Arbitration CAS 2006/A/1077 Incheon United FC v. Dragan Stojisavljevic, award of 20 October 2006

Panel: Mr George Abela (Malta), Sole Arbitrator

Football
Termination of the employment contract
Counterclaim submitted by the Respondent

According to R64.2 of the Code, when the Respondent submits a counterclaim to the CAS, it has to pay its share of the advance of costs. In case of non-payment, the request/appeal shall be deemed withdrawn; this provision also applies to any counterclaim. Therefore, if the Respondent leaves to the Appellant to pay both shares of the advance of costs, the Respondent's counterclaim cannot be decided upon by the Panel.

This is an appeal by Incheon United Football Club, Korea Republic (the Appellant) against a decision of the FIFA Dispute Resolution Chamber (the DRC) dated 12 January 2006. It concerns an employment agreement signed on 24 June 2004 between the footballer Dragan Stojisavljevic from Serbia and Montenegro (the Respondent or footballer) and Incheon United Football Club which was valid as from 1 June 2004 until 31 December 2005.

According to clause 8 of the contract, the club could terminate the contract unilaterally if the player 'did not play a single game for the club during 60 days due to an injury, if he left the club without approval, or if his conduct was unbefitting for a professional football player and for a representative of the club.'

By a letter dated 3 March 2005, notified to the player on 18 March 2005, the club terminated the employment contract since the player allegedly did not play any game for the club during 5 months and 22 days, and moreover, since the footballer allegedly had left the club without approval.

On the termination of his employment, the club offered the footballer the payment of his salaries from August 2004 to March 2005 in the amount of USD 120,000 less:

• apartment rental fee of South Korea Won KRW 16,800,000 in total, i.e. app.	USD	16,000
• apartment maintenance KRW 3,187,190, i.e. app.	USD	3,000
• apartment maintenance	USD	500
• traffic ticket fee KRW 40,000 i.e. app.	USD	40

• income tax	USD	30,000
Total Deductions	USD	49,540

Therefore on termination of the contract the club offered the footballer the amount of approximately USD 70,000.

On 29 March 2005 the footballer submitted a claim before the DRC stating that the Club had terminated the employment contract without just cause and requesting the payment of his salaries from August 2004 to March 2005 in the total amount of USD 120,000 which were still outstanding.

The DRC delivered its decision on 12 January 2006 on the following considerations:

> *"(…) Entering into the substance of the matter, the Chamber acknowledged the facts of the case as well as the documentation contained in the file, and in particular the fact that the player claimed for the fulfilment of his contractual financial rights until the unilateral termination of the contract, bud did not ask for the consequences of a possible unjustified breach of the contract by the club. Moreover, the Chamber acknowledged the club's statement dated 26th April 2005, whereby the club agreed to pay to the player the salaries from August 2004 to March 2005 in the amount of USD 120,000 less apartment rental fee of USD 16,000 and less income tax of USD 30,000, therefore USD 74,000 in total. The Chamber concluded from the above-mentioned statement that the club owes the player the amount of USD 120,000 on account of salaries from August 2004 to March 2005. This fact was considered by the members of the Chamber as uncontested by the parties.*
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> *The Chamber then had to deliberate on which of the amounts mentioned by the club (apartment rental fee of USD 16,000, income tax of USD 30,000) are possibly deductible from the amount of USD 120,000 which is owed to the player.*
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> *As far as the apartment rental fee of USD 16,000 is concerned, the Chamber took note of the fact that the employment contract concluded between the parties stipulates the club's obligation to provide the player with an adequate apartment. In this regard, the Chamber acknowledged as well that the employment contract does not further specify the mentioned obligation. Therefore, the Chamber stated the club has the obligation to pay the player's apartment, whatever apartment it provides the player with. In consequence, the club is not entitled to deduct from the player's outstanding salaries its expenses for the rental of the apartment in the amount of USD 16,000.*
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> *With regard to the income tax in the amount of USD 30,000, the Chamber noted that the employment contract stipulates a monthly salary of USD 15,000, 'after Korean taxes have been deducted'. On account of this, the Chamber emphasized that according to the wording of the employment contract, the salary of USD 15,000 is to be considered as the net salary. Therefore, it was clear for the Chamber that from the amount of USD 120,000, being the eight monthly salaries from August 2004 to March 2005, no taxes have to be deducted.*
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> *The Chamber concurred that the docs presented by the club in its defence in this regard does not contain documentary evidence of its allegations. Moreover, the Chamber stated that the club failed to prove that it had to deduct any further amount from the player's salary. Therefore, the Chamber concluded that the club is not entitled to deduct from the player's outstanding salaries taxes in the amount of USD 30,000.*
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> *In view of the above, the Chamber decided that the club Incheon United FC from Korea has to pay to the player Dragan Stojisavljevic from Serbia and Montenegro the amount of USD 120,000 on account of outstanding salaries from August 2004 to March 2005.*

