Arbitration CAS 2006/A/1112 Carlos Soares Azenha v. Shenyang Ginde FC, award of 5 December 2006

Panel: Mr Hendrik Kesler (The Netherlands), Sole Arbitrator

Football
Termination of the employment contract between a club and a coach
Lack of just cause
Compensation for damages

1. **A professional football employer might be expected to treat the interests of its employees with the utmost care. Therefore in the context of a temporary departure of the head coach, a club is expected to take the appropriate measures to fill this temporary vacancy. By failing to establish this clearly, a club gives the impression of being in full agreement with the departure of the head coach and, more important, the replacement coach's temporary substitution. In addition, by not informing in writing the replacement coach of its dissatisfaction with the way the latter carries out the substitution, the club reinforces this impression. By failing to produce any satisfactory documentary evidence establishing that the employment contract was breached with just cause and by terminating the contract with the replacement coach, the club breaches the employment contract with the replacement coach without just cause.**

2. **A coach is entitled to receive the compensation for the unilateral breach caused by the club on the basis of the employment contract.**

The Appellant is Carlos Soares Azenha (the "Appellant"), a professional football coach from Portugal.

The Respondent is Shenyang Ginde Football Club, Co. Ltd. (the "Respondent"), a football club from Shenyang, China.

On 25 January 2003, the Appellant signed an employment contract with the Respondent as an assistant coach. The contract was valid from 1 January until 31 December 2003.

According to this agreement the Appellant was entitled to receive an annual net salary of USD 110,000, to be paid in accordance with the following terms:

- USD 50,000, within 7 days of the contract's signature;
- USD 5,000 per month (12 months in total), the amount of USD 60,000.

Furthermore the Appellant was also entitled to receive match bonuses in the amount of USD 2,000 per victory and USD 700 per draw as well as one return flight ticket (China - Portugal) for him and three other tickets for his family.

In May 2003 – starting from 19 May – some incidents occurred between the Appellant and the Respondent, finally ending up in a letter of dismissal sent by the Respondent to the Appellant, dated 31 May 2003, which letter was received by the Appellant on 1 June 2003.

It is undisputed between the parties that the head coach of the Respondent, Mr António da Conceição was authorized by the Respondent to go to Portugal between 19 May and June 2003.

The dispute between the parties is mainly -briefly summarized- whether the Appellant fulfilled his contractual obligations during the absence of the head coach in the period lasting from 19 May up to 31 May 2003.

In this dispute the Respondent claims for instance that the Appellant did not provide a proper training plan in time and finally doing so on 28 or 29 May 2003 it was missing a plan for 1 June 2003.

The Appellant however claims that he received a training plan from the head coach which was subject only to some small changes, for instance, because of a training match to be played on 28 May 2003.

As already indicated above the disputes between the Appellant and the Respondent resulted in termination of the contract by the Respondent in a letter of dismissal dated 31 May 2003.

It is therefore a fact that the discussions between the Appellant and the Respondent about the fulfilment of their obligations from the contract against each other did not take more than 13 days.

On 20 August 2003 the Appellant submitted a claim to FIFA asking for payment of a compensation of USD 30,000 and EUR 3,687,28 as a result of the breaking of the employment contract by the Respondent without just cause.

The case was dealt within FIFA by the Single Judge of the Player's Status Committee who rendered his decision on 15 February 2006 (the "Decision").

The Decision contains following elements:

- partial acceptance of the claim made by the Appellant;
- the Respondent, Shenyang Ginde Football Club, Co. Ltd., has to pay the amount of USD 15,000 to the Appellant;
- the amount, due to the Appellant, has to be paid by the Respondent within 30 days as from the date of notification of the decision;
- an interest rate of 5% per year will apply if the Respondent fails to comply with the abovementioned deadline.
- any further claim of the Appellant is rejected;

- the Appellant is directed to inform the Respondent immediately of the account number to which the remittance is to be made and to notify the Player's Status Committee of every payment received;
- the claim of the Respondent – Shenyang Ginde Football Club, Co. Ltd. – regarding reimbursement of the costs and the fees incurred to the present procedure is rejected;
- according to article 60 paragraph 1 of the FIFA statutes, the decision may be appealed before the Court of Arbitration for Sports (CAS). The statement of appeal must be sent to 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 here too. 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 was notified to the Appellant by fax on 2 June 2006.

