Arbitration CAS 2007/A/1419 Mirko Poledica v. KP Legia Warszawa SSA, award of 11 June 2008

Panel: Mr Hendrik Kesler (The Netherlands), President; Mrs Maria Zuchowicz (Poland); Mr Jean-Pierre Morand (Switzerland)

Football
Contract of employment
Termination of contract without just cause
Compensation due in case of termination without just cause
Special indemnity provided by art. 337 CO

1. **A club which has deliberately cancelled a contract of employment concluded with a player not because of an actual breach by the player but to avoid the risk that the latter could attempt to use a termination agreement to obtain a specific compensation set forth therein at a later stage, in the hypothesis where he would find a new club, constitutes a unilateral breach of the employment contract without just cause. Indeed, the cancellation of the agreement which results from a deliberate "risk management" decision, is unrelated to any effective breach of the agreement by the player and has only the purpose of avoiding the risk of possibly being confronted with a potential claim by the player. Such termination represents a deliberate violation of the employment contract by the employer.**

2. **In line with the provision of article 17 part 1 of the FIFA Regulations for the Status and Transfer of Players addressing the consequences of the termination of contract without just cause, where no circumstances give reasons for any mitigation, the full amount of the player's outstanding remuneration shall be granted to the player as a matter of principle.**

3. **Article 337c of the Swiss Code of Obligations provides that in the case of an undue termination of an employment contract the judge may award an indemnity of maximum six months salary. The cancellation of the employment contract without just cause represents a deliberate violation of the employment contract by the club and justifies the award of an indemnity.**

Mirko Poledica ("the player" or "the Appellant") is a professional football player from Serbia, at present living in Cacak, Serbia.

KP Legia Warszawa SSA ("the Club" or "the Respondent") is a Polish football club with its headquarters in Warsaw, Poland. The Club is a member of the Polish Football Association, which, in turn is affiliated to the Federation International de Football Association (FIFA).

The Appellant and Respondent are subject to and bound by the applicable Rules and Regulations of the Federation International de Football Association. FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials, players and players' agents worldwide. FIFA is an association under Swiss law and has its headquarters in Zürich (Switzerland).

On 28 June 2004, the Appellant and the Respondent signed an employment contract, valid from 1 July 2004 until 30 June 2007.

According to said contract, the Appellant is entitled to a basic remuneration of EUR 320,000 for the entire duration of the contract.

The contract stipulates that the afore said remuneration is payable in three instalments in the gross amounts of EUR 100,000 for the season 2004/05, EUR 110,000 for the season 2005/06 and EUR 110,000 for the season 2006/07.

On 8 July 2006, the Appellant and the Respondent concluded an agreement concerning the possible early termination of the employment contract. In this termination agreement, the Respondent agreed to release the Appellant in the event he could find a new club.

In an addendum to the termination agreement executed on July 11, 2006, the parties specified that:

> *"Upon confirmation by the Player that he found a new club, the contract between Klub Pitkaski Legia Warsawa SSA and the Player Mirko Poledica will be terminated pursuant to the terms agreed upon in the Agreement, and effective on such day the Player will become a free Player with the right to his card and the Club Legia Warsawa shall not refuse to issue it".*

It was also specified that:

> *"The remaing provisions of the agreement are not subject to any amendments".*

The termination agreement dated July 6, 2006 provided that in the event of termination of the contract based thereon, the Respondent would pay a compensation in the net amount of EUR 50,000 to the Appellant.

On 1 September 2006, the Appellant informed the Respondent that he had not been able to find a new club and, therefore, intended to continue to play and train with the Club on the basis of the existing employment contract.

On 19 September 2006, the Club's board passed the following resolution:

"1. Deem the attitude to Player Mirko Poledica based on his conscious misleading of the Board's representative and his conscious abuse of such situation to obtain financial profits by false pretenses to drastically violate principles of social co-existence.

2. As a result of a disloyal attitude of the Player, which led to a complete loss of trust towards him and a loss of further cooperation, as well as due to his multiple rejections to terminate the contract by mutual agreement of the parties and the lack of prerequisites concerning a possibility of the Player to play at a satisfactory sport level, the Board decided to:

- *Terminate the contract with the Player with immediate effect,*
- *Submit a petition to the Province Governor to revoke the Player's work authorization,*
- *Oblige the Player to immediately settle all equipment, collected advances, etc. with the Club".*

On 21 September 2006, the Appellant informed the Club – via his lawyer Jan Wożniak – that he would appeal the previously mentioned resolution at FIFA.

On 26 September 2006, the Appellant submitted his claims to FIFA.

