



EMPLOYMENT TRIBUNALS

Claimant
Mr Robin Carpenter

v

Respondent
Football Association Limited

Heard at: Watford

On: 31 July to 2 August 2023
(3 August 2023 in chambers)

Before: Employment Judge Bedeau
Members: Mr M Bhatti MBE
Mrs S Wellings

Appearances

For the Claimant: In person
For the Respondent: Mrs C Davies, Counts Judgement

RESERVED JUDGMENT

1. The claim of failure to make reasonable adjustments is not well-founded and is dismissed.
2. The provisional remedy hearing listed on 4 December 2023, is hereby vacated. The parties are not required to attend.

REASONS

1. In a claim form presented to the tribunal on 10 October 2020, the claimant made claims of harassment related to disability, victimisation, and failure to make reasonable adjustments.
2. The respondent was given an extension of time to present its response by 15 July 2022. In its response liability is denied and it raised the issue of the length of time it took the claimant to present his claims. The last act being September 2019, but the claim form was presented 10 October 2020.
3. At the preliminary hearing held before Employment Judge R Lewis on 22 February 2022, the Judge set the case down for a public preliminary hearing on 14 and 15 July 2022, before a Judge sitting alone, to hear and determine whether, at the material time:
 - 3.1 The claimant met the definition of disability by virtue of his autism.

- 3.2 To decide whether the claims were presented out of time and, if so, whether time should be extended on just and equitable grounds?
- 3.3 Set a case management timetable for the final hearing and to consider any application for Judicial Mediation.
4. At the public preliminary hearing held on 14 and 15 July 2022 before Employment Judge McNeill KC, the Judge struck out the harassment related to disability and victimisation claims as they were presented out of time and time was not extended on a just and equitable basis. In relation to the claim of failure to make reasonable adjustments, time was extended, and the claimant was allowed to pursue that claim to a final hearing on 31 July to 3 August 2023. Case management orders were also issued.
5. A further case management preliminary hearing before EJ McNeill KC, to hear and determine the claimant's application for specific disclosure documents, was held on 4 January 2023. After considering the submissions by the parties the Judge ordered specific documents be disclosed by the respondent to the claimant.

The issues

6. EJ McNeil clarified the issues in relation to the reasonable adjustments claim in the case management orders sent to the parties on 31 July 2022. The Judge wrote:

“Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

43. It is not in dispute that at the relevant date (around September 2019) the respondent knew or could reasonably have been expected to know that the claimant had autism.
44. It is also not in dispute that the respondent had criteria for selection for acceptance on the A-Licence course (a provision, criterion or practice often referred to as a PCP) which at the relevant time (around September 2019) required or favoured those who were employed in the professional game.
45. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was not employed in the professional game at the time?
46. Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at that disadvantage?
47. What steps could have been taken to avoid the disadvantage? The claimant suggests that the respondent could have considered his application as it would have been in 2014 when he worked for Arsenal Ladies.
48. Was it reasonable for the respondent to have to make that (or any other) adjustment (the claimant does not have to prove the adjustment that should have been made although it is helpful when a proposed adjustment is identified)?
49. It is not in dispute that the respondent did not make the adjustment requested. Indeed it refused to make that adjustment.”

The evidence

7. The tribunal heard evidence from the claimant who did not call any witnesses. On behalf of the respondent evidence was given by Mr Chad Faulkner Ehlertsen, Head of Operations of FA Education; and from Mr Matthew Bishop, UEFA A-Licence Lead.
8. In addition to the oral evidence the parties produced two bundles of documents comprising in excess of 1100 pages. Where appropriate, references will be made to the documents as numbered in the joint bundle.

Findings of fact

9. The claimant was assessed on 24 November 2014 and in her follow ups report dated 1 December 2014, by Ms Sue Hahn, Head of Diagnostic Services, he wrote:

“That the claimant met the criteria for a diagnosis of autism.

(311-315 of the joint bundle)”

10. The claimant has a lifelong interest in football which has been identified as his autistic fixation, meaning that it is an area of interest to him which he has studied in depth. This autistic fixation provides him with a safe and calming environment in which to work. (346 to 347)
11. From August 2007 to May 2014, he was working at Arsenal Ladies Football Club, as Head Coach for the under 10's, under 11's, under 12's, under 13's and under 15's girls. Prior to that he held various coaching positions. In terms of his football qualifications, he acquired Key Stage 3 and 4 certificates in 1999; Key Stage 2 Teaching certificate in 2005; the Football Association Mentoring Adults in 2010; UEFA B Level 2 certificate in Coaching Football in 2003; UEFA B Level 3 certificate in Coaching Football in 2011; and FA Youth Award Level 3. He has also other sports studies and health and fitness qualifications. His FA Licensed Coach number is 1914575. (309 to 310)