The merits of the Decision will be considered 8 below.

The Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS).

It challenged the Decision, submitting the following requests for relief.

1. To revoke the challenged FIFA decision in its entirety;

2. To establish that the respondent -Shenyang Ginde Football Club, Co. Ltd.- pays the full compensation due for the unilateral termination without just cause of the appellant's employment contract as assistant coach in the amount of USD 30,000.

3. To establish that the respondent also reimburses the amount of EUR€ 3,687.28, paid by theAppellant for his return flight ticket to Portugal.

On 3 July 2006 the Appellant filed its appeal brief.

In accordance with article R55 of the Code of Sports related Arbitration (the "Code") the Respondent filed its answer within 10 days of receiving the Appellant's appeal brief, i.e. 10 July 2006.

The submissions of the Respondent may be summarized as follows:

To revoke the appeal made by the appellant and respect the decision passed by the single judge of the Player's Status Committee of FIFA.

Although both parties appointed an arbitrator, they later on both agreed in writing that the dispute should be decided by a Sole arbitrator.

Mr Hendrik Willem Kesler, attorney at law in the Netherlands, was appointed as Sole arbitrator by the President of the Appeal's Arbitration Division.

In accordance with article 28 of the Code, the seat of this Arbitration was established at the CAS secretariat, Avenue the Beaumont 2, 1012 Lausanne.

In accordance with article R29 of the Code the official language of this arbitration is English.

Pursuant to article R57 of the Code, the Sole arbitrator decided to render decision on the papers as a hearing was not found necessary, neither by both the parties.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from the articles 59 and 60 of the FIFA Statutes 2004 and article R47 of the Code.

2. Moreover, it is confirmed by the order of procedure, duly signed by the parties.

3. Consequently, CAS has jurisdiction to decide the present dispute.

Applicable law

4. In respect of appeal arbitration proceedings, R58 of the Code, provides following:

   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 of sports 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. Article 59 paragraph 2 of the FIFA Statutes further provides for the application of the various regulations of FIFA or, if applicable, of the confederations, members, leagues and clubs, and, additionally, Swiss law.

6. In the present matter Article 44 of the employment contract is applicable:

   The dispute should hand let by friendly coordination. If can not be disposed, the case will be submitted to the Chinese Football Association for arbitration. Party B also can submit it to Federation International Football Association (FIFA) or to the local court, located in the city of party A.

7. As the Appellant (party B in the contract) has chosen to submit its case to FIFA, the rules and regulations of FIFA shall apply primarily and Swiss shall apply subsidiarily.

Admissibility of the appeal

8. The appeal was filed within the 21-day deadline provided by article 60 of the FIFA Statutes and indicated in the Decision.

9. It follows that the appeal is admissible, which is also undisputed.

Legal analysis: merits

10. Pursuant to article R57 of the Code the Sole arbitrator has full power to review the facts and the law, therefore the Sole arbitrator has the power and the duty to examine the whole case and to decide whether the given Decision is just and appropriate.

11. The main issues to be resolved by the Sole arbitrator are:
    - did the Respondent breach the employment contract concluded between the parties on 25 January 2003 without just cause?
    - is the Appellant therefore entitled to receive the compensation for this unilateral breach on the basis of clause 39 of the employment contract, or is there any reason for mitigation of this amount?
    - is the Appellant entitled to claim the cost for his flight back to Portugal to the amount of EUR 3.687,28?

A. Did the Respondent breach the employment contract concluded between the parties on 25 January 2003 without just cause?

12. After having closely reviewed all the documents at hand the Sole arbitrator came to the conclusion that the Respondent breached the employment contract with the Appellant without just cause.

13. The Sole arbitrator can agree with the findings and considerations of the Single Judge of the FIFA Player's Status Committee of 15 February 2006, particularly as set out in ground 32.

14. The Sole arbitrator endorses in particular the Single Judge's conclusion that the Respondent has produced no satisfactory documentary evidence to prove that the termination was with just cause.

15. More over the Sole arbitrator considers that the disputes between the Appellant and Respondent took place in a timeframe of not more than 13 days. It is also undisputable that the head coach, Mr António da Conceição, was authorized to go to Portugal between 19 May and 1 June 2003.

