Arbitration CAS 2009/A/1758 Theo Bücker v. Ismailia SC, award of 29 October 2009

Panel: Prof. Petros Mavroidis (Greece); Mr Martin Schimke (Germany); Mr Karim Hafez (Egypt)

Football
Termination of the contract of employment without just cause by the coach
Non participation of the respondent to the hearing and CAS jurisdiction
Limitation to the freedom of the parties to choose the applicable law
No analogous application of the FIFA Regulations on the Status and Transfer of Players to coaches
Application of the wrong regulations and annulment of the previous decision
Determination of damages and burden of proof under Egyptian law
Compensation for moral damages under Egyptian law

1. **The non-appearance of the respondent does not restrain a CAS panel's jurisdiction, as long as copies of the Statement of Appeal and the Appeal Brief, along with details regarding the time and place of the hearing were handed to the respondent by courier and signed as received on behalf of it.**

2. **With regard to the applicable law, the CAS panel is, in principle, bound by the choice of the parties to the dispute; the choice of the parties however, is subject to legal scrutiny itself. The parties cannot request for example, from the panel to apply laws which are not relevant for the adjudication of the dispute.**

3. **The FIFA Regulations on the Status and Transfer of Players (RSTP) in their 2005 edition is not applicable in a dispute involving a coach and a football club; the applicability of Article 17 RSTP to a coach (as opposed to a player) cannot be established according to the CAS case law. First, because Article 1 RSTP provides that the Regulations concern "players", not coaches. Second, because the FIFA Statutes no longer contain the provision of its 2001 version which equated coaches with players.**

4. **The fact that the FIFA Dispute Resolution Chamber (DRC) applied the RSTP on the merits of the dispute between a coach and a football club, which were not applicable to the particular case, is reason enough for a CAS panel to reverse the DRC's decision.**

5. **There are no provisions under Egyptian law equivalent to Article 337c para. 1 of the Swiss Code of Obligations but merely general law provisions regarding the determination of damages and the burden of proof. According to the Egyptian Civil Code, unless damages are liquidated, it is for the court to determine them, whereas only direct loss is recoverable, and then only subject to the claimant's duty to mitigate loss. However, according to the general principles, whoever claims a right must prove it, and as long as the party claiming damages could not establish on concrete terms such damages, it is not entitled to compensation.**

6. While moral damages are included in the damages that can be recovered under Egyptian law, the party asserting such damages bears the burden to prove the damage suffered on concrete terms. In this respect, the fact that a coach signed a new contract immediately upon the end of the first contract with his former club is a decisive criterion showing that the coach did not actually suffer any material loss, since he immediately secured alternative employment and is thus considered to have failed to discharge his burden of proof, following which his request for moral damages should be rejected.

The Appellant, Mr Theo Bücker, is a German professional football coach ("the Appellant" or "the Coach").

The Respondent is Ismailia Sports Club, a football club with seat in Ismailia, Egypt ("the Respondent" or "the Club"). The Respondent is a member of the Egyptian Football Association (EFA), itself affiliated to the Fédération International de Football Association (FIFA).

On 12 December 2005, the parties entered into a contract of employment, valid until 30 June 2006 or the end of the 2005-2006 football season, (the "first contract"). The first contract was to be automatically extended by one year, unless one of the parties applied in writing for its non-extension at least one month before its expiry.

According to the terms of the first contract, the Appellant had the right to a signing-on fee of USD 10,000 and a monthly salary of USD 9,000, whereas a furnished apartment and a car would be made available to him for the duration of the contract.

On 21 April 2006, the Appellant sent a letter to the Respondent, informing it of his withdrawal from his contractual obligations. This letter was of no material consequence in light of the facts described immediately thereafter.

On 7 May 2006, the Appellant signed with the new President of the Club another contract, valid until June, 30 2008 or the end of the 2007-2008 football season ("the second contract"). The contract provided for automatic extension, unless one of the parties applied in writing for non-extension at least two months before its expiry.

