Arbitration CAS 2008/A/1731 FC Zorya v. Almir Sulejmanovich, award of 31 August 2009

Panel: Mr Manfred Nan (The Netherlands), Sole Arbitrator

Football
Unilateral termination of an employment contract
Alleged waiving by the player of his financial rights

One of the strict conditions to establish whether the player has waived his rights to the salary-claim is that the intention of the player to waive his rights to this financial claim against the appellant must arise by necessary implication.

The Appellant FC Zorya (the "Appellant") is a professional football club affiliated with the Ukraine Football Association. FC Zorya plays in the Premier League, which is the highest football league in Ukraine.

The Respondent Almir Sulejmanovic (the "Player") is a professional football player from Slovenia, at this moment playing for Rudar Velenje, a professional football club affiliated with the Slovenia Football Association. The Player is a defender and captain of his team. Rudar Velenje plays in the 1. Liga, which is the highest football league in Slovenia.

The Appellant and the Player signed an employment contract valid from 25 July 2006 until 15 July 2008.

The employment contract provided for lump-sums and a monthly salary as well as a contribution for renting an apartment.

The Player unilaterally terminated the contract as per 31 December 2006 and signed a new contract per 1 January 2007 with FC Vetra, a professional football club in Lithuania.

On 9 March 2007 the Player lodged a claim with FIFA against the Appellant requesting allegedly outstanding payments in the amount of USD 28.100,--. In particular, the Player claimed:

- the allegedly outstanding lump-sum payment, due by 15 August 2006, in the amount of USD 15.000,--;
- an allegedly outstanding share of the lump-sum payment, due by 31 December 2006, in the amount of USD 3.500,--;
- allegedly outstanding salaries for the months of November and December 2006 in the amount of USD 8.000,--;

- an allegedly outstanding share of the salary for the month of August 2006 in the amount of USD 1.200,--, and
- allegedly outstanding costs for rent for the months of November and December 2006 in the amount of USD 400,--.

The Appellant did not respond to the claim lodged by the Player at the Dispute Resolution Chamber (DRC) of FIFA.

On 28 March 2008 the DRC found that the Appellant omitted to express itself in the proceedings and decided to accept the claim of the Respondent to an amount of USD 27.700,--, excluding only the claim for allegedly outstanding rent payments.

The Appellant was ordered to pay the amount of USD 27.700,-- to the Player with an interest rate of 5% per year in case the Appellant would not pay this sum within the next 30 days as from the date of notification.

Notification of this decision was received by the Appellant on 11 November 2008.

By letter dated 25 November 2008 the Appellant filed its Statement of Appeal against the Decision of the DRC with the Court of Arbitration for Sport (CAS) in Lausanne, followed by an Appeal Brief dated 3 December 2008.

The Player filed its Answer on 27 December 2008 according to Article R55 of the Code of Sports-related Arbitration (the "Code") within the deadline of 20 days after having received the grounds for the appeal from CAS.

The Appellant supplemented its written submissions by letter dated 2 April 2009.

Both parties agreed that the dispute should be decided by a Sole Arbitrator.

Pursuant to Article R57 of the Code the Sole Arbitrator decided that a hearing was necessary because the Appellant asked for it by letter dated 5 January 2009 and both parties submitted documentary evidence (a contract termination agreement – the "Termination Agreement" – between the Appellant and the Player dated 1 January 2007 and 22 March 2007) which had never before been submitted to the DRC.

By letter dated 16 June 2009 the Appellant informed CAS of its impossibility to attend the hearing. However, the Appellant did not request the postponement of the hearing which remained scheduled for 19 June 2009.

The hearing was held on 19 June 2009 at the CAS court office in Lausanne. The Player declared that he had no objection to raise with regard to the composition of the Panel. At the end of the hearing the Player confirmed that he had a fair chance to present his case and that he has been treated well.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from Articles 60-62 of the FIFA Statutes (in their version entered into force on 1 August 2007) and Article R47 of the CAS Code.