The claims submitted were in summary as follows:

- To declare that the Respondent breached unilaterally the existing contract without just cause;
- to order Respondent to pay the full amount of the contract signed on 28 June 2004;
- to order Respondent to pay the compensation as stipulated in the agreement of 8 July 2006 and the annex to it of 11 July 2006.

On 27 September 2006, the Appellant confirmed his claims. In the same letter, he also indicated that the Respondent had finally paid him the salaries which they had refused to pay to him in an earlier stage. The Respondent however did not specify whether the Respondent had paid all his salaries up to the 19 September.

On October 12 2006, the Respondent filed an answer with essentially the following content:

- To reject the claim of the Appellant and to declare the managing board's resolution concerning the termination of the contract as legally effective;
- to state that the Appellant deceived the Respondent by having intentionally replaced a draft of a termination agreement offered to him on 7 July 2006 with a first version of the said agreement without the Respondent's knowledge;
- to state accordingly that the Respondent signed the termination based on a mistake and that it was not bound thereby;
- in any event, to take into account the salary received by the Appellant pursuant to his new contract during the relevant period.

The Dispute Resolution Chamber of FIFA (DRC) issued its decision on 22 June 2007 partially accepting the claim of the Appellant and ordering the Club to pay EUR 60,000 to the Appellant.

The decision of the DRC was notified to the parties on 30 October 2007.

The decision of the DRC was – briefly summarized – based on the following considerations:

First of all, the DRC held that it was competent to deal with the submitted claims concerning outstanding remuneration under an employment contract between a Serbian player and a Polish club.

The DRC analyzed which edition of the Regulations for the Status and Transfer of Players had to be applied. As the contract employment between the parties was signed on 28 June 2004 and the claim was lodged with FIFA on 22 May 2006, the DRC held that the current FIFA Regulations for the Status and Transfer of Players (edition 2005, hereinafter: the Regulations) were applicable.

The DRC noted that it was undisputed that the employment contract had been unilaterally terminated by the Respondent on 19 September 2006.

The DRC observed that the Respondent did not argue that the Appellant had failed to fulfil specific obligations under the employment contract, but only referred to the Appellant's disloyal attitude and the loss of trust resulting from the Appellant's repeated refusals to terminate the contract by mutual agreement. The Respondent also referred to the Appellant's alleged unsatisfactory sporting performance.

The DRC lent particular emphasis to the Respondent's allegation that the Appellant had deceived it by having modified the draft termination agreement and, thus, having acted in bad faith.

The DRC however held that a party signing a document of legal importance without knowledge of its precise contents does so in principle on its own responsibility. Therefore, the DRC found that the fact that the Appellant had modified the contents of the relevant document before its signature by the Respondent, had to be considered as an act of bad faith committed by the Appellant, but did not provide a valid reason for the termination of the employment contract.

Based thereon, the DRC held that the abovementioned circumstances did not constitute a valid ground allowing the Respondent to terminate the employment contract unilaterally.

The DRC therefore concluded that the unilateral termination of the employment contract by the Respondent had to be considered as a termination of the contract without just cause.

Taking into account the regulations for the calculation of the compensation (article 17 para 1 of the Regulations) and the amount received by the Appellant pursuant to his new contract, the DRC decided to award the Appellant compensation for the breach of contract in the amount of EUR 60,000.

The DRC rejected the claim for the compensation provided for in the termination agreement. Such was not applicable as the employment contract had not been terminated by mutual agreement, which was the situation covered by the agreement but unilaterally by the Respondent.

The DRC decided, therefore, as follows:

> *"1. The claim lodged by the Claimant, Mr Mirko Poledica, is accepted;*
>
> *2. The Respondent, KP Legia Warsaw, must pay the total amount of EUR 60,000 to the Appellant* ***within 30 days*** *as from the date of notification of this decision.*
>
> *3. In the event that the abovementioned total amount is not paid whiting the stated deadline, an interest rate of 5% per year as of expiry of the aforementioned deadline and the present matter shall be submitted to FIFA's Disciplinary Committee, so that the necessary disciplinary sanctions may be imposed.*
>
> *4. The Claimant, Mr. Mirko Poledica, is directed to inform the Respondent, KP Legia Warsaw, directly and immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*
>
> *5. Any further claims of the Claimant, Mirko Poledica, are rejected.*
>
> *6. According to art. 61 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision and shall contain all the elements in accordance with point 2 of the directives issued by the CAS, a copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the Appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS (cf. point 4 of the directives)".*

On 19 November 2007 the Appellant filed his statement of appeal together with 4 exhibits against the decision of the DRC.

