



Arbitration CAS 2006/A/1023 Nenad Mladenovic v. FC Metallurg Donetsk, award of 8 August 2006

Panel: Mr Raj Parker (United Kingdom), Sole Arbitrator

Football

Contract of employment between a player and a club

Lack of documentary evidence establishing the rate of salary and bonuses owed to the player

Validity of a contractual deduction of salary and of a reduction of bonuses

- 1. The lack of sufficient documentary evidence establishing the contractual rate of salary and bonuses of a player, the way in which those salary and bonuses are to be paid and, most importantly, whether there is any reduction in salary or bonuses, don't permit to make out a player's case that amounts of salary and bonuses have been wrongly deducted from his remuneration especially where an agreement concluded between the parties discharged all liabilities throughout the term of the contract of employment.**
- 2. A contract between a player and a club may validly provide for a reduction of the player's bonuses and for a deduction of salary in case of a breach by the player of his obligation such as a deterioration in the player's skills.**

The Appellant is Mr Nenad Mladenovic of Serbia and Montenegro (*Mladenovic* or the *Player*). Mladenovic is a Serbian professional football player.

The Respondent is FC Metallurg Donetsk of Donetsk, Ukraine (*Metallurg* or the *Club*). Metallurg is a Ukrainian football club and is a member of the Football Federation of Ukraine, which is affiliated to the Fédération Internationale de Football Association (*FIFA*).

Mladenovic and Metallurg signed a two-year employment contract lasting from 1 July 2003 until 30 June 2005, with the option of a two-year extension (the *Contract*).

Mladenovic has also produced a further document, which purports to be an addition to the Contract (the *Addition*), which gives details of his monthly salary and bonuses, the details of which are not stated in the Contract. Handwritten entries to the Addition show a monthly salary of USD 20,000 with no figure given as to bonuses. The Addition bears no signature from either Mladenovic or any representative of the Club.

The Contract contains clauses pertaining to disciplinary measures which can be imposed on the Player in the event of a breach of an "*obligation*" under the Contract. One such measure (clause 3.1) is a

penalty permitting a reduction in bonuses for a breach of an obligation within the Contract. Another measure (clause 3.2) is a reduction (ranging from 25% to 100%) of the Player's monthly salary and a complete reduction in bonuses for a "*gross or bogus violation*" of the Player's obligations to the Club. In the Addition, there is a list of the obligations of the Player and penalties for breach of those obligations, including reductions in salary and/or bonuses.

On 15 October 2004, Mladenovic sent a fax to Metallurg, stating that the Club was in default of payment of his salary and bonuses, with a total of USD 83,500, broken down as follows:

- 50% of the salary due for the first three months of the Contract totalling USD 30,000;
- salary payments for August and September 2004, totalling USD 40,000; and
- bonuses for an unspecified period totalling USD 13,500.

On 4 November 2004, having received no reply from Metallurg, Mladenovic complained to FIFA by fax claiming:

- Outstanding salary of USD 83,500 to 4 November 2004;
- Salary to the end of the Contract totalling USD 160,000; and
- USD 120,000 "damages".

Mladenovic also requested a declaration from FIFA that he was free to sign a new contract with a club of his choice without any compensation being due to Metallurg.

On 6 January 2005, FIFA enquired of Mladenovic whether the matter had been settled. On 18 January 2005, Mladenovic replied to FIFA that the matter had not been settled and that he had only received half of his salary for November and December 2004 and he therefore claimed that Metallurg now owed him a total of USD 103,500.

On 4 February 2005, FIFA wrote to the Football Federation of Ukraine, requesting that Metallurg, as a member club, respond to the claim of Mladenovic within 15 days.

On 18 February 2005, Metallurg replied to FIFA, indicating that it believed that all amounts due as salary had been paid to the Player, but accepted that the Club had deducted the Player's bonuses by 50% on the grounds that there had been a "*deterioration of [the Player's] skills*" and that Mladenovic had breached "*the established work schedule*" in the summer of 2004. Metallurg provided a report from the Head Coach of Metallurg, Mr Slavoljub Muslin (the *Head Coach*), confirming such a deterioration in the Player's skills and minutes from a meeting of the Sporting Board of Metallurg dated 30 August 2004, which confirmed the reduction of the Player's bonuses from September 2004.