A-Licences

12. The Union of European Football Association “UEFA” requires the respondent to ensure that football coaches working in England hold suitable qualifications relevant to the level at which they are working. As part of that, UEFA grants the respondent a limited number of “A-Licences” to award each year. It also grants a number of A-Licences to the football governing bodies in other countries around Europe. The A-Licence is UEFA's highest level qualification that coaches can achieve. It is a requirement set by UEFA that coaches working at certain levels within professional clubs hold an A-Licence, for example, first team and other lead coaches. To ensure that the respondent meets these obligations to UEFA and that professional clubs in the men's and women's games are able to meet the requirements for certain coaches to hold the A-Licence, the respondent need to carefully consider who it accepts on to the A-Licence courses it runs. The A-Licence course is a very competitive course to

get on to and each year applications exceed the number of places available by a large margin. The respondent, therefore, has in place a priority order system to assist with reviewing the applications it receives to ensure it is prioritising applications from those who most need the qualification.

13. The A-Licence is comprised of six, three-day modules at the Football Association's education training facilities at St Georges Park, Burton upon Trent, East Staffordshire. In between those modules, learners are visited at their professional clubs for a minimum of three "in-situ" sessions during which they are observed coaching their teams by those delivering the course to assess and provide feedback on how they are implementing their learning in their professional club setting. In-situ observation and feedback are an important part of the learner's development towards the A-Licence qualification and is, therefore, integral to how the course has been designed.
14. During the Covid-19 pandemic, various modules were delivered online to learners undertaking the A-Licence course. However, in-situ visits were crucial, so these were delayed and delivered once social distancing restrictions were lifted.
15. Learners undertaking the A-Licence course are given a learning journal which sets out the structure of the course and is designed to encourage them to record and reflect on their development. (816 to 927)
16. There is a learning journal that sets out the respondent's approach to learning on the A-Licence course. (829)
17. Of note, the respondent gives priority to applicants who are working in the professional game. If they are not, then they do not have the same opportunity to apply their learning from the course within a professional environment and will not benefit in the same way from, or be able to progress on, the course as much as those working in the professional game. Learners also benefit from being able to share insights from the A-Licence course with coaches working at a similar level within their clubs which learners working in a grassroots environment would not benefit from.
18. The respondent has determined the need to prioritise those groups where applicants are working in professional clubs in order to satisfy the various technical requirements in place regarding the A-Licence qualifications. Applicants working in professional clubs also greatly enhances the delivery and effectiveness of the A-Licence course for a number of reasons. Firstly, working in a professional setting ensures that applicants are working with players of an appropriate standard at suitably elite levels of competition. The A-Licence is the highest individual qualification that can be awarded and is, therefore, aimed at those working with players at a high standard within the sports. Secondly, the A-Licence is designed on the basis that coaches are working in reasonably sized multi-disciplinary teams to support their players. Thirdly, applicants are working alongside other specialist coaches and support staff, such as, sport scientists, physiotherapists, analysts, specialists and specialist coaches, to name a few. Having these multi-disciplinary teams in place is standard at professional clubs but not within the grassroots game.

19. In January 2014, the claimant applied for the A-Licence course but was unsuccessful. At that time he was still working as a Coach at Arsenal Ladies Football Club.

Disability discrimination

20. In May 2014, following seven years as a Coach at Arsenal Ladies Football Club, "the Club", he disclosed that he had been diagnosed as suffering from autism. Following that disclosure, he asserted that he was dismissed by the Club. He issued Employment Tribunal proceedings, Case number 3301310/2014, but before the case was heard, the Club accepted liability for disability discrimination and unfair dismissal. There was a settlement agreement dated 18 May 2015 and, in accordance with the terms of it, the Club agreed to pay him £17,200 within 14 days on condition that he withdrew his claims and any potential claims against it. Of relevance are paragraphs 7 to 9 of the settlement which reads as follows:-

“7. The First Respondent will provide the Claimant with assistance in respect of his applications to obtain his UEFA A-Licence by providing a letter of support in respect of his application in the form of the draft Schedule B.

8. The First Respondent will provide the Claimant with assistance in respect of his application to obtain his UEFA A-Licence by supporting him with the preparation of his portfolio of coaching evidence needed to be submitted as part of his application for the UEFA A-licence, including all reasonable administrative and documentary support required by the Claimant for the completion of the UEFA A preparatory course. When the claimant requires such assistance, the person who he is to contact is Judy Pitrakaou.