2. Moreover, the jurisdiction of the CAS is explicitly confirmed by the Order of Procedure duly signed by both parties.

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

4. Pursuant to Article R57 of the CAS 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.

Applicable Law

5. In respect to the Appeal Arbitration Proceedings, Article R58 of the CAS Code reads as follows:

   "The Panel shall decide the dispute according to the applicable regulations and rules of law chosen by the parties or, in the absence of the such a choice, according to the law of the country in which the federation / association of 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".

6. Then, Article 60 para. 2 of the FIFA Statutes provides 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".

7. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FIFA shall govern primarily, whereby Swiss law shall apply in the event the interpretation or construction of the FIFA rules and regulations is required.

Admissibility of the appeal

8. The appeal was filed within the deadline provided by Article 61 para. 1 of the FIFA Statutes (version 2007) and stated in the decision of the FIFA DRC, i.e. within 21 days after notification of such decision. Furthermore it complied with all other requirements of Article R48 of the CAS Code.

9. It follows that the appeal is admissible.

Procedural motions

10. First, the Player asks the Sole Arbitrator to disregard the letter dated 2 April 2009 sent by the Appellant to CAS, because it was sent after the closing of the written submissions.

11. The Sole Arbitrator points out that Article R56 of the CAS Code is applicable. Article R56 of the CAS Code reads as follows:

"Unless the parties agree otherwise or the President of the Panel order otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer".

This means that no party may raise any new claim without the consent of the other party or the President of the Panel's express indication after the written submissions have been exchanged.

12. The Sole Arbitrator finds that pursuant to Article R56 of the CAS Code the Appellant would have needed the consent of the Player to file a letter after the written submissions were exchanged. However, the Player did not approve it. It would therefore be to the Sole Arbitrator to decide whether there are such exceptional circumstances to justify the late submitted letter. The Sole Arbitrator notes that the Appellant did not refer, nor prove any exceptional circumstances to justify the admissibility of the letter dated 2 April 2009. As a result the Sole Arbitrator disregards this letter.

13. Secondly, the Appellant alleged a violation of its procedural rights since it was not given the opportunity to participate in the proceedings at the DRC and therefore could not put up a defence on the merits of the claim. However, the Sole Arbitrator states that Article R57 of the CAS Code is applicable. Article R57 of the CAS Code reads as follows:

"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance (…)".

14. This means that according to Article R57 of the CAS Code the Panel has full jurisdiction in this dispute and is not bound by decisions taken by any other jurisdictional body. The case will be considered de novo and any such procedural violation (if any) may be cured by the proceedings and new hearing before CAS. This has been well established by CAS case law (See: CAS 94/129, para. 59 and CAS 2006/A/1155, among others). For this reason the Sole Arbitrator is of the view that the procedural motion of the Appellant on this issue must be dismissed.

Discussion

15. The issue to be resolved by the Sole Arbitrator is whether the Player – by signing the Termination Agreement (*"Agreement of abrogation of the contract"* in the Russian version) – has waived his rights to any financial claim against the Appellant.

16. The Sole Arbitrator establishes that both parties do not dispute that the *"Agreement of abrogation of the contract"* (Russian version) as filed by both parties with their written submissions is identical, except for the signing date. The Appellant submits the agreement dated 1 January 2007 and the Player submits the same agreement, however dated 22 March 2007. The Sole Arbitrator observes that the parties differ in opinion about the translation (English version) of para. 3 of the Termination Agreement.

17. The agreement deals with the termination of the employment contract between the Appellant and the Player. In para. 1 to 5 of the Termination Agreement the parties have defined their agreement.

18. In para. 3 of the *"Agreement of abrogation of the contract"* the parties have defined the legal consequences (of the termination of the employment contract) related to the claims of the Player, including his financial claims.

19. The Appellant points out that para. 3 of the Termination Agreement reads as follows:

"The football Player Almir Sulejmanovich refuse to have any claims to the Ltd "Football Club Zarya". There are no any financial claims about the salary, bonuses and other payments (01.01.2007)".