On 30 June 2005, Mladenovic entered into an agreement (the *Agreement*) which stated:

"1. *Once the Contract, dated 01.07.2003, expired the Parties terminate fulfilment of their mutual liabilities with respect to each other, viz:*

1.1 *Mr. Nenad MLADENOVIC terminates to perform as a football player in FC Metallurg Donetsk from 1 July 2005;*

1.2 *The Player is released from fulfilment of any liabilities to the Club from 1 July 2005;*

1.3 *The Club is released from fulfilment if any liabilities to the Player from 1 July 2005”.*

On 12 July 2005, after the expiration of the Contract, Mladenovic produced bank statements to FIFA, allegedly showing that USD 299,950 had been paid as salary into his bank account throughout the duration of the Contract, rather than the amount specified in the Contract of USD 480,000. Mladenovic claimed that the amount owed in salary and unpaid bonuses was now USD 208,550.

The FIFA Dispute Resolution Chamber (*DRC*) issued a decision (the *Decision*) on 23 November 2005 and served it on the parties on 28 November 2005. The DRC noted the following:

- The Addition is not signed by either party. The figure of USD 20,000 entered as salary is handwritten without initials of either party, and there are no figures given for the specific amounts of bonuses to be paid;
- The bank statement produced by Mladenovic to prove payment of his salary by Metallurg contains no reference to the Club, but shows that payments were made by three separate companies, the names of which bear no reference to Metallurg. Neither the Contract nor the Addition include any reference to these companies; and
- Taking into consideration the circumstances that the Player had lodged a formal claim against the Club should he not have received his dues in full, it was difficult to believe that the player would sign the Agreement, which purported to release the Club from all liabilities during the term of the Contract.

The DRC therefore decided to reject the claim by Mladenovic. The DRC also noted that, even if the Agreement had not been entered into by the parties, the claim would still have been rejected on the grounds of the lack of documentary evidence evidencing the amount of contractual payments to be made to Mladenovic.

On 20 January 2006, Mladenovic appealed to the Court of Arbitration for Sport (CAS) against the DRC's decision.

In letters of 1 and 2 March 2006 respectively, Mladenovic and Metallurg indicated that they were content to allow the Sole Arbitrator to issue an award on the sole basis of the written submissions and therefore the Sole Arbitrator decided that it was not necessary to hold a hearing in this matter.

LAW

CAS Jurisdiction

1. Under R47 of the Code:

“An appeal against the decision of a federation, association or sports related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports related body.

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure or first instance”.

2. The jurisdiction of the CAS derives from Articles 59 and 60 of the FIFA Statutes. In the Order of Procedure, both parties agreed that the CAS had jurisdiction to hear the appeal from the decision of the DRC.
3. It follows that the CAS has jurisdiction to decide the present dispute.

Applicable law

4. Under R58 of the Code:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

5. Further, Article 59.2 of the FIFA Statutes provides as follows:

“The CAS Code of Sports-Related Arbitration governs the arbitration proceedings. With regard to substance, CAS applies the various regulations of FIFA [...] and, additionally, Swiss law”.

6. In the present matter, the parties have not agreed on any particular law to govern the Contract. Therefore, the rules and regulations of FIFA shall apply primarily and Swiss law shall apply complementarily.

Merits

A. General considerations

7. The core of this appeal is the question of whether amounts of salary and bonuses have been wrongly deducted from the Player. The Player has the burden of proving that this is the case.

There is a lack of definitive documentary evidence provided by Mladenovic establishing the amounts of salary and bonuses to which he claims he was contractually entitled.

8. Neither party requested a hearing to amplify the lack of documentary evidence in this case on this core question.

B. The status of the Agreement

9. The relevant wording in dispute is:

“The Club is released from fulfillment of any liabilities to the Player from 1 July 2005”.