9. The First Respondent will pay on behalf of the Claimant the course fee for the UEFA preparatory course and will pay the course fee for the UEFA A-Licence provided that the Claimant applies for the UEFA A-Licence course and is accepted within 3 years of successful completion of the UEFA A preparatory course.”

21. We find that there was no term in the agreement that the Club would provide the claimant with a player to assist him while on the A-Licence course, as part of his application get on to the course. Neither the Club nor the individual respondents in that case, Clare Wheatley and Mr John Bayer, guaranteed him a place on the course. (329 to 332)
22. In order to apply on the A-Licence course, an applicant must register their interest online. They are then, subsequently, sent a link to the form to fill out formally their application. Applying its criteria, the respondent decides who to admit on the course.
23. There is a conflict in the evidence between the parties as to whether the claimant applied enrol on to the A-Licence course between 2016 to 2018. In his email dated 16 October 2016, he applied to enrol on the course, code CL451, and attached his UEFA B Licence as well as an endorsement letter from Arsenal Ladies Football Club. He stated that the Club was paying for the course pursuant to the settlement agreement following their acknowledgement of liability on 18 May 2015. He further wrote:

“As part of the agreement I have permission for use of players at Arsenal Ladies with appropriate age groups at the correct level for this course, however after my treatment there, that would be my last option.

I now work at Creasy Park Stadium in Dunstable which is the home ground of Dunstable Town and AFC Dunstable men and ladies. I have a good relationship with both clubs who have first team players and u21s and u18s, which would also meet the criteria for players to work with for the A-Licence course.” (343)

24. The course application criteria in 2016 had changed. In relation to those working in the men’s game, priority was given to those working within the Senior Professional Game in England as part of the Premier League and English Football League; those who needed the qualification in order to meet Elite Player Performance Plan requirements; full-time staff would be considered before part-time staff; those working as full-time Coaches in The National League and outside of the professional game; Coaches who were working and living in England; and full-time Coaches within the Senior Professional Male Game who needed the qualification for EPPP requirements although they did not necessarily need the qualification but have been identified in terms of future development.

25. In relation to the women’s game, priority is given to:

- “Those who need the qualification as part of the FA Women’s Super League requirements
- Those who need the qualification as part of the FA Women’s Championship League requirements
- Those who work within and need the qualification as part of the FA Female Talent Pathway requirements

As well as this, where possible coaches working in the below areas who don’t necessarily need the qualification in terms of requirements, but have been identified in terms of future development will be considered:

- Coaches working with FA women’s super league, championship and WSL Academy teams
- Coaches working with FA Women’s National League teams
- Coaches working within the FA Female Talent Pathway.” (345)

26. In the previous year applicants were told on the application form in answer to the question “who is it for?” it stated the following:

“For coaches who are, or who intend to be working in 11 v 11 football within the international, professional, semi professional and elite girls or youth programmes. Candidates are strongly advised to ensure they will have access to sufficient players to practice 11 v 11 sessions between part one, part two, and a final assessment.” (337)

27. The claimant submitted his interests in the course on the 16 August 2017 and 8 May 2018, but on each occasion, he heard nothing back. He asserted that he

was not sent a link to complete the application, therefore, had no opportunity to apply. According to the respondent, he was sent the link, but it could have gone to his spam email. We were not in a position to determine this conflict one way or the other and, in any event, the outcome is not material to this case. (351 to 352)

28. It is the claimant's case that the respondent changed the priority requirements in order to exclude him from the A-Licence course. There was no evidence provided by him in support of that assertion. We find that in order to change the order of priority, respondent would have had to persuade the Premier League, the English Football League, and the Women's Super League, to change their enrolment requirements to avoid having to admit the claimant on to the course. They are the stakeholders, and such a claim is unrealistic and far-fetched without an iota of evidence to support it. No evidence was provided apart from the statement that the other stakeholders were aware of the circumstances claimant's involvement with the respondent. We, therefore, do not accept that the changes were deliberately targeted exclude the claimant from getting on to the A-Licence course.
29. In September 2019, the claimant made enquires of FA Education about applying to be admitted on to the A-Licence course in the next round. He was informed that the application window was open until 9.00pm Friday 27 September 2019. (482)
30. He had earlier been sent on 6 June 2019, information regarding UEFA A-Licence selection criteria and was informed that the respondent could not fully comment on any assurances Arsenal Ladies Football Club might have given him but that all candidates were assessed against its selection criteria. He was further informed that reasonable adjustments could be made to help him submit his application for a place on the course, such as help with writing it to which he had stated he found difficult.
31. On 13 September 2019, FA Education, sent an email to him stating that he was able to apply to the UEFA A Licence course and that applications closed on 25 September 2019.
32. The claimant responded that same day referring to a discussion he had with an administration officer in FA Education regarding reasonable adjustments. He wrote that, having regard to the size of the respondent's organisation, he met the criteria for the course in terms of players at the correct level for the course at Arsenal Women Football Club which was part of the settlement, and the respondent had made adjustments similar to what he was requesting for BAME and female Coaches. He stated that he was at a disadvantage compared to others in relation to the adjustments made for them. (573)
33. We find that there was no evidence of a similar adjustment being given to BAME and female Coaches as alleged by the claimant. The claimant did not produce any credible evidence in support of his assertion. The respondent's case is that funding and support are provided to certain groups only if they meet the criteria for the course in the first instance.