On the same day, the Appellant submitted his appeal brief together with 6 exhibits. The Appellant's requests are as follows:

> *"a) To confirm jurisdiction of CAS, since it is based on the arbitration clause inserted in the FIFA Statutes, according to Art. 61 and 62;*
>
> *b) To revise the FIFA's decision;*
>
> *c) To uphold that the contract between Mr. Mirko Poledica and the football club KP Legia Warszawa SSA was unilaterally terminated without due cause by the club, on 19 September 2006;*
>
> *d) To reject the accusation of deceit and its partial acceptance by FIFA;*
>
> *e) To uphold the right of the player to get the whole amount until the end of this contract, i.e. 30 June 2007, for the unilateral termination without due cause by the club;*
>
> *f) To order KP Legia Warszawa SSA to pay the player the amount as follows:*
>
> *i) Difference for late remittance, according to the letter on 6 July 2006, the sum of 6'686 PLN, resp. the total sum of 1'650 Euro;*
>
> *ii) 11 Salaries from August 2006 until June 2007, 100'837 Euro, deducted 10'000 Euro for the earned salary for January – June 2007, in total 90'837 Euro, (according to the Swiss law, Art. 337c CO it is applicable, resp. Art. 361 and 362 CO);*
>
> *iii) An appropriate indemnity, Art. 337c CO;*

iv) 5% interest rate p.a. since the termination from 19 September 2006 until the day of payment for the total amount of 92'487 (I + ii); according Art. 104 and 339 para. 1 CO;

v) To bear all costs and expenses by the club relating to the arbitration proceeding;

vi) To pay everything to the bank account in Serbia, since the player is tax resident in Serbia".

In its answer dated December 12, 2007, the Respondent concludes as follows:

"1. To confirm and to uphold fully and entirely the Dispute Resolution Chamber Decision passed on 22 June 2007;

2. To impose on the Player obligation to pay all costs of his proceedings".

In a letter of 27 November 2007 to the CAS FIFA waived its right to intervene in the arbitration proceeding (cf Art. R41.3 of the Code of Sports related Arbitration)

A hearing was held on 28 April 2008 at the CAS headquarters in Lausanne.

LAW

Jurisdiction of the CAS

1. The jurisdiction of the CAS is based on Articles 60 ff of the FIFA Statutes and Article R47 of the Code of Sports-related Arbitration (hereinafter: "the Code"). It is also confirmed by the procedural order, which was duly signed by all the parties.

2. The CAS therefore has jurisdiction to deal with this dispute.

3. Pursuant to Article R57 of the Code, the Panel has full power to review the facts and the law.

Applicable law

4. Article R58 of the Code provides the 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 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. According to Article 60 para 2 of the FIFA Statutes:

"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".

6. In addition thereto, the parties expressly confirmed at the hearing that they agreed to subject the present dispute to the FIFA Regulations and additionally, to Swiss law.

Admissibility

7. The decisions of the DRC were notified to the parties on 30 October 2007. The appeal was filed on 19 November 2007, within the deadline laid down in the FIFA Statutes and referred to in the decision itself. The statements of appeal and the appeal brief fulfil the requirements of the Code. The appeal is therefore admissible.

Legal merits

8. Given the circumstances as set forth above, the Panel considers that the following issues have to be addressed:

   A. Has the Respondent unilaterally breached the employment agreement?

   B. If so, what amount has to be granted as compensation to the Appellant?

   C. Is the Appellant in addition entitled to the special indemnification set forth in article 337c CO.

A. Has the Respondent unilaterally breached the employment agreement?

9. According to the Panel, the answer to this question is positive.

10. First, the Panel notes that the Respondent has accepted the decision of the DRC. With this, the Respondent implicitly acknowledged the DRC's conclusion that it unilaterally breached the employment contract without just cause.

11. During the hearing in Lausanne, the Respondent explicitly stated that it had deliberately cancelled the contract not because of an actual breach by the Appellant but to avoid the risk that the Appellant could attempt to use the termination agreement to obtain the specific compensation set forth therein at a later stage, in the hypothesis where he would find a new club.

12. The Appellant had effectively let know, namely through a letter of 1 September 2006, that he considered that he was still entitled to apply the mutual termination agreement (including the EUR 50,000) during the next transfer period, i.e. in December / January.

13. The Respondent confirmed at the hearing that the specific purpose of the termination was to prevent that risk to occur.

14. Consequently, it is clear that the termination of the employment agreement was not justified by a just cause, and has to be considered as the result of a deliberate "risk management" decision by the Club regarding a potential issue in connection with the interpretation of the termination agreement. At the time, this issue was not actual and would have become so only if the Player would have found a new club during the next transfer period and then claim the compensation.

15. Irrespective of how this hypothetical issue should have been decided if it had ever arisen, the Panel concludes that this situation cannot constitute a just cause of termination of the employment contract.