According to the terms of the second contract, the Appellant had the right to a signing-on fee of USD 50,000 and a monthly salary of USD 15,000; moreover, a furnished apartment, a car and USD 550 per month to cover apartment costs would be made available to the Appellant for the duration of the contract.

On June 14, 2006 the parties had a discussion, during which the Appellant informed the Respondent about his will to terminate the contract and offered to return the signing-on fee (USD 50,000) and the

car. The Respondent refused the offer and demanded back everything the Appellant had received by the club in implementation of the latter's obligations under the first and the second contract.

On June 15, 2006, the Appellant signed a document in the EFA headquarters cancelling the second contract; he invoked Article 10 of the second contract, which allows a party to withdraw from its contractual obligations, if the other party breaches its own contractual obligations. The Appellant agreed to pay back the USD 50,000 that it had received as advance payment, as well as return the car. The EFA declined to receive the amount of the money and the car invoking the absence of the Respondent as an excuse.

There is no dispute among the parties regarding the facts.

On 9 August 2006, the Respondent, via the EFA, lodged a claim before the FIFA's DRC for breach of contract by the Appellant. In its claim, the Respondent submitted that the Appellant had signed an employment contract with another club on 14 June 2006, despite the existence of a valid contract between the parties (which was supposed to run until June 30, 2008). In doing that, that is, in committing himself to a new contract, the Respondent claimed that the Appellant was in breach of his obligations under the second contract.

The Club requested that the Coach should pay back everything that he had received from the Club, both under the terms of the first and the second contract. The Respondent requested the following amounts specifically:

-	*USD 10,000*	*Advance payment dated 15.12.2005*
-	*USD 54,000*	*6 months' salary*
-	*USD 33,000*	*6 months' flat rental*
-	*USD 50,000*	*Advance payment dated 11.05.06*
-	*USD 360,000*	*24 months' salary*
-	*USD 13,200*	*24 months flat rental*
-	*USD 870*	*Fine imposed by the EFA for the Appellant's behaviour during the match Ismailia vs. Ahly (Attli)*
-	*USD 20,000*	*Fine imposed by Ismailia SC for his behaviour during the match Ismailia vs. Ahly (Attli)*
	_____	
-	*USD 511,370*	*TOTAL*

On August, 22 2006, FIFA acknowledged receipt of the correspondence and drew to the attention of the Respondent the fact that it should submit in writing a request to the EFA so that the latter presents its claim to FIFA at its earliest convenience. A second letter to this effect was sent by FIFA to the Club on March 5, 2007.

Following these two letters, the EFA sent a letter to FIFA dated March 8, 2007, including a letter signed by the Club's President, in which the Club repeated its position and the requested amount.

On March 23, 2007, FIFA sent a copy of this letter to the Appellant, requesting it to submit its position on the matter, together with the supporting documents by April 13, 2007.

On April 24, 2007, the Coach sent his submission to FIFA, via his lawyer, asking FIFA to reject the Request of the Club. The Coach further requested that he be compensated for unsporting behaviour by the Club and for all defamatatory expressions that the Club made against him to the local press: to this effect, he requested the payment of a sum of USD 100,000 for moral damage.

On June 15, 2007, FIFA sent a letter to the Club asking for the Club's statements with regard to the Coach's submission; upon receiving such statements by the Club on June 28, 2007, FIFA sent a letter to the Coach on June 29, 2007, asking him for his final position.

With its letter to the Parties of August 28, 2008, FIFA informed the Parties that the file would be submitted to the Single Judge of the Players' Status Committee on September 2, 2008.

Having established that the Coach had unilaterally breached the employment contract without just cause, the Single Judge proceeded to evaluate the possible consequences for breach of contract, and whether the Club was entitled to compensation as a result of the breach of contract.