The claimant's September 2019 application

34. On 27 September 2019, the claimant made an online application to be admitted on to the A-Licence course, CL 463. He stated that the club to which he was attached was Herts Academy Football Club and was working within the female game. He was working within the professional area, not grassroots or overseas and was a part-time academy Coach. (562 to 563)
35. In support of his application he submitted his curriculum vitae; an endorsement from Arsenal Women's Football Club; a statement on how he met the criteria; and a reference from Ms Clare Wheatley, Arsenal Women Football Club, Head of Women's Football, dated 5 September 2019.
36. In his application he stated that his supporting evidence demonstrated that he met the criteria. He referred to his curriculum vitae, and an endorsement by Arsenal Women's Football Club. He then wrote:

“A reasonable adjustment has also been requested for me to be viewed as in the position as at Arsenal women by the panel be cause of the admission of unfair dismissal and disability discrimination.

Therefore I meet all the criteria for the course.

Many players I worked with during my time at Arsenal have go on to play in the ws1 and ws2 and USA leagues and many have been and still are involved in England youth teams and one is currently in the England senior team.

I have been told by the FA that I am also the highest qualified coach with a disability in the country and have ambitions to be the first to gain the UEFA A-License and to go on and compete in full time professional football in the women's game WS1 or WS2 the men's professional game or the disability international teams competing in European and world cups.” (586)

37. The priorities for the A-Licence Coaching course 2019/2020 in respect of women's football, are similar to the men's game. They are:

“Those who need the qualification as part of the FA Women's Super League requirements.

Those who need the qualification as part of the FA Women's Championship League requirements.

Those who work within and need the qualification as part of the FA Female Talent Pathway requirements.

As well as this, where possible coaches working in the below areas who don't necessarily need the qualification in terms of requirements, but have been identified in terms of future development will be considered:

Coaches working with FA Women's Super League, Championship, and WSL academy teams

Coaches working with FA |Women's National League teams

Coaches working within the FA Female Talent Pathway.”

(928 to 931)

38. We find that the respondent receives many more applications each year for each A-Licence course than there are places. In relation to the September 2019 applications for the three courses 2020 commencing in June 2020, the respondent received 850 applications for 150 places. This equates to nearly six applicants for each place. We find that competition for places on the course is very high. The respondent’s regulatory obligations to UEFA mean that it must make sure that those who need the licence are given a place its list of priorities.
39. In Ms Wheatley’s supporting letter she stated that the claimant had coached at Arsenal Ladies Centre of Excellence, from 2007 to 2014, and during that time he acted as Head Coach for the under 10s, under 13s, under 14s and under 15’s. He was Assistant Coach for under 10’s, under 12s and under 13’s squads. She stated that during his seven-year period of employment he achieved notable successes. She then wrote:

“During Robin’s final season for Arsenal Ladies Football Club, all 18 of the under 15’s were invited to the FA Elite Player Camp and seven of these went on to represent England. Robin played a key part in these players’ long-term development technically, tactically, physically, socially and psychologically. In December 2013 Robin was assessed during a routine training session with U15’s and passed on all criteria in the FA Centre of Excellence Technical Report, demonstrating a high standard in training. In addition, robin worked well with players in the area of growth mindset and shared his experiences with other coaches at the Centre.

Robin consistently demonstrated that he had the skill set, passion and tactical prowess to deliver within a football environment and I have pleasure in endorsing his application and recommending that he should receive a place on the course.” (583)

40. Mr Chad Ehlertsen, Head of Operations of FA Education, had, prior to the claimant’s application, sort advice from Mr Justyn Price, Senior Lead – Learner Insight and Coach Development, who emailed his advice Mr Ehlertsen as well as copying-in others, on 18 September 2019. He stated that he believed that “reasonable adjustments” for the respondent had two implications:

“1. That we make reasonable adjustment to our application process in order that the method of application does not prevent learner from submitting their request to be considered against the selection criteria for qualification (e.g. If a learner finds written application a challenge, FA Education could make a reasonable adjustment by transcribing their application) **The selection criteria of an award would not be amended as I believe this would be counter intuitive regarding our approach to equality of access.**

2. Once learners are accepted onto a course reasonable adjustments can be made to the methods / medium of teaching sessions and materials (e.g. provision of a signer for learners with hearing impairments or handouts produced on various coloured paper to support visual clarity).

