Arbitration CAS 2007/A/1342 Kayserispor Kulübü Baskanligi v. Erich Brabec, award of 5 February 2008

Panel: Mr Efraim Barak (Israel), Sole Arbitrator

Football
Contract of employment
Breaches of contract not justifying immediate termination of the contract
Breaches of contract by the player
Breaches of contract by the club
Appreciation of the balance between the player's breach and the club's breach
Compensation for damages and principle of mitigation of damages

1. **The fact for a player not to be present to receive payment in cash does not excuse the breach of the club which did not pay to the player the amounts due at a specific date. On the other hand, the absence of payment cannot justify the immediate termination of the contract by the player if according to the contract, the right to cancel the contract only accrues 60 days following the due date.**

2. **The player who arrives to the training 2 days late breaches the contract. Nevertheless, this breach does not justify the cancellation of the agreement by the club and does not give ground to payment of any compensation to the club.**

3. **A club not allowing a player to participate in the trainings commits a breach of contract. The short lateness in return of the player does not constitute a motive justifying the refusal to let him train.**

4. **A club which tries to use the slightly late arrival of the player, which is far from being a fundamental breach and shall not lead to the end of the relations between the parties, for the purpose of justifying the termination of these relations, is the one actually causing the fundamental breach.**

5. **In accordance with Article 97 of the Swiss Code of Obligations (CO), the obligee is entitled to claim damages, so as to restore him to the position he would be in had the breach not occurred. Pursuant to Article 44 CO, which states the general principle of mitigation of damages, compensation can be reduced if the claiming party has contributed to causing or aggravating the damage. Similarly, all monies earned by the claiming party which would not have been earned if the breach had not occurred must be deducted from compensation. In addition, in accordance with Article 43 CO, all circumstances of the case, in particular the seriousness of the fault, may be taken into account in assessing the amount of damages.**

Kayserispor Kulübü Baskanligi ("Kayserispor", the "Appellant" or "the Club") is a Turkish football club. It is a member of the Turkish Football Federation, which is in turn a member of FIFA.

Mr Erich Brabec (the "Player" or the "Respondent") is a Slovakian football player, born on 24 February 1977.

On 25 January 2005, Kayserispor and the Player entered into an employment contract (the "Contract"). According to its terms, the Contract was effective beginning on 25 January 2005 and was supposed to expire on 31 May 2008.

The Contract provided that the Player would receive the following remuneration:

- For the 2004-2005 season (from 25 January 2005 until 31 May 2005), a guaranteed total amount of EUR 100,000 paid as follows:
  - EUR 25,000 *"cash on signing the contract on 5 February 2005"*.
  - EUR 25,000 *"cash till 15.3.2005"*.
  - Four monthly instalments of EUR 12,500 each to be paid between 25 February and 25 May 2005 on the Player's bank account.
  - Appearance fees for a number of games.

- For the 2005-2006 season (from 1 June 2005 until 31 May 2006), a guaranteed total amount of EUR 200,000 paid as follows:
  - EUR 50,000 *"cash on Juni 20, 2005"*.
  - EUR 25,000 *"cash until 20 September 2005"*.
  - Ten monthly instalments of EUR 10,000 to be paid between 25 August 2005 and 25 May 2006 on the Player's bank account.
  - Appearance fees according to the number of games in which the player would participate.

- For the 2006-2007 season (from 1 June 2006 until 31 May 2007), a guaranteed total amount of EUR 230,000 paid as follows:
  - EUR 50,000 *"cash till 20 Juny 2006"*.
  - EUR 50,000 *"cash until 20 September 2006"*.
  - Ten monthly instalments of EUR 13,000 to be paid between 25 August 2006 and 25 May 2007 on the Player's bank account.
  - Appearance fees according to the number of games in which the player would participate.

- For the 2007-2008 season (from 1 June 2007 until 31 May 2008), a guaranteed total amount of EUR 250,000 paid as follows:
  - EUR 50,000 *"cash till 20 Juny 2007"*.
  - EUR 50,000 *"cash until 20 September 2007"*.
  - Ten monthly instalments of EUR 13,000 to be paid between 25 August 2006 and 25 May 2007 on the Player's bank account.

- Appearance fees according to the number of games in which the player would participate.

The Contract also provided that the Player was entitled to receive an apartment and a car, with rent paid by the Club.