Decision of the Dispute Resolution Chamber

The claim of the player Dragan Stojisavljevic from Serbia and Montenegro is accepted.

The club Incheon United FC from Korea has to pay the amount of USD 120,000 to the player Dragan Stojisavljevic.

(…)

According to art. 60 par. 1 of the FIFA Statutes this decision may be appealed before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receiving notification of this decision and has to contain all elements in accordance with point 2 of the directives issued by the CAS, copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for the filing of the statement of appeal, the appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal (cf. point 4 of the directives)".

The decision of the DRC was notified to the Appellant on 7 April 2006. On 26 April 2006 the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the CAS) against the decision.

LAW

Jurisdiction

1. The jurisdiction of the CAS in this case is based on art. 59 of the FIFA Statutes. It is confirmed by the signature of the order of procedure by the parties.

Law applicable to the merits

2. 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 present matter, the parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FIFA shall apply primarily and Swiss law shall apply complimentarily, in accordance with the FIFA Statutes.

The Decision

3. On 24 June 2004 the parties signed an employment agreement which was valid as from 1 June 2004 until 31 December 2005.

4. According to clause 8 of the contract, the club could terminate the contract unilaterally 'if the player cannot play for more than 60 days due to an injury incurred during training or/and official game, if he left the club without approval, or if his conduct was unbefitting for a professional football player and for a representative of the club':

"8. Disqualification/Termination

In addition to any violation of any representation or obligation contained herein any of the following occurs during the term of this Agreement, PLAYER shall be deemed in breach of this Agreement and CLUB may terminate this Agreement, effective upon 10 days notice to PLAYER.

B. In such case where PLAYER cannot play for more than 60 days due to an injury incurred during training or and official game:

C. In such case where PLAYER leaves CLUB, a game or the training area without the prior approval of CLUB, its coaches, its managers or its trainers:

F. In such case where, in CLUB's sole discretion, PLAYER conducts himself in a manner unbefitting of a professional soccer player and representative of CLUB".

5. By a letter dated 3 March 2005 which was notified to the Player on 18 March 2005, the club terminated the employment contract, based on the above-mentioned contractual clause, since the player allegedly did not play any game for the club during 5 months and 22 days, and moreover, since the footballer allegedly had left the club without approval.

6. On termination of the employment contract, the Club offered the payment of the footballer's salaries from August 2004 to March 2005 in the amount of USD 120,000 less USD 49,540 representing the apartment rental fee in the amount of USD 16,000; apartment maintenance in the amount of USD 3,500; traffic ticket fee in the amount of USD 40; and income tax in the amount of USD 30,000.

7. In front of the DRC the footballer submitted that the Club had terminated the employment contract without just cause and requested the payment of his salaries from August 2004 to March 2005 in the total amount of USD 120,000 which were still outstanding. The player points out that in July 2004 he got injured and therefore returned to Serbia and Montenegro on 24 August 2004 for surgery and rehabilitation, allegedly with the approval of the club, and returned to the club in January 2005.

8. In its decision, the DRC correctly remarks that the player claimed for the fulfilment of his contractual financial rights until the unilateral termination of the contract, but did not ask for the consequences of a possible unjustified breach of contract by the club. The DRC pointed out that the club agreed to pay the player the salaries from August 2004 to March 2005 in the amount of USD 120,000 less the amounts specified in paragraph 6 supra. The DRC concluded that the club owes the player the amount of USD 120,000 on account of salaries from August 2004 to March 2005. This fact was considered by the members of the DRC as uncontested by the parties.