Apart from the amount of USD 50,000 (signing-on fee) that the Coach was disposed to pay to the Club and *"after taking all of the circumstances of the present dispute into account, especially the remuneration agreed for the Coach in the second employment contract and the time remaining on the employment contract between the time of the breach of contract and the contractually agreed expiry date, the Single Judge considered compensation of USD 150,000 as appropriate"*.

The Decision of the Single Judge of the Player's Status Committee read as follows:

> *"1. The claim of the Claimant, club Ismailia SC, is partially accepted.*
>
> *2. The Respondent, coach Theo Bücker, has to pay the amount of USD 50,000 (signing-on fee) as well as the amount of USD 150,000 (compensation) to the Claimant within 30 days as from the date of notification of this decision.*
>
> *3. Any further claims lodged by the Claimant are rejected.*
>
> *(…)".*

The FIFA Decision without grounds was issued on 2 September 2008 and the FIFA Decision with grounds was notified to the parties on 15 December 2008.

Subsequent to the notification of the FIFA Decision on 15 December 2008, the Appellant filed a Statement of Appeal with the CAS together with the supporting exhibits. In his Statement of Appeal, the Appellant called both the Club and FIFA as Respondents.

In his Statement of Appeal, the Appellant made the following requests for relief:

"(a) to annul the Decision of the FIFA's Single Judge from 15 December 2008;

(b) that the Respondent be held liable to the Coach for the full amount of the costs of the Appeal".

With its letter to the CAS dated 12 January 2009, FIFA noted that the Appellant had included it in its letter of appeal as Respondent. FIFA argued that, since the dispute was a labour dispute between the two parties (i.e. the Coach and the Club), it did not concern FIFA as such: consequently, the Single Judge was acting *in casu* as the competent deciding body of the first instance; it was not, therefore, a party to the dispute. The opposite would have been the case if, for instance, the Appeal concerned a disciplinary issue where FIFA had acted as the disciplining institution. This was not the case in the present dispute, and, hence, FIFA should not be considered as party to the dispute. FIFA requested from the CAS to rule accordingly.

Further to the FIFA's letter, the Appellant replied with a letter dated January 14, 2009, that FIFA had effectively been named Respondent in his letter of appeal, but agreed to exclude FIFA from the present procedure . The CAS, by virtue of the *non ultra petita maxim*, agreed to do so and not to treat FIFA as Respondent in the present dispute.

The Respondent failed to file its response to the Appeal, although the Counsel to the CAS, with a letter to the Parties dated 19 February 2009, reminded them of the consequences of such omission. To this effect, the CAS Counsel made the Respondent aware of the legal consequences of omissions as explained in Article R55 of the CAS Code of Sports-related Arbitration ("the CAS Code").

With a letter sent to FIFA on April 21, 2009, the Counsel to the CAS asked FIFA for a clean copy of the FIFA's decision on the matter.

The Panel held a hearing on June 29, 2009 at the CAS premises in Lausanne.

LAW

CAS Admissibility and Jurisdiction

1. The decision of the DRC was notified to the parties on December 15, 2008 and the deadline for appeal before the CAS is, according to Article 63 para. 1 of the FIFA Statutes, 21 days from the date of receipt of notification of the decision; the Appellant filed his Statement of Appeal on January 2, 2009, that is, within the statutory deadline. Consequently, the appeal is admissible.

2. The jurisdiction of CAS to adjudicate the present dispute is based on Arts. 60 ff. of the FIFA Statutes 2005 edition and on Article R47 of the CAS Code. The parties to the dispute did not question the jurisdiction of CAS to adjudicate their dispute.

3. Moreover, the Decision of the FIFA's Single Judge explicitly establishes the jurisdiction of the CAS *"according to Article 63 para. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport"*.

4. The scope of the Panel's jurisdiction is defined in Article R57 of the CAS Code, which provides that: *"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"*.