The Appellant's pre-season preparation for the 2005/2006 season began on 25 June 2005.

On that date, the Player had not yet returned from abroad and therefore did not join the beginning of the trainings on the 25th, nor on the 26th. He arrived in Kayseri on the evening of 26 June 2005 and presented himself to the Appellant on 27 June 2007.

On 29 June 2005, the Player's attorney wrote to the Appellant as follows (in relevant part):

> *"But it seems that Kayserispor does not want to fulfil its obligations and duties towards the player and today, Mr BRABEC has been told by the Manager of the club that HE IS NOT ALLOWED TO TRAIN WITH THE FIRST TEAM OF THE CLUB AND THAT HE SHOULD TRAIN WITH THE SECOND TEAM OR ALONE WITH A SPECIAL COACH.*
>
> *This cannot be accepted by Mr BRABEC as he has been contracted to play with the first team, and he has played last season 2004-2005 with no problems. The position of your club is clearly a breach of the contract.*
>
> *On another hand, today Mr BRABEC has not been given the keys of his car which is another obligation of the club, according to article 11 of the contract. This is, again, a clear breach of the contract. […]*
>
> *Finally, I remind you that there is also an unpaid sum of 50,000 (five thousand) US Dollars, which should have been given the 20th of June 2005".*

The Appellant answered on 1 July 2005 as follows:

> *"On behalf of your client, Mr Erich BRABEC hadn't joined to training that started 25.07.2005 with giving his own reasons.*
>
> *However after first trainings, he did not take the medical tests that needed his player license. As a prove of the matter, you can find the notary supported document in the attachment.*
>
> *If your client is right, we can arrange training with a special coach and a special training program for him to improve his skill level. After he takes his all the medical tests and the enduring test, He'll be able to play with the first team.*
>
> *I want you know that, our club hurt by your client's behaviour, Also our Board of Directors can deliver him warning and fine by taking a report from medical institutions, performance test or from the training reports which he didn't join".*

Between 1 and 8 July, the Player presented himself regularly to the training grounds but could not train. On this issue, the parties' allegations differ: the Appellant submits that the Player presented himself at times when there was no training, whereas the Respondent contends that he was systematically refused access to the premises.

On 8 July 2005, upon the Appellant's request and on its behalf, a notary public in Kayseri notified the following to the Player:

> *"Dear concerned, as a professional footballer of our club, Although you are obliged to perform training on weekdays from 18.00 pm to 19.00 pm under the supervision of our junior team trainer, Ridvan Ceçen, you did not join our training programme. You came to club premises on 07/07/2005 around 10.00-11.00 am together with the notary public and declared that you want to train at club premises on your own although you know that at that time there was no training programme at the club and you were informed to follow the training programme. By doing so, we understand that you have no good intentions therefore we have to sent you this legal warning".*

On 9 July 2005, the Player left Kayseri.

On 20 July 2005, the Respondent filed a claim against the Appellant before the FIFA Dispute Resolution Chamber (the "DRC").

On 27 July 2005, the Appellant wrote to the DRC complaining about the Player's conduct and requesting the following: *"On the condition of our club's rights to be safe, we request to terminate Mr. Brabec's contract and for us to transfer new foreign players. Also we request Mr. Brabec to recover our lost".*

On 8 August 2005, the Respondent signed an employment contract with the Austrian football club FC Superfund, effective from 9 August 2005 until 31 May 2007. This agreement was terminated by the parties at the end of the 2006 football season. The Player's salary was EUR 4,000 per month, paid fourteen times a year.

On 30 August 2006, the Respondent signed an employment contract with the Swiss football club FC Aarau AG, effective from 31 August 2006 until 30 June 2007. The Player's salary was CHF 9,400 per month, paid twelve times a year.

On 30 June 2007, the Respondent signed an employment contract with the Czech football club SK Slavia Praha fotbal a.s., effective from 1 July 2007 until 30 June 2009. The Player's salary under this agreement is CZK 140,000 for the first year of contract and CZK 150,000 for the second year of contract, plus certain bonuses and appearance money.