9. Deduction of apartment maintenance fee in the amount of USD 3,172

Article 5G [Housing] of the contract signed between the contending parties on 24 June 2004 stipulates that:

'Housing: CLUB shall provide an adequate housing for the PLAYER and his family, however the Player's living costs and house operating costs such as water, gas, electricity, telephone use and other necessary items shall be paid by the Player.'

The Appellant, in its appeal brief states that during Respondent's rental time in the apartment, the landlord has sent an invoice of house operating costs of KRW 3,168,300 (USD 3,172). In the absence of the Respondent, this amount was paid by the Appellant. The Appellant contents that according to article 5G of the contract, it is the respondent's duty to pay these costs and therefore the amount paid by the Appellant has to be deducted from the salary of the Respondent. The Sole Arbitrator notes that this amount was claimed by the Appellant even before the DRC.

The Appellant presented the receipt of the maintenance fee and the bank receipt of payment to the landlord. The Panel notes that such amount was also listed in the notice given to the footballer by the club at the termination of the employment agreement. According to Article 5G of the contract, the Appellant was only bound to provide an adequate furnished flat but it was the responsibility of the Respondent to pay for the management costs of the apartment. The Sole Arbitrator agrees with the submissions of the Appellant that the amount of USD 3,172 covering house management costs has to be borne by the footballer and hence must be deducted from the player's salary in accordance with Article 5G of the contract.

Therefore the deduction of the sum of USD 3,172 from the salary of the footballer is justifiable.

10. Deduction of income tax in the amount of USD 30,000

In its Appeal Brief the Appellant maintains that it does not object to the fact that according to the employment contract signed between the contending parties, all taxes resulting from the Respondent's employment with the Appellant had to be borne by the Appellant. The Appellant states that in fact it has, at its own cost, paid all taxes due during Respondent's employment with the Appellant. However, according to the Appellant, the Respondent has an outstanding tax debt in Korea amounting to KRW 44,810,670 [USD 44,000] which was due from his former labour contract with the club Anyang LG Sports Ltd [now FC Seoul] from 2000 to 2001.

In its Decision the DRC noted that the employment contract stipulates a monthly salary of USD 15,000 'after Korean taxes have been deducted.'

> *"13.On account of this, the Chamber emphasized that according to the wording of the employment contract, the salary of USD 15,000 is to be considered as the net salary. Therefore, it was clear for the Chamber that from the amount of USD 120,000, being the eight monthly salaries from August 2004 to March 2005, no taxes have to be deducted".*

The DRC concluded that the club is not entitled to deduct from the player's outstanding salaries taxes in the amount of USD 30,000.

The Sole Arbitrator agrees with the DRC in that according to the wording of the employment contract, the salary of the player in the amount of USD 15,000 is to be considered as the net salary. However, it results to the Sole Arbitrator that the amount claimed by the Appellant does not refer to taxes due by the Player throughout his employment with the Appellant. In fact, the

Appellant claims that it has paid all taxes due in accordance with the agreement signed between the parties. The Appellant, as it has clearly outlined even before the DRC, specifies that this amount had to be deducted due to a civil administration order '*according to which the amount concerned corresponds to an amount of tax not paid by Mr. Stojisavljevic to the state authorities in the past.*'

The Sole Arbitrator notes that the contract signed between the footballer and LG Sports Limited on 10 February 2000 specifies that:

> *"Article 3 (Contract money): The club shall pay the player USD 340,000 (three hundred and forty thousand US dollar, Tax included) for contract money.*
>
> *Article 4 (Annual Salary and Bonus): Club agrees to pay the player USD 10,000 (ten thousand US dollar, Tax included) per month as his salary in response for the result of his execution of the duties defined by this agreement".*

It therefore results that during his former employment contract with LG Sports Limited, the Player's salary and contract money were inclusive of taxes and it was the player's responsibility to pay the taxes from his salary, bonus and contract money. From the documents presented by the Appellant it results to the Sole Arbitrator that after an official order of Incheon Tax Administration office, the Club, in accordance with Article 33 of the National Korean Tax Collecting Law, had to seize 50% of the player's monthly salary and paid that amount to the tax office. It results from the documents submitted by the Appellant that the Appellant paid the amount of USD 30,000 to the Korean Tax Office. The Appellant submitted receipts for November 2004, December 2004, January 2005 and February 2005. The amount claimed by the Appellant before the DRC representing income tax paid by the club was USD 30,000. The amount listed in the notice given to the player on termination of his employment agreement was also in the sum of USD 30,000 covering four months, i.e. (2004.11 – 2005.02) x US$ 7,500.