16. On the contrary, under the circumstances, the Respondent's cancellation of the agreement constitutes a deliberate decision to cancel an agreement without any valid ground and itself an obvious violation of the employment contract by Respondent.

B. What amount shall be awarded as compensation?

17. The Appellant claims a sum of EUR 90,837 representing his overdue salary for the months of July to December (inc.) 2006 and January to June (inc) 2007, after deduction of the salary received from his new Club.

18. The Respondent does not dispute it would have owed this amount in the case that the contract had been maintained until 30 June 2007.

19. In line with the provision of article 17 part 1 of the FIFA Regulations for the Status and Transfer of Players, the Panel finds that the above amount shall be granted to Appellant as a matter of principle.

20. The claim of EUR 1,650 for late remittance is rejected, since the difference in the conversion rate is not supported by any evidence provided by the Appellant.

21. Are there any circumstances that may give reasons for a mitigation of this amount?

22. The Panel finds that there is no ground to award a reduced amount in this case.

23. As a mitigation ground, the Respondent invokes the fact that the Appellant would have deceived it into signing a contract which does not reflect its true intent.

24. In this respect, the Panel is however unable to share the DRC's position that this would have effectively been the case.

25. The agreement of 8 July 2006 drafted by the Appellant's lawyer is transparent and clear.

26. It is not a complex contract but a document consisting only in a few paragraphs set forth on a single page.

27. Legia Warsaw is an experienced Club which has competed and still competes at the highest level in Poland.

28. Assuming even the Respondent effectively signed the contract without reading it, which is difficult to admit given the simplicity of the document, it did so at its own risks and has to bear the consequences.

29. Given the circumstances, the Panel holds that the Appellant has not deceived the Respondent. Appellant's lawyer simply redrafted a contract proposal, i.e. quite a usual step in a process of negotiation.

30. Furthermore, Respondent did not only sign the simple and straightforward agreement dated 8 July 2006 but three days later, it even confirmed it by executing a rider thereto.

31. The above-mentioned circumstances do not support a finding of deceit and the Panel cannot therefore share the DRC's appreciation in this respect.

32. Finally, the fact mentioned by the Respondent that the technical qualities of the Appellant were not satisfactory does not constitute a valid ground for unilateral termination of the contract nor to reduce the agreed remuneration.

33. Since no other element has been raised by the Respondent which could possibly constitute grounds for reduction, the Panel holds that the Respondent has to be awarded with the full amount of his outstanding remuneration, i.e. EUR 90,837.

C. Is the Appellant entitled to the special indemnity provided in art. 337CO?

34. The Panel notes primarily that the Appellant is not claiming anymore the amount set forth in the termination agreement, but is asking the Panel to award an indemnity within the meaning of art. 337c of the Swiss CO.

35. The Appellant has thereby indicated that it left it to the discretion of the Panel to set the level of the indemnification.

36. Swiss CO Article 337c provides that in the case of an undue termination of an employment contract the judge may award an indemnity of maximum six months salary.

37. Despite the clear wording of art. 337c CO ("may") which seems to imply discretion to award an indemnity, the Swiss Supreme Court holds that an indemnity has to be granted absent exceptional circumstances (see WYLER R., Droit du travail, Berne 2002, p. 384).

38. The Panel notes that this position seems difficult to reconcile with the wording of art. 337c CO and is subject to criticism by some commentators.

39. In the instant case however, the Panel finds that the circumstances do in any event justify the award of an indemnity.

40. Indeed, at the hearing, the Respondent clearly admitted that the cancellation of the agreement was unrelated to any effective breach of the agreement and that it had only the purpose of avoiding the risk of possibly being confronted with a potential claim. The cancellation therefore did represent a deliberate violation of the employment contract by Respondent.

41. Taking account of the Appellant's salary on one hand and the reason for the termination of the contract on the other hand, the Panel holds that the applicable indemnity shall be set at the level of one month's salary.

42. The Appellant shall therefore pay to the Respondent in addition to the sum mentioned under B) the sum of EUR 9,166 (EUR 90,837), therefore in total EUR 100,003.

The Court of Arbitration for Sport rules:

1. The appeal lodged by Mr Mirko Poledica on 19 November 2007 against the decision of the FIFA Dispute Resolution Chamber of 22 June 2007 is partially upheld.

2. The decision issued by the FIFA Dispute Resolution Chamber on 22 June 2007 in the dispute between Mr Mirko Poledica and KP Legia Warszawa SSA is set aside.

3. KP Legia Warszawa SSA is ordered to pay to Mirko Poledica the amount of EUR 100.003 + interest ad 5% as from 19 September 2006.

(…)

6. All other claims are dismissed.