On 23 February 2007, the FIFA Dispute Resolution Chamber (the "DRC") issued a decision on the Respondent's claims (the "Decision"). The Decision contained the following ruling:

> *"1. The claim lodged by the Claimant, Erich Brabec, is partially accepted.*
>
> *2. The Respondent, Kayserispor, has to pay to the Claimant, Erich Brabec, the amount of EUR 190,000.*
>
> *3. Any further request made by the Claimant is rejected.*
>
> *4. The Respondent's counter-claim is rejected.*
>
> *5. The amount due to the Claimant has to be paid by the Respondent within 30 days as from the date of notification of this decision.*
>
> *6. If the aforementioned amount is not paid within the aforementioned deadline, an interest rate of 5% per annum shall apply and the present matter will be submitted to the FIFA's Disciplinary Committee, so that the necessary*

disciplinary sanctions may be imposed.

7. The Claimant is directed to inform the Respondent immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.

8. According to art. 61 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 directive)".

The Decision was notified to the parties on 6 July 2007.

On 26 July 2007, Kayserispor appealed the Decision by filing a statement of appeal with CAS.

On 26 July 2007, the Appellant filed a statement of appeal against the Decision, with supporting exhibits. It made the following prayers for relief:

"1. set aside the challenged DRC decision;

2. establish that the Respondent breached the employment contract entered with the Appellant without just cause during the protected period;

3. establish that the Respondent shall pay compensation to the Appellant;

4. sanction the respondent for the breach of contract without just cause during the protected period with restriction of at least four months on his eligibility to play in official matches, in accordance with Article 17(3) of the FIFA Regulations for the Status and Transfer of Players;

5. condemn the Respondent as the only responsible of this trial, to the payment in the favour of the Appellant of the legal expenses incurred;

6. establish that the costs of the arbitration procedure shall be borne by the Respondent as the only responsible of this trial".

In its statement of appeal, the Appellant requested that the matter be decided by a sole arbitrator, and appointed a CAS member as arbitrator should this request not be accepted.

On 3 August 2007, the Appellant filed its appeal brief, together with supporting exhibits.

By letter dated 8 August 2007, FIFA informed the CAS that it renounced its right to intervene in the arbitration proceedings and provided a copy of the disputed decision.

On 9 August 2007, the Respondent sent a fax to the CAS stating that he preferred a three-member arbitration panel and appointed a CAS member as arbitrator.

On 27 August 2007, the Respondent filed its answer, with supporting exhibits.

On 10 October 2007, the CAS wrote to the parties to inform them that the Deputy President of the CAS Appeals Arbitration Division had decided to submit the appeal for resolution by a sole arbitrator. Mr Efraim Barak was nominated as sole arbitrator.

On 24 October 2007, the CAS wrote to the parties, on behalf of the sole arbitrator, requesting the parties to supplement their presentations by answering certain questions set out in the CAS' letter. The Respondent was also requested to produce copies of contracts signed for the seasons 2005/2006, 2006/2007 and 2007/2008.

On 25 October 2007, FIFA sent to the CAS a copy of the file of the procedure which was pending before the DRC between the parties. Copies were sent by the CAS to the parties on 26 October 2007.

On 16 November 2007, the CAS wrote to the parties that the sole arbitrator had decided to disregard any argument or evidence that was not contained in the answer of the Respondent to the appeal or that was not requested by the Sole Arbitrator in his request to supplement the submissions. However, the Appellant was granted the right to submit additional comments. In addition, the parties were requested to produce English translations of certain documents.

The Sole Arbitrator held a hearing on 3 December 2007 at the CAS premises in Lausanne.

LAW

CAS Jurisdiction

1. Article 60 of the FIFA Statutes reads as follows:

   "1 FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.

   2 The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

2. In addition, Article 62(1) of the FIFA Statutes provides:

   "The Confederations, Members and Leagues shall agree to recognize CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS. The same obligation shall apply to licensed match and players' agents".

3. The parties confirmed the jurisdiction of CAS by signing the order of procedure dated 7 November 2007.

4. It follows that CAS has jurisdiction to decide on the present dispute.

Applicable law

5. As the seat of CAS is in Switzerland, this arbitration is subject to the rules of Swiss private international law ("LDIP") governing international arbitration. According to Article 187(1) LDIP, the arbitral tribunal decides in accordance with the law chosen by the parties or, in the absence of any such choice, in accordance with the rules with which the case has the closest connection.

