repair the deficiencies in its structure and procedures. Gillingham and Mr Scally have responded positively and constructively to contact from the Equality and Human Rights Commission, who followed up the notification of those judgments, and have enforcement powers if they are not able to achieve an agreement with an employer under section 23 of the Equality Act 2010. We do not set out all the detailed steps taken by Gillingham as we accept that Gillingham and Mr Scally are sorry for their conduct and have made every effort to put in place robust anti-discriminatory practices at the club. It appears that they will be entering into a section 23 agreement so that it will not be necessary for the Equality and Human Rights Commission to take formal enforcement action.

55. We have regard to those positive steps, which are valuable for the future, but they do not undo the very serious misconduct by both Gillingham and Mr Scally. Having decided against any sporting sanctions, we do feel that substantial fines are needed to mark the seriousness of the offences and to make clear that clubs must make sure that they establish

sufficiently robust anti-discrimination structures and procedures before and not just after such matters may arise and so far as possible to prevent them from arising in the first place.

56. Gillingham produced their financial statements for the year ended 31 May 2014. It was not submitted that there has been a significant change since that date. The balance sheet shows net assets of £1,478,710 and net current assets of £1,083,456 including £512,448 cash at bank. The profit and loss account shows a profit of £11,206 for the year ended 31 May 2014 on a turnover of £5,532,671 as compared with a profit of £1,309,129 the previous year. We have no financial information about Mr Scally though we do know that for tax purposes he is resident outside the United Kingdom and that those 2014 financial statements noted him as the sole shareholder of the company which owned the majority of the voting rights in Gillingham Football Club Limited.

57. Taking all the facts and circumstances into account, including the financial information in the previous paragraph, we impose a fine of £75,000 each on Gillingham and Mr Scally. We make clear that this is not a fine of £150,000 split between them. It is a fine of £75,000 for Gillingham's misconduct and a separate fine of £75,000 for Mr Scally's own misconduct. Mr Scally was the driving force and the decision-maker on behalf of Gillingham in the dismissal of Mr McCammon and the way it was handled. He therefore does bear a heavy individual responsibility. Gillingham was the employer of Mr McCammon and Mr Scally was the club's agent as a director and the chairman. Moreover, it was the responsibility of the club and the whole of its board to ensure that Gillingham acted lawfully at all times and that it had suitable structures and procedures. A fine of £75,000 is fair for each of Gillingham and Mr Scally.

58. Ms Mulcahy made the point that the respondents Gillingham and Mr Scally had already been ordered by the Employment Tribunal to pay a total of £68,728.42 to Mr McCammon, of which £50,211.63 was attributable to the finding of victimisation. We note that £8,134.27 of the balance not attributable to the victimisation was for breach of contract for unauthorised deductions from Mr McCammon's wages from 7 May 2010 to 31 January 2011, which means it was money which Gillingham ought previously to have paid anyway. The same applies to a large part of the £50,211.63, as the award of £39,797.89 for compensation for loss of earnings for the period 1 February to 31 July 2011 represented money which would and

should have already been paid by Gillingham to Mr McCammon if they had not wrongfully terminated his employment contract when they dismissed him on 31 January 2011. It follows that neither the £8,134.27 nor the £50,211.63 represents a true cost to Gillingham as those are sums that they ought to have paid before to Mr McCammon. The Employment Tribunal did award £10,000 to Mr McCammon for injury to feelings but that was the only large item in the overall award which had the effect of any sort of penalty on Gillingham and Mr Scally. We do not consider that the Employment Tribunal award justifies any reduction of the fine in these disciplinary proceedings. The same clearly applies to Gillingham's and Mr Scally's costs of unsuccessfully defending the proceedings before the Employment Tribunal and then unsuccessfully appealing to the Employment Appeal Tribunal (though we note this just to complete the picture on this aspect, as Ms Mulcahy never made what would have been an unrealistic suggestion that we should make any allowance for those costs).

59. While Mr Baines largely took the position of not making specific proposals on questions of penalty but simply leaving it to the Regulatory Commission's discretion, he did specifically ask that we should direct Mr Scally to undertake an education programme. Under Rule E3(9) such a programme is mandatory for anyone found to have committed an Aggravated Breach of Rule E3(1) but not in this case. We do nevertheless consider that it would be usefully complementary to the positive changes implemented by Gillingham if Mr Scally were to undertake an education programme directed towards the deficiencies in his conduct identified in the Employment Tribunal judgment and in the findings of this Regulatory Commission. The details of that education programme are to be provided to Mr Scally by The FA and he must complete it by 31 January 2016.

60. We see no need to add a formal reprimand or warning as to future conduct in either case. Those messages are clear enough from the orders we are making.

61. The costs incurred in relation to the holding of this Regulatory Commission exceed £7,000. Under regulation 8.8(b) of the Disciplinary Regulations we order that Gillingham and Mr Scally must each pay £3,500 towards those costs.

62. The fines and costs are to be paid to The FA by 1 September 2015.

63. The personal hearing fees are forfeit and will be retained by The FA.

Nicholas Stewart QC
Chairman

Brian Jones

Stuart Ripley

29 July 2015