20. The Player points out that the correct translation of para. 3 of the Termination Agreement reads as follows:

"The football Player Almir Sulejmanovic refuse to have any claims to the Ltd "Football club Zarya". There are no any financial claims about the salary, bonuses and other payments from 01.01.2007".

21. The Sole Arbitrator states that the translation of para. 3 of the *"Agreement of abrogation of the contract"* by an independent translator reads as follows:

"Football player Almir Suleymanovich abandons all claims against JSC "Football Club Zarya". There are no financial claims, related to salary issues, bonuses and benefits, with effect from 01.01.2007".

22. The Sole Arbitrator underlines that one of the strict conditions to establish whether the Player has waived his rights to the salary-claim is that the intention of the Player to waive his rights to this financial claim against the Appellant must arise by necessary implication. The Termination Agreement deals with the termination of the employment contract valid from 25 July 2006 until 15 July 2008. From the independent translation of para. 3 of the *"Agreement of abrogation of the contract"* the Sole Arbitrator concludes that parties have agreed that the Player abandons all his claims against the Appellant, except for the explicitly indicated financial claims related to salary issues, bonuses and benefits in relation to the employment period until 01.01.2007. If the parties – as the Appellant argues – should have wanted to agree that the Player waived all his rights for financial claims (including the mentioned claims until 01.01.2007), the adding of the second sentence in para. 3 of the *"Agreement of abrogation of the contract"* makes no sense. In the view of the Sole Arbitrator the difference in signing-date of the Termination Agreement is irrelevant because it does not change the wording and the meaning of the agreement. Nevertheless, the file contains strong indications to the Sole Arbitrator that the parties reached the Termination Agreement in March 2007. The Sole Arbitrator first points out that the Player asked FIFA to

intervene by letter dated 13 March 2007: *"Today I gave a proposal to a FC Zarya administrator to terminate the contract with 1.1.2007 in order to give me ITC"*. Secondly the Sole Arbitrator observes that at the top of the *"Agreement of abrogation of the contract"* as filed by both parties it says: *"From: FKZarya Fax No. 530708 MAP. 22 2007 18:06"*. Thirdly the FIFA file holds a letter of the Lithuanian Football Federation to FIFA dated 4 May 2007 which reads as follows: *"With reference to the above-mentioned matter we would like to advise, that we received ITC from Football Federation of Ukraine for player Almir Sulejmanovic on 23rd of March 2007"*.

23. All this points to the conclusion that the parties specifically have agreed that the Player has no financial claims related to salary issues, bonuses and benefits with effect from 01.01.2007. As a result the Sole Arbitrator finds that para. 3 of the Termination Agreement does not establish that the Player waived his rights for financial claims related to salary issues, bonuses and benefits in relation to the employment period until 01.01.2007.

24. The Appellant did not submit any other evidence to conclude that the Player did waive his rights for financial claims in relation to the employment period until 01.01.2007. Therefore the Sole Arbitrator reaches the conclusion that there is no legal obstacle whatsoever for the Player to request the allegedly outstanding payments relating to his employment contract with the Appellant.

25. In its written submissions the Appellant did not dispute the claims of the Player about the due amounts as awarded by the DRC.

26. After a thorough analysis of the relevant documents the Sole Arbitrator deems the decision taken by the DRC reasonable and fair. Therefore, the Sole Arbitrator rejects the Appeal filed by the Appellant.

The Court of Arbitration for Sport rules:

1. The Appeal filed on 25 November 2008 by FC Zorya against the decision issued on 28 March 2008 by the Dispute Resolution Chamber of FIFA is rejected.

2. The decision issued on 28 March 2008 by the Dispute Resolution Chamber of FIFA is confirmed.

3. FC Zorya shall pay the amount of USD 27.700,-- (twenty seven thousand and seven hundred US Dollars) to Almir Sulejmanovich, together with 5% interest as from 11 December 2008.

(…)

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