6. According to Article 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".

7. Article 60 paragraph 2 of the FIFA Statutes reads as follows:

"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

8. In the present matter, as the parties have not specifically agreed on the application of any particular law, the Panel shall enforce the parties' choice of law made by reference and apply the rules and regulations of FIFA, in particular the Regulations for Transfer and Status of Players, edition July 2005 ("Regulations"), and, additionally, Swiss law.

Merits

9. In the course of these proceedings, both in the written submissions and during the hearing, each party claimed that the other party breached the Contract. It is therefore necessary to examine the parties' allegations in this respect, in order to determine whether one or both parties committed a breach of contract and, if that is the case, whether one or both parties' prima facie breach may be excused by the other party's prior violation. This analysis will be made below, in successive order.

A. Absence of payment of the amount of EUR 50'000

10. Concerning payments due for the season 2005/2006, the Contract provides the following:

"A. <u>Guaranteed amount</u>: -200 000.- EUR

- 50 000.- eur (fiftythausend euro) receives cash on Juni 20, 2005

[…]".

11. It is undisputed that the amount of EUR 50,000 was not paid to the Respondent, either on 20 June 2005 or later. It is also undisputed that the Player was not present in Kayseri on 20 June 2005 but only returned on 27 June 2005.

12. The Respondent submits that the absence of payment on 20 June 2007 constituted a breach of contract by the Appellant. According to the Respondent, if the Appellant could not make the payment cash on the 20 June 2005, it should have made it by bank transfer.

13. The Appellant considers that since the contract provides that payment must be made in cash, there was no breach if payment could not be made due to the absence of the Player. According to the Appellant, the absence of payment did not constitute a breach even after the Player's return on 27 June 2007, because at that time the Respondent had himself committed a prior breach (by returning late for the pre-season camp).

14. The Sole Arbitrator considers that the absence of payment by the Appellant of the amount of EUR 50,000 constitutes a breach of contract.

15. Indeed, in accordance with the Contract, the Appellant had a clear (and undisputed in these proceedings) obligation to pay to the Respondent, on 20 June 2007, an amount of EUR 50,000. This payment was never made.

16. The Sole Arbitrator finds that the fact that the Respondent was not present in Kayseri on 20 June 2007 to receive payment in cash does not excuse the breach, for the following reasons.

17. First, there is no evidence that payment was tendered to the Respondent on 20 June 2007 or at any other date. In particular, payment was not made when the Player returned from the summer break, on 27 June 2007, although as from that date he would have been available to receive the payment in cash.

18. The fact that the Player returned late cannot justify the absence of payment. Even if the Player had committed a breach by not returning on 25 June 2005, this breach would have been cured when the Player came back on 27 June 2007 and made himself available for training (although, of course, he may have been liable in connection with the consequences of the breach). Therefore, the Appellant had no reasons not to proceed with payment of the amount of EUR 50,000 to the Player at the latest on 27 June 2005.

19. By not paying this amount, the Appellant breached the Contract.

20. However, the Sole Arbitrator rules that this breach cannot justify the immediate termination of the Contract by the Respondent.

21. Clause 7 of the Contract reads as follows:

"If the cash guaranteed salary (payable 5.February 2005, 15. Marz 2005, and every 20.June and 20.September of years 2005, 2006, 2007) will not be payed in 60 days to the player, the player can cancel his contract immediately and can make a free transfer".

22. In accordance with this provision, the Player could *"cancel"* the contract if he did not receive payment of one of the amounts due as *"guaranteed salary"*, which includes the amount of EUR 50,000 that was due on 20 June 2005. However, the right to cancel the contract only accrued 60 days following the due date. Therefore, the Respondent's right to cancel the contract based on the absence of payment on 20 June 2005 could not have accrued before 19 August 2005. The Sole Arbitrator considers that the Player should have continued to offer his services until that date (unless there were other reasons that the absence of payment for suspending the services or terminating the Contract – see below).

B. Late arrival of the Player

23. It is undisputed that the 2005/2006 pre-season camp organized by the Appellant started on 25 June 2005. It is also undisputed that the Player returned to Kayseri after the summer break on 27 June 2007. The issue is whether this constitutes a breach of the Contract.

