

**IN THE MATTER OF AN FA RULE K ARBITRATION**

**REASONS FOR AWARD FRIDAY 7 FEBRUARY 2014 - NICHOLAS STEWART QC SITTING AS INTERIM TRIBUNAL**

**BETWEEN:**

**WEST HAM UNITED FOOTBALL CLUB LIMITED**

**The Claimant**

- And -

**THE FOOTBALL ASSOCIATION LIMITED**

**The Respondent**

**REASONS FOR DECISION**

1. These are the full reasons for my decision on Friday 7 February 2014 made on an interim application under FA Rule K8 by the Claimant's Notice of Arbitration dated 6 February 2014. On the conclusion of an oral hearing on 7 February 2014, at which both parties were represented by counsel and solicitors, my decision dismissing the application was announced to the parties and then set out in a short formal award which for convenience is annexed to these reasons.
2. That formal award and these written reasons together constitute the award made by me as the Interim Tribunal appointed by Sport Resolutions (UK) for this case.
3. The case arises from the red card dismissing the West Ham United FC ("the Club") player Mr Andrew Carroll ("the Player") from the field of play for violent conduct during the second half of a Premier League match *West Ham United v Swansea City* on Saturday 1 February

2014. Subject to any further challenge by the Player or the Club under the FA Rules, the automatic effect of the dismissal was a 3 match suspension coming into effect immediately.

4. The first match to which Mr Carroll's suspension would apply – and following my decision has applied – was the Premier League fixture *Aston Villa FC v West Ham United* on Saturday 8 February 2014. The urgent need for a hearing on Friday 7 February 2014 was for all concerned to know whether the Player would be available for that match.
5. I first briefly explain the procedures which applied to this case under the FA Rules, as it is important to be clear exactly who had the task of deciding what at each stage of the process. One point to stress at the outset is that it was no part of my function as the Interim Tribunal to decide whether the referee's original decision was right or wrong. That was never a decision for me and on that point I express no view either way.
6. The first step in the Club's challenge to the 3 match suspension was its application referring the case to an FA Regulatory Commission under Section A of the *FA's Disciplinary Procedures 2013-2014, Field Offences & Fast Track*. : see The FA Handbook Season 2013-2014, pages 410-414, available online at [www.thefa.com](http://www.thefa.com) . Section A, regulation 5, which is the key provision in this case, states:
  - (a) A Player and his Club may seek to limit the disciplinary consequences of the dismissal of a Player from the Field of Play by demonstrating to The Association that the dismissal was wrongful.
  - (b) A claim of wrongful dismissal may be lodged only for on-field offences which result in a sending off, except for two cautions leading to a dismissal.
  - (c) The Regulatory Commission that considers a claim of wrongful dismissal is concerned with only the question of whether any sanction of a suspension from play is one which should be imposed in view of the facts of the case. This role is not to usurp the role of the Referee and the dismissal from the Field of Play will remain on the record of the Club and the Player, will remain the subject of the administration fee and will accrue the appropriate number of penalty points for a first team sending off.
7. The 3 person Regulatory Commission in this case sat on Tuesday 4 February 2014 and rejected the Club's application. The decision was by a 2-1 majority but for all the purposes of the FA Rules, all the applicable legal principles and my own decision, the effect of a

majority decision is exactly the same as a unanimous decision. Nothing at all turns on that lack of unanimity.

8. Once the Regulatory Commission had decided to reject the application and uphold the suspension, under the express provisions of Section A, Regulation 5(l), there was no appeal available. That rule reflects the policy that the procedure for challenging a suspension under paragraph 5 is a fast-track procedure intended to ensure as far as possible that if the Regulatory Commission rejects the challenge the start of the suspension should not be delayed.

9. With an appeal expressly barred by Regulation 5(l) (to which all clubs and players have signed up in one way or another and to which they are bound as a contract) the only further step available to the Club was under FA Rule K1(a), which entitled the Club to bring the matter before an independent Arbitration Tribunal. It is important to note that this is not a way of sidestepping the bar on an appeal, as rule K.1(d) at page 134 of the FA Handbook 2013-14 states:

Rule K1(a) shall not operate to provide an appeal against the decision of a Regulatory Commission or an Appeal Board under the Rules and shall operate only as the forum and procedure for a challenge to the validity of such decision under English law on the grounds of ultra vires (including error of law), irrationality or procedural unfairness, with the Tribunal exercising a supervisory jurisdiction.