I hope this might prove useful in future discussions on this topic, the examples are clearing not exhaustive and we Mer also wish to connect 1st4sport to drill upon the experience of this topic area.” (508)

41. The claimant was informed in an email from Ms Judy Pitrakou, Human Resources Consultant, on 3 October 2019, that the respondent will be responding to his request for a reasonable adjustment by 11 October 2019. (587)
42. Mr Ehlertsen’s view was that it was not appropriate for applicants not working in the professional game to attend the course. The course relies on the individual being in a position where they coach a professional team; whether they could put into practice the skills they are taught on the course; and it is a core part of the course that they are observed at their clubs doing so. The cost incurred in undertaking the course is £3645 for FA Licence\coaches club members, and £4374 for non-FA Licence coach members in 2019. He considered that it would be wrong for the respondent to take money from people for whom the course is not relevant and who would be paying the fee in their personal capacity. In contrast, many clubs in the professional game pay the course fees for their coaches who are undertaking the A-Licence.
43. We find that he gave consideration to whether the A-Licence priority order should be adjusted for the claimant in the way he requested but did not and do not think that it would have been reasonable to treat the claimant as though he was still employed by Arsenal Ladies Football Club. He had not been employed by the Club for over five years by the date of his application. Although the Club admitted to discriminating against him and terminating his employment, from the respondent’s perspective, he was not working in an area of the women’s game where the A-Licence course was relevant to him. It had nothing to do with his autism. Regardless of whether he had autism or not, the course would not have been appropriate for him at that point in time because he was not working at the right level.
44. Further and or alternatively, if he had been treated as though he was employed by Arsenal Football Club, he would have been ranked differently in the priority order, but it was still very unlikely he would have got a place on the course as there would have been people in the priority order ahead of him. He coached Arsenal Women’s under 15’s which sits behind the older youth game age groups and behind the adult professional game teams in the priority order. There were a number of applicants for the course in question who were unsuccessful but who worked in roles that engaged with those more senior players and who would, therefore, have had their applications prioritised ahead of the claimant’s. No applicant from those in the grassroots game was successful.
45. Mr Matthew Bishop, UEFA A-Licence Lead for the Senior Professional Game, along with Mr Abdul Fazal, Coach Inclusion and Diversity Manager; Ms Audrey Cooper, Head of Women’s Coach Development; and Ms Amy Buxton, Education Delivery Co-ordinator, Women’s Game, were responsible for reviewing the applications received in September 2019. Mr Liam Hill, Education Delivery Co-ordinator, for A-Licences, provided administrative support. Mr Geoff

Pike, National Coach Developer Lead for the FA, who would have been involved in reviewing the applications was, at the time, on leave from 1 September 2019.

46. We find that in the professional female game, a large number of applications were not accepted on to the course although they met the priority criteria. They were, however, placed on the reserve list for future A Licence courses.
47. All applications from the grassroots Coaches and those overseas were rejected because there were no spaces left on the course. Spaces had been awarded to those who met the respondent's priority criteria. In addition, a number of applications from individuals who met the criteria were rejected. (976a to 976g)
48. Mr Bishop reviewed the claimant's application and was aware that his request for an adjustment to the criteria had been turned down. He was also aware the claimant had autism. Mr Bishop's role was to ensure that the respondent appropriately prioritised applications from those who most needed the A-Licence. When reviewing the applications list, he saw from the summary of the claimant's application, that he was not working at a professional club, therefore, did not meet the criteria for acceptance onto the A-Licence course. He stated and, we find as fact, that reasonable adjustments were made to the application process wherever possible to enable applicants to submit their applications, for example, by providing the option to dictate an application where the applicant was not be able to type. This support was offered to the claimant, but he chose not to take it up.
49. Once learners have been accepted onto the A-Licence course, reasonable adjustments can be made to ensure they are able to participate in the course itself regardless of need or disability, for example, by providing a sign language interpreter for those who are deaf. Had the claimant's application been successful, the respondent would have considered whether any reasonable adjustments to the delivery of the course could have been made for him. Anyone with a disability would be accepted onto the course if they were a priority for the A-Licence. The respondent also had disabled Coaches on the course. The priority order, in Mr Bishop's view, did not and do not create a particular barrier for disabled coaches.
50. Considering the claimant's application, it was not in any way influenced by anyone engaged or employed by Arsenal Ladies Football Club, subsequently renamed Arsenal Women's Football Club. Contrary to the claimant's assertion, the respondent had no discussions with anyone from that Club regarding his application. No evidence had been put to the tribunal by him to challenge this.
51. There was also no evidence that Mr Geoff Pike had any involvement in the decision regarding the claimant's 2019 application.
52. After the priority order had been applied to the applications, it was determined that the claimant would not be awarded a place on the course. Mr Bishop did, however, consider if there were any alternative training opportunities the respondent could offer to support his professional development. In an email dated 15 November 2019, the claimant was informed by FA Education that he