10. The Agreement was signed one day prior to the natural expiration date of the Contract. On the natural expiration of the Contract, Metallurg and Mladenovic would become free of any mutual liabilities arising after 1 July 2005 in any case. Therefore, the more natural interpretation of the Agreement must be that the Agreement relieves any liabilities arising between the Club and the Player throughout the term of the contract. Although Mladenovic claims that he was under the impression that the Agreement only released mutual liabilities arising after the date of the Agreement (despite the fact that the parties would have in any event have been released upon expiration of the Contract the following day), he could have ensured that his outstanding claims already lodged against the Club with FIFA were expressly excluded from the terms of the Agreement. He did not do so. It would be surprising for both parties to have gone to the effort of entering into an agreement which merely confirmed what would be the case on the following day, after the expiration of the Contract.
11. The DRC were correct in the analysis that the Agreement discharged all liabilities between the Club and the Player throughout the term of the Contract. This appeal must therefore be rejected and the decision of the DRC of 23 November 2005 be affirmed.
12. In any event, the DRC were also correct to find that, even if the Agreement had not been entered into, there is a lack of documentary evidence to make out Mladenovic’s case that amounts of salary and bonuses had been wrongly deducted from his remuneration. The appeal should also be rejected on that ground.

C. Salary and bonuses

13. The Addition was unsigned, and the figures for bonuses were left undefined in the Addition. The Contract does not contain any information as to the rate of salary and bonuses. There has been no documentary evidence produced which clearly states the contractual rate of salary and bonuses due to Mladenovic from the claim. No evidence was put forward as to why Mladenovic did not query this at the time of signing of the Contract, nor is there any evidence as to what both Club and Player believed the rate of salary to be at the start of the contractual term. In addition, despite the fact that Mladenovic submits that salary was deducted from him in the first

three months of his contract, there has been no evidence submitted that Mladenovic made any complaint to Metallurg regarding this.

14. The bank statements supplied by Mladenovic show that the Player's "salary" was paid by three separate companies with no relation to Metallurg. Again, there is no evidence that, during the term of the Contract, Mladenovic himself queried this arrangement.
15. In light of the above, there is insufficient documentary evidence to establish the contractual rate of salary and bonuses, the way in which those salary and bonuses were to be paid and, most importantly, whether there was any reduction in salary or bonuses.

D. The basis for any reduction of salary and/or bonuses

16. The Addition states certain obligations of the players and subsequent penalties. Clause 1.6 of the Addition states that:

"The football player who decreased his playing qualities and has finished fulfilling professional duties can be placed on a different salary".

17. Clause 2.2.3 of the Contract further states that the Player is obliged:

"to use his craftsmanship and professional skills as effectively as possible to gain the targets that were set in front of him and all the team by "CLUB" during sports competitions".

18. For breach of an obligation in the Contract, clause 3.1 permits a reduction in bonuses, and states:

"For the breach of the obligations, given in the chapter 2 of the given contract, measures of the disciplinary penalty, mentioned in the Ukrainian Labor Law, Club inner rules, Regulations of the football competitions of Football Federation of Ukraine can be used as to the "SPORTSMAN". Besides, "SPORTSMAN" because of the same breach can be hampered of bonuses, provisioned by the given contract within the period when the transgression took place".

19. The staff report of the Head Coach, which was attached to the record of the board minutes of 30 August 2004, indicates that there had been a deterioration in the player's skills. The decision of the Board of Metallurg to reduce bonuses therefore is justified under Clauses 2.2.3 and 3.1 of the Contract. Clause 1.6 of the Addition would also have permitted Metallurg to reduce Mladenovic's salary accordingly.

20. The letter of 7 March 2005 from the Head Coach, certifying that Mladenovic was a "very professional, courteous and loyal football player", is submitted by the Player as evidence that there had been no deterioration in his playing skills. The wording of this however is ambiguous and cannot be held to categorically state that there had been no deterioration in Mladenovic's skills in August 2004. Mladenovic has provided no further evidence in support of his submission that there had been no deterioration in his skills.

E. Conclusion

21. The decision of the DRC, on the basis of the terms of the Agreement, which was signed by both parties, is affirmed.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Nenad Mladenovic in relation to the decision by the FIFA Dispute Resolution Chamber of 23 November 2005 is dismissed.

(...).