10. In this particular case the Club was saying that there was both an error of law and a procedural unfairness, so that on either ground the Regulatory Commission's decision was invalid and should be set aside. The two grounds alleged are:

(1) Error of law - the Regulatory Commission had applied the wrong test in reaching its decision that the dismissal of the Player by the referee had not been wrongful.

(2) Procedural unfairness - the Regulatory Commission had not held an oral hearing at which the Player could have given oral evidence.

11. The consideration of those allegations and the eventual ruling on the validity or invalidity of the Regulatory Commission's decision would be done by a 3 person Arbitration Tribunal appointed by Sport Resolutions (UK). Both parties were entitled to have the matter decided by that full 3 person tribunal.

12. However, this left the practical difficulty that it was simply not feasible to appoint and convene that full tribunal and arrange a hearing and final decision in the very short time before the Player's suspension would actually bite, i.e. before the match against Aston Villa on Saturday 8 February. This left the following difficulty:

(1) The challenge by the Club by a Rule K application did not postpone the start of the Player's 3 match suspension. The FA Rules contain no provision for a stay of the suspension in those circumstances.

(2) Accordingly, if the Club was eventually successful in setting aside the Regulatory Commission decision and then having the 3 match suspension rescinded, the suspension would already have been served anyway. The injustice of that result is obvious: the original red card by the referee would have been held wrongful, the 3 match suspension would therefore also have been held unjustified and would have been set aside, but it would have been all too late anyway as the Player would have compulsorily missed three matches.

13. To deal with this sort of situation, Rule K8 [FA Handbook, p. 138] provides an additional mechanism for appointment of a single arbitrator as an Interim Tribunal to deal with any application for interim relief. I was therefore appointed by Sport Resolutions (UK) on Thursday 6 February 2014.

14. The interim relief sought by the Club in this case was a stay of the 3 match suspension of the Player until the final decision of the full Arbitration Tribunal. The Club was not asking or expecting me to decide that the Regulatory Commission decision was invalid. It was asking me simply to hold the position until the outcome of the full arbitration so as to avoid the potential injustice I have mentioned in 12(2) above.

15. Over the two days between the Regulatory Commission decision and my appointment the Club was threatening to go to court before the end of the week, i.e. before the match against Aston Villa. In fairness to the Club, that should not be misunderstood. An urgent application to the court would have been essentially the same application for interim relief as the one which was actually made to this Interim Tribunal and essentially the same principles would have been applied by the court as encapsulated in FA Rule K1(d): see paragraph 9 above. To enable the Club's urgent application to be resolved in such a short time under Rule K1(d), and thereby avoid the need for a court hearing, a high degree of

cooperation was required between the Club and the FA, for which both are to be commended.

16. My task as the Interim Tribunal was therefore limited to deciding whether the 3 match suspension should be placed on hold while the case proceeded to a full arbitration. However, despite the limited scope of that task, it raised important issues for the parties and the hearing before the Interim Tribunal necessarily involved detailed submissions by their lawyers.
17. The importance to the Club (and the Player) is clear: The loss of this particular Player for three matches was clearly capable of affecting the results in a season where the Club remains vulnerable to relegation. The FA attempted to downplay the significance of this Player's suspension but it is clear to me that the loss of this Player for even one match, let alone three matches, would constitute significant harm to the Club (even though, as it turned out on Saturday 8 February 2014, i.e. after my decision, the Club won the first match without the Player).
18. On its side the FA regards it as very important for the good order and integrity of football and the competitions under its auspices in England and Wales to avoid any disruption or undermining of the fast-track procedures under which questions of suspensions of players are quickly and decisively resolved and suspensions, unless successfully challenged, come into effect immediately or as quickly as the circumstances allow. That is a proper concern about potentially significant harm to the FA's legitimate interests. (Included in that general point, the FA is also specifically concerned that challenges to suspensions following dismissals from the field of play are not misused so as to manipulate the periods and the matches affected rather than to pursue genuine complaints. That is also a legitimate point although in this particular case there was nothing in the written material or the oral submissions to suggest that this Club was attempting any such artificial manipulation. This was clearly a case brought in good faith where the Club and the Player felt they had a genuine grievance.)
19. Everything or pretty much everything I have said so far will be clear anyway to the parties and their lawyers. But as this case and other cases involving high-profile football clubs and players (and referees) naturally draw wider interest, it may well be helpful to have explained how the various bits of the disciplinary jigsaw fit together.
20. I now turn back to my particular task as the Interim Tribunal.