5. Finally, the Panel notes that the Respondent did not participate in the hearing. Copies, nevertheless, of the Statement of Appeal and the Appeal Brief, along with details regarding the time and place of the hearing were handed to the Respondent by courier and signed as received on behalf of it. The non-appearance of the Respondent does not restrain the Panel's jurisdiction: Rule 57 of the Code states that: *"If any of the parties is duly summoned yet fails to appear, the Panel may nevertheless proceed with the hearing"* (see also *CAS 2008/A/1534,* para. 5.3.2).

Applicable Law

6. The Panel finds an express choice of law within the contract: Article 7 of the second contract provides that *"every dispute arising between the two parties around this contract execution or interpretation shall fall under the jurisdiction of laws and by-laws in Egypt and FIFA Regulation"*, while Article 8 of the same contract sets forth that "this contract shall be subject to the provisions and the internal by-laws in the club and labour law in the private sector in Egypt and its amendments in the events not specifically provided for herein".

7. According to Article R58 of the CAS 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"*. Since Article R58 of the CAS Code refers to the law applicable to the merits of the dispute it is Egyptian law and FIFA Regulation that govern this contract. The Panel is, *in principle*, bound by the choice of the parties to the dispute and will therefore apply Egyptian law (as specified in Article 8 of the second contract) and FIFA Regulation in order to resolve this dispute.

8. The choice of the parties however, is subject to legal scrutiny itself. The parties cannot request for example, from the Panel to apply laws which are not relevant for the adjudication of a dispute. In this vein, the Panel notes that the FIFA Regulation on the Status and Transfer of Players (the 2005 edition) is not applicable in the present dispute: the applicability of Article 17 of the FIFA Regulations to a coach (as opposed to a player) cannot be established according to the CAS case law. In this respect, the Panel refers to the findings by the CAS Panel in CAS 2008/A/1464 & 1467, para. 68, according to which *"(...) Article 1 of the FIFA Regulations ("Scope") provides that the Regulations concern "players," not coaches. Moreover, the FIFA Statutes no longer contain the provision which appeared in Article 33.4 of their 2001 version which equated coaches with players"*.

Issues to be determined

9. The CAS Panel has to determine the following:

   A. Should the Decision of the FIFA's Single Judge be upheld?

   B. Should the Panel rule on the case de novo and issue a new award?

   C. Is the Respondent entitled to compensation due to the termination of the contract before its expiry?

   D. Should moral damages and/or interest be payable to the Appellant?

A. Should the Decision of the FIFA's Single Judge be upheld?

10. The Single Judge applied the FIFA Regulations on the merits of the dispute between a coach and a football club. Yet, according to the CAS case law, the FIFA Regulations are not applicable to the merits of a contractual dispute between a coach and a football club, since the provision equating players with coaches in Article 33 para. 4 of the 2001 FIFA Statutes no longer appears in the 2005 or the 2008 version of the FIFA Statutes, and, as mentioned above, it is the 2005 edition of the FIFA Statutes that applies to the present dispute.

11. This is reason enough for the Panel to reverse the DRC's decision (see also CAS 2007/A/1298 & 1299 & 1300, para. 100). We are comforted in our decision to do so, since we observed a number of findings that were left unsubstantiated in the DRC decision. For example, the Single Judge has not explained at all the quantification of the compensation that he recommended. We are left in the dark as to the methodology used to reach the number that he advances: while it is true that the Decision includes some abstract criteria for the calculation of damage suffered by the Club, such as *"the remuneration agreed for the Coach in the second employment contract"* or *"the time remaining on the employment contract between the time of the breach of contract and the contractually agreed expiry date"*, it does not contain any discussion regarding the relative significance of these criteria to the quantification of compensation. We see a number that can be explained through a myriad of ways, but no expressed basis for the number we see in the DRC Decision.

B. Should the Panel rule on the case de novo and issue a new award?

12. According to Article R57 of the CAS Code,

   "The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged (…)".