24. In this respect, the Appellant states that the Player had been clearly informed of the date at which he should return, i.e., 25 June 2005. On the other hand, the Player alleges that he was only informed of this date by his agent on 24 June 2005 and immediately made arrangements to return as soon as possible, by booking the next available flight; he arrived in Kayseri on the evening of 26 June 2005 and was present for training on the next day.

25. The Contract does not state the date at which the Player was to return to Kayseri following the 2005 summer break. The question therefore is whether the Appellant requested the Player to be present on 25 June 2005 and, if that is the case, whether such request created a contractual obligation on the Respondent's part.

26. In its written submission, the Appellant stated that *"all players were duly informed about the date of appearance at the Appellant's quarters"*. The Appellant produces no evidence in this respect. In its additional submission of 6 November 2007, the Appellant further alleged the following:

"The Respondent was informed of the date of return by phone, as all other players of the team. In order to make sure that all players arrive on the due day, it is the common practice to inform the players by phone given the fact that they either go back home or are on holidays during the summer break, places where it is not possible to notify any information in writing. The Respondent is the only one who did not appear on the requested date".

27. The Appellant did not specify the date at which the telephone notices were made and produces no evidence in this respect.

28. The Appellant choose neither to invite nor to bring any of its representatives as a witness and no person who could personally explain and support in his testimony the facts as alleged by the Appellant was present at the hearing. However, the Appellant's counsel stated that the players had been informed of the date of return at the end of the previous season. In addition, the Club's manager contacted the players by telephone during the break. Furthermore, in its

submissions the Appellant stated that *"As explanation for his delay the Player asserted family reasons without giving any further detail"*.

29. In its answer, the Respondent stated that *"nobody told him the exact day of return"*. Furthermore in a detailed explanation in his written statement of 6 November 2007, he added the following:

The term "family reason" was used for the first time by the appellant in his appeal brief dated August 3, 2007[…]

Thus, the Respondent did not state any "family reasons" reason for his alleged delay because he was not aware of any delay and there was no any delay caused by the Respondent".

Then, the Respondent added to his statement a long and detailed explanation stating that he was never informed in advance of the due date for his return.

30. During the hearing, the Respondent stated again that he did not receive any document mentioning that he had to return on 25 June 2005, nor was he informed of this date prior to the 24 June 2005 when this was first notified to him by a phone call to his agent.

31. As set out above, the Contract does not contain any indication of the date at which the Player should have returned to Kayseri and there is no other evidence than the parties' contradictory statements about if, how and when the Player was informed of the date of return.

32. In the evaluation of the facts, the Sole Arbitrator finds itself bound to apply the general rules on the burden of evidence in order to determine which party should bear the consequences of the failure to prove its allegations.

33. According to Article 8 of the Swiss Civil Code:

"Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit".

[Translation: "Unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its right"].

34. Such principle applies also in CAS proceedings (see, e.g., CAS 96/159 & 96/166, published in Digest of CAS Awards II 1998-2000, The Hague 2002, pp. 434 ff.). As a result, in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e., it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue.

35. In the present case, the Appellant claims that by not returning on 25 June 2005, but only on 27 June 2005, the Respondent breached the Contract. It is therefore the Appellant which must prove the facts underlying this claim. In particular, the Appellant must establish that the Respondent was informed that he had to return on the 25 June 2005. The Sole Arbitrator finds that the Appellant met its burden of proof, merely because of the fact that the Respondent himself in a written document made and sent immediately after the occurrence of the disputed facts actually admitted the facts as described by the Appellant;

- As above indicated, the Sole Arbitrator requested and received a copy of the FIFA file on this matter.
- One of the documents in the FIFA file is a letter sent by the Respondent counsel to FIFA on 4 August 2005, i.e. less than a month after the disputed facts occurred, and when the true facts should have still been fresh in the memories of all the parties involved.
- In same letter of 4 August, the counsel for the Respondent stated that: *"**Mr. Bradec arrived two days late […] and explained the family problems which have impeded him to arrive on time**"*.
- Therefore, not only the statements of the Respondent in his submissions were not true, and he was actually the one who indeed stated the existence of family reasons, but he also admitted (by using the term "**impeded him to arrive on time**") that he knew that he had to arrive earlier than the date at which he actually arrived, but those family reasons actually prevented him from coming on time.