21. The basic starting point for that task is clear: There should be no question of the Interim Tribunal putting the Player's 3 match suspension on hold if the Club has no serious prospect of persuading the full Tribunal (see paragraph 12 above) that the Regulatory Commission decision was wrong.
22. The judgment whether the Club does or does not have a serious prospect of persuading the full Tribunal is a judgment to be made by this Interim Tribunal. If I decide that there is a serious prospect of the Club's succeeding (which does not need me to say that the Club will probably succeed, only that there is a serious argument to be put for its case) then I should leave the final decision to the full 3 person Arbitration Tribunal and go on to consider the fairest way to deal with the interim position. That means deciding whether or not to put the 3 match suspension on hold in circumstances where we do not know whether in the end it would be upheld or rescinded.
23. This reflects the established legal guidance from the House of Lords decision in *American Cyanamid v Ethicon Ltd* [1975] AC 396 as explained and refined in subsequent cases. While I greatly appreciate the benefit of skilled and thorough legal submissions at the hearing on 7 February 2014, I do not need to elaborate on that aspect of the law.
24. I have refused to stay the Player's 3 match suspension and have dismissed this application by the Club on the ground that the Club has no serious prospect of persuading the full Arbitration Tribunal that the Regulatory Commission decision was invalid. In terms of the courts' guidance emanating from the *American Cyanamid* case, I have decided there is "no serious issue to be tried" by the full Tribunal and that is an end of the case for interim relief.
25. This does also imply my own judgment that the Regulatory Commission decision was valid. That is my clear view.
26. This is not to say, if I had been a member of the Regulatory Commission, whether I should have reached the majority or the minority view. That is not a decision for me and I express no view. If this interim application had gone to court instead of Rule K arbitration, then in accordance with well-established legal principles the judge would not have made that decision either but would also have correctly regarded it as not a decision for him or her at all.
27. Why do I say there is no serious issue to be tried, i.e. that the Club has no serious prospect of success before the full Tribunal? On that question, there are the two issues to be considered as noted in paragraph 10 above.

28. The first issue is whether the Regulatory Commission applied the wrong test in reaching its decision.
29. The Regulatory Commission stated expressly that it was applying the test of whether the match referee, Mr Howard Webb, had made an “obvious error”. There is no suggestion of any difference between the majority and the minority on that point. The Regulatory Commission as a whole plainly thought that was the test they should apply.
30. It is not surprising that the Regulatory Commission took that view, even if it does not follow that they were right. The FA’s *Guidance on Disciplinary Matters for Participants and Clubs 2013/2014 Season* states that on claims for wrongful dismissal “The onus remains on the Club to prove that the referee made an obvious error in dismissing the Player from the field of play.” That is very clear, even if the same document does also correctly note that the guidelines “in no way affect, supersede, alter or replace the actual FA Rules and Regulations”. It is irrelevant to my decision that the Club’s representative on the application before the Regulatory Commission expressly accepted that the correct test was “obvious error”. Given the FA’s own published guidance, he can hardly be blamed for that. It would have been quite wrong to hold the Club to that position in its challenge to the validity of the Regulatory Commission decision.
31. The Club says that on the correct interpretation of regulation 5 of Section A, the test of “obvious error” is not the correct test. Counsel on both sides made detailed and helpful submissions on that question of interpretation. The Club starts from the position that there is no express mention of “obvious error” in the rule itself. That is certainly a good starting point for the Club. The FA on its side places emphasis on the widely applicable and established principle in sports law that the person who makes the initial judgment (in this case the referee) is afforded a wide margin of appreciation on any subsequent review. That applies even more strongly when the original judgment had to be made on the spot in the course of an actual game or other competition. It is not necessary or helpful to set out cases here to support that general principle, which I accept and which would not be seriously disputed by the Club.
32. However, whether that general approach applies to the interpretation of regulation 5 is not at all clear. A point against the FA’s interpretation, not conclusive but not to be dismissed either, is that if “obvious error” was intended as the test it would have been easy to say so in clear and express terms.