had been unsuccessful in getting on to the A Licence course 2020. They wrote the following:

“Thank you for applying for the FA level four (UEFA) in coaching football.

Unfortunately, your application has been unsuccessful: the reason for this is because you are not currently working in the professional game.

Importantly, you can continue to learn about the game and develop your coaching skills.

The technical and tactical topics covered in the FA Level 4 (UEFA A) are available to you through a series of webinar sessions that will be run over the next few months.

The first sessions are available for you to book onto now by clicking the “book” button (s) below.

We are also offering you a single opportunity to speak with a member of the Professional Game Team about your application and how you can use the webinar effectively to improve your coaching.

We will not go into any further discussion for your non selection as that reason has already been explained nor will we discuss other applications with you. We will be in touch on Monday via email with a date for that call; if you are unable to make that date there will be no further opportunity to talk to a member of the PGT.”

53. They then set out the priority given to the male and women’s games in the selection process. (689 to 691)
54. The claimant had incorrectly stated that he was working in the female professional game when he submitted his application. In paragraph 64 of his witness statement, he stated that teaching him in a grassroots club would not have helped him at league level.
55. He spoke to Mr Bishop on 22 November 2019, raising concerns about the application process which he felt had discriminated against him. There is a contemporaneous note, in points form, of the discussion they had. Mr Bishop noted that the claimant wanted to know who was involved in the process and blamed a number of people for his earlier failed applications. He challenged Mr Bishop’s involvement in the 2019-2020 round, and alleged that he had received a different letter from the one sent to the other applicants. He was contemplating taking legal advice regarding the offer of support as he was concerned that he may not be in the right mental state at that time to take up the offer of in-situ support and to attend and observe those on the A-Licence course. He, however, agreed to accept the offer of support. (749)
56. Mr Bishop noted in his email to Ms Lucy Pearson, Head of FA Education, and Ms Sue Ravenlaw, Head of Safeguarding, that in relation to further support, in respect of the claimant, that:

“1. Conduct and in-situ club visit (date and venue to be agreed by all parties).

2. There is no time scale on when the club visit is made. This would be based on his personal circumstance and state of mind.

3. In-situ support to be conducted by Mat Bishop
 4. Action plan to be provided around his suitability based on the demands of the A licence.
 5. Following of the completion of the club visit and agreed action plan, we will offer him additional support opportunities via tending two days of an A license block. (1 day around an in possession theme and one day around and out of possession theme).
 6. It was stressed that this was a support opportunity and there was no guarantee that this would lead to a successful application in the future.
 7. This offer would be communicated through Sue Ravenlaw by no later than Friday 29 November.
 8. Mat Bishop to receive some training around supporting a person with autism.” (749)
57. In Mr Bishop’s evidence, which we have accepted, he stated that even if the claimant was still employed by Arsenal Women’s Football Club coaching their under 15’s team, all of the successful applicants from the women’s game would have been prioritised above him. Further, there were many individuals who would have taken priority above the claimant but who were not accepted on the course. The unsuccessful candidates from the women’s game would have been prioritised ahead of the claimant due to them undertaking roles at their clubs working with elite players on the respondent’s Senior Women’s Pathway, which would have placed them at a higher level of priority compared with the claimant based on the criteria. Mr Bishop then referred to the documents in the bundle giving a list of those applicants who were unsuccessful and those who were placed on the reserved list. (976c)
58. Ms Sue Ravenlaw, looked into the claimant’s complaints and emailed him on the 31 January 2020. This included his request for a reasonable adjustment to his September 2019 application. She concluded that it was not reasonable for the respondent to have treated his application as though he remained employed by Arsenal Women’s Football Club and that the rejection of his application was solely due to him not meeting the relevant criteria. It was not connected in anyway to his disability. She found no evidence to suggest that he was deliberately blocked from accessing the A-Licence course. She attached as an appendix to her letter setting out the ways in which the respondent was prepared to support him. We further find, that in responding to the claimant, she had taken advice from the National Autistic Society. (770 to 780)
59. Those who were awarded a place on the A-License course, CL463, commencing in June 2020, each met the criteria. (976g)
60. There was one applicant who was accepted on to the course and who was working grassroots in a non-professional club. This person was an internal member of staff working for the respondent who was required to undertake the A-Licence course due to the requirements of the role. The course was needed to enable them to tutor in football. They met the criteria of being a full-time of a Professional Coach and fell within the category of:

“As well as this, where possible coaches working in the below areas who don’t necessarily need the qualification in terms of requirements, but have been identified in terms of future development will be considered.”