36. Furthermore, this unexplained change of statements and the fact that those "family reasons" that were stated by the Respondent in 2005 in his letter to FIFA as the reason for his late arrival suddenly "disappeared", brings the Sole Arbitrator to the conclusion that indeed the Respondent knew that he should have arrived earlier to the beginning of the trainings, and that this excuse was actually used by the Player, while in fact no real family reasons prevented him from arriving on time.

As a consequence, the Sole Arbitrator finds and rules that the Respondent, who returned to Kayseri on 26 June 2006 evening and arrived to the training on the 27 of June and not on 25 June 2005, breached the Contract. Nevertheless, this breach of the contract, as will be further explained, did not justify the cancellation of the agreement by the Appellant and does not give ground to payment of any compensation to the Appellant.

C. The Non-Training of the Player after his return

37. It is undisputed that the Player did not train with the Appellant's teams after his return on 27 June 2005. However, the parties disagree on the reasons for the absence of training, and on whether this absence of training constitutes a breach of contract by one of the parties.

38. In this respect, the Appellant submits that because of the Player's late return, he could not pass the medical tests and, as a consequence, could not be registered before the season's start. As a consequence, according to the Appellant, the Player could not train with the first team. The Appellant further claims that the Player was not present for training and only came to the training grounds at times where no trainings were scheduled, although he had been duly informed about the hours of training.

39. The Appellant also contends that it offered to the Respondent to train with the second team, or to have a personal training program, until the medical examinations were completed. However, according to the Appellant, the Respondent refused this solution.

40. On the contrary, the Respondent states that he was willing to train and offered his services to the Appellant. He also indicates that he was ready to pass the medical tests on 4 July 2005, as proposed by the Appellant in its letter of 1 July 2007, but these medical tests were not arranged by the Club. The Respondent further alleges that he regularly presented himself for training but was systematically refused access to the premises.

41. The records and the exchange of correspondence between the parties actually give evidence to the fact that indeed the Appellant offered the Player those temporary solutions until he will go through the medical examinations, and that until 4 July 2005 things may have gone in the right way, since the counsel to the Respondent wrote on 4 July to the Appellant:

"However, it seems that Mr Brabec and his agent, Mr Csonto, have already talked to someone in the club and have let Mr Brabec have today and tomorrow the physical, medical and blood test, in order to go later with the rest of the team in the training camp in Austria".

Nevertheless, it seems that things actually went differently. No answer or explanation was given by the Appellant to the question whether indeed there was a possibility that the Player would pass the medical tests on the 4th and 5th of July 2005, and if there was such possibility why the medical test did not eventually take place.

42. It is undisputed that the Appellant did not let the Player train with the first team, based on the fact that the Player had not passed the medical tests. However, there is a dispute about whether the Club actually offered the possibility to the Player to train with a personal coach or with the second team and whether the Player did present himself to training. In this respect, the Sole Arbitrator finds as follows:

- Although the Contract does not contain specific wording stating that the Player is entitled – or obliged – to train, the Sole Arbitrator finds that training was both a right and an obligation of the parties, contained implicitly in the Contract. In this respect, the intention of the parties can be inferred from the importance that training represented for them in the context of the dispute and in the course of these proceedings.
- Based on the evidence on record, the Sole Arbitrator finds that the Player did tender his services by presenting himself to the training grounds.
- The Sole Arbitrator finds that the Player was not allowed to train. This was confirmed by the Appellant, which explained that the Player could not train in the absence of a license, which in turn could not be obtained because of a lack of medical tests and results.
- The Sole Arbitrator finds that the fact that the Player had not yet passed the medical tests should not have prevented the Player from training. In particular, the Sole Arbitrator notes that, according to the Appellant, all other players started training on 25 June 2007, whereas the medical report of another Player of the team, submitted by the Appellant as evidence to the fact that indeed the medical test required a long list of Doctors (in order to explain why the medical tests for the player could not be arranged immediately after his arrival), was signed only on 6 July 6 2005, meaning that until this date the other players of the team participated in the trainings although the Appellant had not yet received the

results of their medical tests.

- Furthermore, Art. 26 of the Turkish Football Federation regulations, as presented to the Sole Arbitrator by the Appellant, indeed states that a positive medical test is required for registering a player's contract and granting the license, but there is nothing in these regulations that prevents or prohibits the training of a player with the club as long as the result of the medical test were not yet submitted. As we saw, the other players of the team actually participated in the trainings long before their medical test report was signed and submitted to the Club.