33. The interrelationship of subparagraphs 1(a) and 1(c) raises points for argument. The effect of the second limb of paragraph 1(c) is that if the test is “obvious error” then a player whose dismissal was “obviously” wrong is still partly punished by the retention of the applicable disciplinary points – an odd result from the viewpoint of fairness to the individual player but expressly based on the wish not to usurp the role of the referee (even where, on the FA’s interpretation of regulation 5, it has been held that the referee was obviously wrong). The FA says that the second limb of paragraph 1(c) reinforces the notion of limited scope for interference with a referee’s decision and therefore supports the stricter test of “obvious error”. On the other hand, the Club can argue that by expressly supporting the referee’s decision to the limited extent in that second limb but allowing for a greater relief from the sanction under the first limb, by implication that is leaving it to the Regulatory Commission to reach its own decision without further protecting the referee’s decision by requiring a stricter test of “obvious error”.
34. The arguments on both sides go further. However, I do not need to consider them further here, for reasons which I explain below. I have drawn attention to some of the points relating to regulation 5 because it is important for the FA and all those potentially affected by that rule to appreciate that this case has shown that there are real questions about its correct interpretation. Unless the rule is amended by the proper procedures, those questions will not go away and cannot be resolved without a definitive decision by a tribunal (or court). Regulatory Commissions need to know what test they should apply.
35. The reason I do not have to consider those arguments further or decide what is the correct test under regulation 5 is that, properly read and understood, the Regulatory Commission decision in this case met the correct test even on the view of that test most favourable to the Club.
36. Counsel for the Club submitted that the correct test was not “obvious error” but the lower test of whether the Regulatory Commission, looking at all the material available to it (which under paragraph 5(d) must include video and/or DVD evidence of the incident from all available angles), considered that on balance of probabilities the dismissal was wrong – neither side suggesting that there was any distinction to be made here between “wrongful” and “wrong”.
37. On this point there are two key passages in the Regulatory Commission’s written reasons:



In paragraph 17: “Two members were of the opinion that Mr Carroll had tried to strike his opponent by throwing his arm a considerable distance towards his opponent, at head height and at speed, thus constituting unnecessary force.

Paragraph 19: “Clearly, with two members firmly of the opinion that the Referee’s report of the incident was correct, the claim was rejected by a majority decision.”

The referee’s report included: “As the ball went away and after the two players had parted, Carroll threw his right arm towards the head of his opponent in what was, in my opinion, an attempt to strike his opponent.”

38. Those paragraphs clearly show that the majority (which is all that counts, as I have made clear in paragraph 7 above) did come to the positive decision that the Player had struck out intentionally, which is the essential point on whether the dismissal was wrongful or not.
39. Counsel for the Claimant, faced with this difficulty, argued that the Regulatory Commission’s express belief that they were to apply the test of “obvious error” meant that their decision was inevitably tainted by that belief and that they could not be safely taken to have applied a lower (and in his submission correct) test. While there may well be cases where a tribunal’s misconceptions about the correct legal principles could invalidate the whole decision even if superficially taken on a different basis, the findings and views as stated in this Regulatory Commission’s written reasons do not leave any serious room for doubt on that score. If it is assumed for these purposes in the Club’s favour that it was a misconception by the Regulatory Commission that the correct test was “obvious” error, I see no justification for reading the majority’s factual conclusion as meaning anything other than what it says. What it says amounts to a clear view that the referee was right and not merely that he was not obviously wrong.
40. The effect is that on the best case for the Club on this first ground (whether that best case is itself right or wrong), the Regulatory Commission did make an error of law in identifying the wrong test but the error did not affect its decision. On the clear factual findings by the majority, as expressed particularly in paragraphs 17 and 19 of the written reasons, whatever the right test the only correct decision for the Regulatory Commission was to dismiss the Club’s application and uphold the 3 match suspension of the Player. It could not realistically be argued by the Club that those factual findings were irrational, unreasonable or in any other way amounted to an error justifying interference by the full Arbitration Tribunal.

However strongly the Club disagrees with those findings, they are well within the range of reasonable differences of view.