The respondent’s finding of misconduct

61. In 2015 the claimant informed the respondent that Arsenal Ladies Football Club had unfairly dismissed him and had discriminated against him on grounds of his disability. It took some time for the respondent to investigate that matter and in August 2019, it charged Arsenal Ladies Football Club with misconduct.
62. On 6 May 2020, the claimant was informed that it had appointed Mr Sean Jones King’s Counsel, to investigate the misconduct allegations and his applications for enrolment on to the A-Licence course. On 15 May 2020, the respondent regulatory commission upheld the charge brought against Arsenal Women’s Football Club, that it had discriminated against the claimant in dismissing him in contravention of the respondent’s rules and regulations and fined the Club £50,000. (114)
63. On 15 November 2021, the respondent wrote to the claimant to inform him of the outcome of Mr Jones’ investigation and its conclusion. (93 to 798)
64. We were not taken to the correspondence in respect of this matter as it did not form part of the claimant’s claim of breach of the duty to make reasonable adjustments.
65. The claimant was not made aware nor was he provided with the reason or reasons by the respondent, for the delay investigating the Club as he had informed FA Education, which is part of the respondent, of his discriminatory dismissal by the Club five years earlier. (Claimant’s additional evidence pages 49 to 50)

The claimant’s personal circumstances

66. The claimant’s autism is life-long. He told the tribunal that his fixation with football encourages him to engage with people and, in doing so, he does not feel either depressed or isolated. He loves being outside playing football and to study football as a Coach was a natural progression. He is supported by his family.
67. In June 2017, he set up the Herts Academy Football Club, but left it in 2021 and, subsequently, sometime in 2021, it closed.
68. He told the tribunal that he has been referred to a Community Mental Health Team who diagnosed him as suffering from Chronic Post-traumatic Stress Disorder triggered by the loss of his employment, his discriminatory treatment, and having been victimised by the respondent. He said that the Community Mental Health Team could only offer psychotherapy, medication, and counselling. Group therapy is not an option for him due to his autism.

Submissions

69. The claimant prepared written submissions which we read, and he spoke to those in his address to us. Ms Davies, counsel on behalf of the respondent, prepared an opening note and gave oral submissions. She also invited the tribunal to have regard to the authorities she put together in a separate bundle.
70. We have taken their submissions into account but do not propose to repeat them herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

71. Section 53(1) Equality Act 2010, “EqA 2010”, states that:

“A qualifications body (A) must not discriminate against a person (B) –

- (a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;
- (b) as to the terms on which it is prepared to confer a relevant qualification on B;
- (c) by not conferring a relevant qualification on B.

72. Section 6 EqA 2010, states:

“(1) A person (P) has a disability if –

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”

73. Section 212(1) EqA defines substantial as “more than minor or trivial.” The effect of any medical treatment is discounted, schedule 1(5)(1).

74. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as “it thinks is relevant.”

75. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24.

The duty to make reasonable adjustments

76. Section 20 EqA on the duty to make reasonable adjustments, provides:

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

- (2) The duty comprises the following three requirements.

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

77. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

"Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability...disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

78. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20, a judgment of the EAT. An Employment Tribunal in considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment, must identify:

- (1) the provision, criterion or practice applied by or on behalf of an employer, or
- (2) the physical feature of premises occupied by the employer;
- (3) the identity of a non-disabled comparator (where appropriate), and
- (4) the identification of the substantial disadvantage suffered by the claimant may involve consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

79. A tribunal in deciding whether an employer is in breach of its duty under section 20 EqA 2010, must identify, with some particularity, what "step" it is that the employer is said to have failed to take.

80. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pc. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

81. In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283, [2007] ICR 1359, the Court of Appeal held that increasing the period during

which the disabled employee could claim full pay while on sick leave to alleviate financial hardship following a reduction in pay, would not be a reasonable step to expect the employer to take as it would mean that the employer would have to assess the financial means and stress suffered by their disabled employees.

82. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift,

“...it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.”, Elias J (President).

83. Paragraph 6.10 of the Code 2011 provides:

"The phrase 'provision, criterion, or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

84. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

“The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.”

85. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

86. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised to accommodate those who cannot fit into existing arrangements.

87. The test is an objective one. The employer must take “such steps as...is reasonable in all the circumstances of the case.” Smith v Churchills Stairlifts plc [2006] IRLR 41.

Conclusion

88. It is admitted that the claimant suffers from autism and was, at all material times, a disabled person.

89. It is further admitted that the respondent applied the requirement to those who applied to go on the A-Licence course, that they would be employed in the professional game.
90. There is also no dispute that the respondent is a qualification body under sections 53 EqA 2010.
91. It is noteworthy that the claimant made an application in 2014 while working for Arsenal Ladies' Football Club for admission on to the A-Licence course which was unsuccessful. He did not subsequently challenge that decision on grounds of his disability.
92. We have made the finding that the respondent change in criteria in relation to priority, was not targeted at the claimant but followed consultation with the other major constituent stakeholders.
93. The operative date is when the decision was taken to reject his application.
94. The provision criterion, or practice requiring applicants to employed in the professional game, we conclude, did not put the claimant at a substantial disadvantage because of his autism. The reason why he did not meet this criterion was not because of his disability. It was because he had not been employed in the professional game in September 2019. Any non-disabled applicant or someone without the claimant's disability and who was not employed in the professional game at the time of their application, would not have been admitted on to the course.
95. The claimant was last employed by Arsenal Women's Football Club in 2014. He applied at the time when he was working for Herts Academy Football Club at grassroots level. The provision, criterion, or practice required or favoured those applicants who were employed in the professional game regardless of their disability. The claimant was at the same disadvantage as those who were not in employment in the professional game at the time of their application. The statistical evidence demonstrates that those individuals' applications were rejected. No applicant at grassroots level was successful.
96. The reason why the claimant was not in the professional game was that he had not been employed for five years prior to his application in September 2019, in that capacity. There was no evidence that he would have been so employed by Arsenal Women's Football Club in September 2019. Indeed, the supportive letter from Ms Wheatley described his skills, abilities up to 2014. He was not in the professional game because he decided to set up and manage his own football club. He, therefore, cannot show that he was at a substantial disadvantage because of his disability compared with non-disabled people, or those without his disability.
97. Even if he was treated, as a reasonable step, as hypothetically having been in employment at Arsenal Women's Football Club, the A-Licence course has a number of practical aspects to it. The successful candidate had to apply what they have learnt to their professional club and be visited to assess how they apply their knowledge and skills. The claimant would be unable to do so as his

club was not at the requisite professional level. The purpose of the course was to prioritise those who most needed the A-Licence at a senior level in the professional game. It would undermine the purpose of the course to assess an applicant in a role he or she is not working in. In paragraph 64 of the claimant witness statement he stated that teaching him in a grassroots club would not have helped him at league level. He did not need an A-Licence for his work at his academy, nor did he need it to work with those under 15's at Arsenal Women's Football Club.

98. There was no evidence that the respondent had made adjustments, as asserted by the claimant, for those underrepresented Coaches to enable them to be admitted on to the A-Licence course.
99. One employee of the respondent who was successful in being admitted onto the course was involved in training at a professional level. That person met the respondent's priority criteria.
100. We further conclude that even if the claimant was accepted on the basis that he was working, hypothetically, for Arsenal Women's Football Club, he would have been very low down in the ranking and would still not have been admitted on to the course. He was at the time he left the Club, teaching girls under 15 years.
101. All those who were successfully admitted on to the course in June 2020, ranked above him.
102. We have, therefore, come to the conclusion that the claimant has not established substantial disadvantage because of his disability or disability. The claim of failure to make reasonable adjustments is not well-founded and is dismissed.
103. The respondent was sympathetic to his circumstances and wanted to help him. Mr Bishop had a discussion with him and made a number of suggestions to support him in his role at his football academy. Ms Ravenlaw repeated the offer, but the claimant did not take them up.
104. We accept that he had concerns about his treatment by the respondent. We are satisfied that those concerns were properly and adequately investigated internally by the respondent. It is to be hoped that he could move on and re-establish a life in football as it has been beneficial to him taking account of his autism. It is clear that while he was working at Arsenal Ladies Football Club, he performed well as a coach. Our judgment does not in any way diminish his abilities as a Coach and his love of football but is based on the legal requirements to establish a successful claim of failure to make reasonable adjustments.
105. The provisional remedy hearing listed on 4 December 2023, is hereby vacated. The parties are not required to attend as there would be no hearing.

Employment Judge Bedeau

Date: 21 September 2023.....

Sent to the parties on:

26 September 2023

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For the Tribunal Office