13. The Panel will thus issue a new decision which will replace the DRC Decision.

C. Is the Appellant entitled to compensation due to the termination of the contract before its expiry?

14. The Panel needs to restate, at this point, that the FIFA Regulations – and specifically the provisions regulating the termination of contract with or without just cause – are not applicable to the dispute at hand. Moreover, there are no provisions, under Egyptian law (applicable to the present dispute), equivalent to Article 337c para. 1 of the Swiss Code of Obligations (CO) or to Portuguese law (see also CAS 2008/A/1464 & 1467 paras. 75 ff.), but merely general law provisions regarding the determination of damages and the burden of proof.

15. According to Article 221 of the Egyptian Civil Code (ECC), unless damages are liquidated, it is for the court to determine them. Damages include *lucrum cessans* and *damnum emergens*. The same provision foresees that only direct loss is recoverable, and then only subject to the claimant's duty to mitigate loss.

16. Article 1 of the Egyptian Law of Evidence in Civil and Commercial Matters establishes the general principle that whoever claims a right must prove it, whereupon the burden shifts to the other side, who must then establish that the underlying obligation either does not exist or has somehow been discharged.

17. Taking into consideration all the above, the Panel notes that the Appellant could not establish – on concrete terms – the alleged damage suffered due to the early termination of the contract by the Appellant. According to Egyptian law, loss is an element of the cause of action for breach of contract which it is for the claimant to establish, if it is to recover any compensation, and cannot simply or automatically be assumed to follow from every contractual breach (see also EL-SANHOURY A.-R., *Al-Wasseet fi al-kadaa elmadani*, Part I, 2004, p. 556).

18. The Panel therefore deems that the Respondent is not entitled to compensation from the Appellant because it could not discharge its burden of proof either before the FIFA Single Judge or before the CAS Panel. Failure to do so leads the Panel to conclude that it has no basis to adjudicate a claim regarding compensation due by the Appellant.

19. In each case, the Panel shares the Single Judge's decision requiring the Appellant to return the USD 50,000 advance, on the theory that the alternative would unjustly enrich the coach. In addition, the Appellant explicitly acknowledged, during the hearing, that he would give the signing-on fee back to the Respondent.

D. Should moral damages and/or interest be payable to the Appellant?

20. The Appellant requests USD 100,000 *"due to gamesmanship in terms of discriminatory comments in public"*. We understand that the Appellant claims compensation for defamatory and not discriminatory comments. Following a question by the Panel to this effect, the Appellant responded that this was indeed the case. According to the Appeal Brief, the Coach suffered damage to his image due to slanderous statements in public, the representation of him as a thief, his hunting by Interpol as a result of the Club President's comments against him. He requests

USD 100,000 for "moral damage". After being requested during the hearing on what this amount stands for, the Appellant's lawyer stated that this amount *"corresponds approximately to the yearly salary of the Appellant"*.

21. While, according to Article 222 of the ECC, moral damages are included in the damages that can be recovered under Egyptian law, the Appellant bears the burden to prove the damage suffered on concrete terms (under Article 1 of the Egyptian Law of Evidence in Civil and Commercial Matters and Article 221 ECC, see also paras. 14 ff. above).

22. Taking into consideration all the above, the Panel notes that the Appellant signed a new contract immediately upon the end of the first contract with the Respondent. To the Panel's view, this is a decisive criterion showing that the Appellant did not actually suffer any material loss, since he immediately secured alternative employment. The Panel therefore deems that the Appellant failed to discharge his burden of proof in this respect and his request for moral damages should be rejected.

The Court of Arbitration for Sport rules:

1. The Appeal filed on January 2, 2009 by the Appellant, Mr. Theo Bücker against the Decision issued by the FIFA's Single Judge on December 15, 2008 is partially upheld.

2. The Decision issued by the FIFA's Single Judge on December 15, 2008 is amended as follows: Club Ismailia SC is not entitled to compensation by the Coach Theo Bücker.

3. The Decision issued by the FIFA's Single Judge is confirmed as to its part that the Appellant, Theo Bücker, has to pay the amount of USD 50,000 (signing-on fee) to the Respondent, Club Ismailia SC.

4. All other or further claims are dismissed.

(…).