In view of the above, the sum of USD 30,000 has to be deducted from the player's salary, which sum represents the amount paid by the Appellant out of the player's salary to Incheon Tax Office. The Sole Arbitrator points out that the Appellant did not provide supporting documents showing that the amount of USD 7,500 representing the amount seized from the salary due in March 2005, was in fact paid by the Club. Hence the Sole Arbitrator will only deduct the total sum of USD 30,000 from the Player's salaries.

11. Deduction of traffic ticket fee [USD 39]

In its Appeal Brief the Appellant is claiming that the Respondent had received a penalty for illegal parking of KRW 40,000 [USD 39] for violating Art. 28 of the Korean Road Traffic Law on 10 June 2004 and that the Appellant had to pay this amount to the administration. The Appellant attached the receipt of the traffic ticket. This amount was also listed in the notice given to the footballer on termination of his employment contract.

From the documents brought before the Sole Arbitrator and since the Respondent failed to prove otherwise and did not in actual fact contest this claim, it follows that the amount of USD 39 has to be deducted from the salary of the Respondent.

12. The Counterclaim

The Sole Arbitrator observed that the player is at this stage also claiming the amount of USD 135,000 for the period from April to December 2005, covering the salaries due to him after the termination of the contract. The player is asking for the damages he suffered due to the unjustified breach of the employment contract by the club. The player maintains that he did not find another job and that he was not compensated for his injuries:

> *"I consider that I should get the salary for all the months after the breaking of the contract too (from April to December 2005, which means for nine months in the amount of 135,000 USD) because the contract was broken by one-side on my damage".*

According to R64.2 of the Code when the Respondent submits a counterclaim to the CAS, he has to effect payment of his share of the advance of costs. From the records of the case, it results to the Sole Arbitrator that the Respondent did not in fact pay his share. In accordance with R64.2 para 2 in fine of the Code, *"in case of non-payment, the request/appeal shall be deemed withdrawn; this provision shall also apply to any counterclaim"* and hence the Respondent's counterclaim could not be decided upon by the Sole Arbitrator.

Therefore the Respondent's counterclaim for the amount of USD 135,000 covering the salaries due to him after the termination of the contract, i.e. for the period from April to December 2005, is dismissed.

Conclusion

13. There is no contestation between the contending parties that the outstanding salaries due to the Respondent until March 2005 amount to USD 120,000. It results that the Appellant has paid USD 70,000 to the bank account of the Respondent on 3 May 2006.

In its Appeal Brief, the Appellant admits having to pay the footballer the outstanding balance of nine thousand two hundred eighty-nine US Dollars [9,289 USD].

It results from all the above that the amounts to be deducted from the footballer's outstanding salaries in the amount of USD 120,000 are the following :

Amount paid by the Appellant on 3 May 2006	USD	70,000
Income Tax paid by theAppellant to Incheon Tax Office	USD	30,000
Traffic Ticket Fee	USD	39
Apartment Maintenance Fee	USD	3,172
Total	USD	103,211

14. It therefore follows that the amount of sixteen thousand seven hundred eighty-nine US Dollars [USD 16,789] has to be paid by the Appellant to the Respondent.

The Court of Arbitration for Sport rules:

1. The Appeal filed on 26 April 2006 by Incheon United Football Club against the decision of the FIFA Dispute Resolution Chamber dated 12 January 2006 is partially accepted.

2. The Appellant shall pay the aggregate amount of sixteen thousand seven hundred eighty-nine US Dollars [USD 16,789] to the Respondent within thirty [30] days from the date of notification of this decision. In case of default, an interest rate of 5% per annum shall apply.

3. (…)

4. The Respondent's counterclaim for the amount of USD 135,000 is dismissed.

(…).