16. The Sole arbitrator therefore takes it as a fact that the club management of the Respondent was aware of the -temporary- departure of the head coach.

17. A professional football employer might be expected to treat the interests of its employees with the utmost care. The Sole arbitrator is therefore entirely convinced that the Respondent's obvious course of action once he was aware of the departure of the head coach -whose (temporary) departure is, as has been established, undeniable- would have been to take further measures to fill this temporary vacancy. By failing to establish this clearly, the Respondent therefore gives the impression of being in full agreement with the departure of the head coach and -more important- the appellant's temporary substitution. If -even after a relatively short time- the respondent had not been satisfied with the way the appellant carried out this substitution, he should have informed him in writing. The Respondent has not, -however- produced such documents, as the single judge established during the hearing of the case in the first instance.

The Single Judge found:

(Consideration 26): Taking into consideration all the aforementioned, the Single Judge underlined the fact that the parties have submitted totally opposing positions with regard to the main facts that surrounded the unilateral termination of contract.

(Consideration 27): In this respect, and taking into account the fact that the personal testimonies provided by each of the parties were issued by individuals that are/were firmly connected to the relevant party and therefore clearly differing, the Single Judge decided that these testimonies do not constitute sufficient documentary evidence of the allegations made by each of the parties concerned.

18. Therefore the Sole arbitrator comes to the conclusion that in the light of the short period that the dispute between the parties arose, there was no clear reason for terminating the contract by the Respondent already on 31 May 2003. Therefore the Respondent had to take the consequences for this termination as set out in paragraph 39 of the employment agreement of 2003, *"If party A violates the contract, party A should pay the compensation to party B, and the total value will be no more than USD 30,000"*.

19. The Sole Arbitrator takes besides that into consideration that the contract between the Appellant and the Respondent had a duration up to 31 December 2003. By ending the contract without just cause, under normal circumstances the Respondent should have to pay to the Appellant the remaining value of the contract, i.e. 7 x USD 5,000 is USD 35,000. Obviously the parties entered into this employment agreement with a specific clause for the termination of the contract with a foreseen compensation to the other party (article 39).

20. On the basis of the abovementioned conclusions the Sole arbitrator does not follow the Single Judge in his conclusion that the Appellant is partially responsible to the club's decision to terminate the employment contract. The Sole arbitrator follows the general principal of law as submitted by the Appellant that the burden of proof is on the side of the Respondent and the Single Judge himself concluded that both parties did not constitute sufficient documentary evidence of the allegations made by each of the parties concerned.

B. Is the Appellant therefore entitled to receive the compensation for this unilateral breach on the bases of clause 39 of the employment contract, or is there any reason for mitigation of this amount?

21. This question is already sufficient answered under the paragraphs above.

C. Is the Appellant entitled to claim the cost for his flight back to Portugal to the amount of EUR 3.687,28?

22. The Sole arbitrator considers that the Respondent does not give any substantial argument for the fact not being responsible for this payment as it is foreseen in the employment agreement under Article 28. Therefore the claim of the Appellant for payment of this amount is granted, as the Respondent does not give any particular good reason why in this case article 28 should not be applicable. In the contract is not foreseen that the payment of the flight ticket is part of the compensation of the USD 30,000. It is undeniable that the Appellant had to fly back to Portugal, so therefore it is not unreasonable to support his claim on this item.

The Court of Arbitration for Sport rules:

1. The appeal filed on 23 June 2006 by Carlos Soares Azenha against the decision issued on 15 February 2006 by the Single Judge of the FIFA Player's Status Committee is upheld.

2. The decision issued on 15 February 2006 by the Single Judge of the FIFA Dispute Resolution Chamber is set aside.

3. The Shenyang Ginde Football Club, Co. Ltd. shall pay compensation to Mr Azenha of USD 30,000.

4. The Shenyang Ginde Football Club, Co. Ltd. shall pay costs of the flight ticket for Mr Azenha back to Portugal of the amount of EUR 3,687,28.

5. The Shenyang Ginde Football Club is ordered to pay the amounts mentioned in points 3 and 4, plus interest 5% since 3 July 2006, within 30 days after notification of the present award.

6. (…).

7. All other motions or prayers for relief are dismissed.