43. The Sole Arbitrator therefore rules that by not allowing the Player to train, even if he did return from the summer break late, the Appellant breached its contractual obligations. The Sole Arbitrator considers that the short lateness in return of the Player was not a motive justifying the refusal to let him train.

D. Consequences of both breaches

44. As set out above, the Sole Arbitrator has found that the Respondent committed a breach by arriving late and that the Appellant committed a breach of contract by not allowing the Player to participate in the trainings.

45. However, the Sole Arbitrator is in the idea that those mutual breaches of contract should not have brought the parties to the termination of the relations between them, if indeed both parties would have like to repair the relations between them.

46. The actual behaviour of both parties during the period in question, clearly represents a situation under which the parties were no longer interested in maintaining the relations between them. This was reflected not only in the mutual breaches of the contract, but also in the quick approach to the legal venues, the immediate use (by both of them) of public notaries producing evidential material for the claims, as well as in the correspondence with FIFA in which both parties almost immediately expressed their intent "to be released" from each other. It is for this reason that Mr Omar Ongaro, Head of Players' Status of FIFA, justly wrote in his letter to the parties of 3 August 2005 that:

"Taking into account the above as well as the contents of the entire documentation at our disposal' we have to presume that the labour relationship between the parties is seriously disrupted. Furthermore, it appears that both parties are not any longer interested in maintaining their labour relationship".

47. In light of all the above the Sole arbitrator came to the conclusion that in the balance between those breaches the Appellant is the party who breached the contract in a more severe way, a breach that actually brought the relation to its end. The Appellant could easily, if it would choose to do so, deal differently with this the slightly late arrival of the Respondent (for instance, by disciplinary means which are common practice in similar cases), however it chose to try and use this breach, that was far from being a fundamental one and should not lead to the end of the relations between the parties, for the purpose of justifying the termination of these relations, while the Appellant himself was the one actually causing the fundamental breach.

48. In accordance with Article 97 CO, the Respondent is entitled to claim damages, so as to restore him to the position he would be in had the breach not occurred.

49. The Sole Arbitrator further notes that as the Respondent did not appeal the Decision, the Sole Arbitrator may not award an amount above EUR 190,000. It must therefore determine whether the amount of EUR 190,000 must be confirmed or whether there are circumstances that may reduce the amount.

50. Pursuant to Article 44 CO, which states the general principle of mitigation of damages, compensation can be reduced if the claiming party has contributed to causing or aggravating the damage. Similarly, all monies earned by the claiming party which would not have been earned if the breach had not occurred (in this case, salaries received from other clubs with which the Player could sign because the Contract was terminated earlier) must be deducted from compensation. In addition, in accordance with Article 43 CO, the Sole Arbitrator may take into account all circumstances of the case, in particular the seriousness of the Appellant's fault, in assessing the amount of damages.

51. In the present case, the Sole Arbitrator considers that, considering all circumstances of the case, including the Respondent's conduct which cannot be ignored, and the fact that the Respondent did not appeal the Decision, the compensation adjudged by the Dispute Resolution Chamber in the amount of EUR 190,000 should be confirmed.

52. The Sole Arbitrator therefore orders the Appellant to pay the amount of **EUR 190,000** to the Respondent. In accordance with Article 104 CO, this amount will bear interest at the rate of 5% per annum as from the date the amounts were due. Since the due dates under the Contract are earlier that the date at which the DRC set the interest running, and since the Respondent did not appeal the decision, the Sole Arbitrator will order interest to run as from 30 days following notification of the Decision, i.e., 6 August 2007.

The Court of Arbitration for Sport rules:

1. The appeal of Kayserispor Kulübü Baskanligi against the decision issued on 23 February 2007 by the FIFA Dispute Resolution Chamber is dismissed.

2. Kayserispor Kulübü Baskanligi shall pay to Mr Erich Brabec an amount of EUR 190,000, with interest at the rate of 5% per annum as from 6 August 2007.

4[1]. The amount due to Mr Erich Brabec shall be paid by Kayserispor Kulübü Baskanligi within 30 days of the notification of this decision.

(…)

7. All other prayers for relief are dismissed.

[1] Numbering as in original operative part.