41. The second ground is that the Regulatory Commission failed to hold an oral hearing at which the Player could have given oral evidence. The Player had submitted a written statement to the effect that he had had no intention of striking the opposing player Mr Flores and that his arm movement was just the effect of his turning away in the direction of the referee to see if a free kick would be given to West Ham. The Club's counsel argued that it was only by hearing and testing that evidence orally that the Regulatory Commission could fairly reach a conclusion on those points.
42. Regulation 5(e) states that the claim of wrongful dismissal is to be determined based on video and/or DVD evidence and written evidence only. That is enough to explain why the Club did not ask for an oral hearing but still leaves the question whether, despite that express restriction excluding oral evidence, it was unfair not to hear evidence from the Player.
43. The Club submitted that it was not possible in English law to contract out of the right to an oral hearing where procedural fairness required such a hearing. Although counsel for the FA did not contest that principle, he nevertheless was not willing to accept that there could be any circumstances in which refusal of an oral hearing on an application under this regulation 5(a) would amount to denial of a fair hearing.
44. I do not need to decide whether that unequivocal position of the FA is correct or not. It is accepted by the Club's counsel that procedural fairness does not necessarily require an oral hearing and that each case must be considered on its own facts. It is also a material consideration that the whole purpose of this agreed fast-track procedure is to enable a quick, relatively simple and inexpensive ruling on disputed dismissals. Against that background, key considerations are the importance of the matter at stake (as one example, whether and to what degree it may affect a person's liberty or livelihood) and the likely value of an oral hearing in deciding the matter.
45. In my judgment, even assuming that there may be cases where to apply the FA rule in paragraph 5(e) would amount to procedural unfairness invalidating the decision, this is nowhere near such a case. The issue is undeniably important to the Club, as I recognise in paragraph 17 above. I also take a realistic rather than technical view of the regulation 5 claim and this claim for interim relief having both been brought only by the Club. I treat the

Player's interests as coming into the equation equally with the Club's. However, although the matter is important to both Club and Player, it involves just one player for three games and despite the potential impact on the Club's results and therefore the possibility of relegation and the well-known enormous financial cost of losing Premier League status, we are not talking about a direct measurable certainty of that outcome.

46. More important still, I do not see any serious likelihood that oral evidence from the Player would have affected the Regulatory Commission's decision. The Regulatory Commission knew what he said about the incident; he expressly denied that he had deliberately attempted to make contact with the Swansea player. The Regulatory Commission was obviously going to base its judgment on what it saw in the video/DVD evidence and I cannot see any realistic possibility that the members of the Regulatory Commission, having seen what the Player said in his written statement, were going to be additionally swayed in their views by his coming along to tell them in person.
47. The result is that the Club has no serious prospect of winning the full arbitration and having the Player's 3 match suspension lifted. There is accordingly no basis for interim relief to prevent the suspension continuing in full effect, starting with the match against Aston Villa the day after my decision.
48. The Club did not resist being ordered to pay: (i) The fees and expenses of the Interim Tribunal and the hearing on Friday 7 February 2014; and (ii) the FA's costs of £13,092 (inc VAT) incurred in this interim application. I therefore made that order, which is fair in the light of the FA's successful resistance of the application for interim relief.



**Nicholas Stewart QC**

**Ely Place Chambers**

**London EC1N 6TD**

**10 February 2014**

**IN THE MATTER OF AN FA RULE K ARBITRATION**

**AWARD FRIDAY 7 FEBRUARY 2014 - NICHOLAS STEWART QC SITTING AS INTERIM TRIBUNAL**

**BETWEEN:**

**WEST HAM UNITED FOOTBALL CLUB LIMITED**

**The Claimant**

**- And -**

**THE FOOTBALL ASSOCIATION LIMITED**

**The Respondent**

This AWARD is made on an interim application under FA Rule K8 by the Claimant's Notice of Arbitration dated 6 February 2014. It is made by me as the Interim Tribunal appointed by Sport Resolutions (UK), following an oral hearing on Friday 7 February 2014 at which both parties were represented by counsel and solicitors.

My full written reasons for this decision will follow in due course and, as agreed with the parties at the conclusion of today's oral hearing, will then form part of this Award.

My decision is to dismiss the application, which included an application for a stay of the 3 match suspension imposed under the FA Rules on the West Ham United FC player Mr Andrew Carroll and due to start with the match against Aston Villa FC on Saturday 8 February 2014.

The ground for dismissal of the application is that there is no serious issue on the validity of the FA Regulatory Commission decision made on 4 February 2014 upholding the 3 match suspension following Mr Carroll's dismissal from the field of play at the Premier League match West Ham United FC v Swansea City FC, i.e. there is no serious prospect that the full Tribunal appointed under FA Rule K will decide in the Claimant's favour and set aside that decision. The 3 match suspension therefore stands with immediate effect.

I also order the Claimant to pay the following costs:

- (i) The fees and expenses of the Interim Tribunal and the hearing on Friday 7 February 2014.
- (ii) £13,092 (inc VAT) costs of The Football Association Limited incurred in this interim application



Nicholas Stewart QC

Ely Place Chambers

London EC1N 6TD

7 February 2014