Arbitration CAS 2009/A/1841 FC Metallurg v. Marko Grubelic, award of 27 October 2009

Panel: Mr Rui Botica Santos (Portugal), Sole Arbitrator

Football
Termination of a contract of employment concluded between a player and a club
Inadmissibility of the answer and of a counterclaim
Determination of the author of the termination
Termination not justified by the refusal by a player to be transferred (absence of just cause)
Compensation for damages

1. **The provisions of article R55 of the CAS Code, read together with article R32, must be applied strictly and without any restrictions, except in situations of *force majeure*. An answer and a counterclaim filed one day late and outside the 21 day time limit fixed under R55 of the CAS Code should consequently be declared inadmissible and shall not be taken into consideration by the panel in the assessment of the merits of the appeal.**

2. **A club's general conduct towards a player can legitimately lead the player to believe that the club no longer views the employment contract as still being in force. Such is the case if the club prevents the player from attending its training sessions and accessing its premises, does not mind the player's absence, takes no concrete measures to oblige the player to provide his services, reduces the player's salary by 50% without even hearing the player or notifying him of such fact. In doing so, the club acts contrary to its duty as an employer and clearly expresses that the player's services are no longer required by it. Under the circumstances, a complaint filed before the FIFA Dispute Resolution Chamber (DRC) by the player should be considered, in practical terms, a notice of default. It follows that any decision by the player to *"walk away"* from the club without notice can only be a result of the club's creation of an unfavourable working environment. As a result it can be concluded that it is the club which terminated the employment contract.**

3. **In deciding to sign a player, a club undertakes the risk that the player might or might not turn out to be a successful signing. This risk cannot therefore be invoked into the contract as a ground for placing the player on the transfer list in case of a decline in his sporting performances and skills. Thus, a player's failure to collaborate with a club to be transferred to another club does not amount to a breach of the employment contract. It is a well established FIFA jurisprudence that a player can only be transferred with his express consent. In this respect, the principle of contractual stability envisaged under article 13 of the FIFA Regulations for the Status and Transfer of Players (RSTP) would seriously be evaded if clubs would not only have the right to force players to be transferred, but also the right to view the refusal by a player to be transferred as a just cause to terminate his contract. This unjust cause of right of a club to forcibly transfer**

a player is even more serious if the reasons behind it relate to poor skills and performance on the part of the player.

4. **Under article 17.1 RSTP, which establishes the consequences of terminating an employment contract without just cause by a club and under Swiss law, a player is entitled to claim payment of the entire amount he will have earned, and compensation for the damages he will have avoided if the employment relationship had been implemented up to its natural maturity. However, the CAS cannot rule *ultra petita* and if a counterclaim cannot be taken into consideration due to its late filing, the CAS will have to abide by the compensation amount awarded by the DRC.**

FC Metallurg (the "Club") is a Ukrainian professional football club registered as such under the Ukrainian Football Federation. The latter is a member of the Fédération Internationale de Football Association (FIFA).

Marko Grubelic (the "Player") is a professional football player of Serbian nationality.

This appeal was filed by the Club against the decision rendered by the FIFA Dispute Resolution Chamber dated 9 January 2009 (the "FIFA DRC Decision") and notified to the Parties on 14 April 2009.

On 1 January 2006, the Player and the Club entered into an employment contract (hereinafter referred to as the "Employment Contract") valid for the period 1 January 2006 to 1 January 2007 – article 6.1 of the Employment Contract.

The Player was therein employed by the Club in the capacity of *"(…) Football player of the professional football team of the Club (…)"* – article 1.1 of the Employment Contract.

The Parties agreed, at articles 3.4 (2) and 4.5 of the Employment Contract, that the Club had the right to place the Player on a transfer in case of a decline in his sporting skills and performances, and also to reduce his monthly salary. Article 3.4 (2) of the Employment Contract reads as follows:

> *"The Club has the rights, (...) in case of decrease in sports skill and a game level to expose the football player on a transfer".*

Article 4.5 reads as follows:

> *"During the validity of the present Contract, in connection with its non-fulfilment by the Football player, as well as the decrease of the sport craftsmanship or loss of the necessary physical form, and also in case of exhibiting the football player to a transfer, the rate of the wages can be changed into the way of decreasing amenably the decision of the Club Council of Sport and in accordance with labour legislation in force of Ukraine".*

The Employment Contract contained no provision in relation to the Player's salary.

Thereafter, on an unknown date, assumed to be a date close to the date when the Employment Contract was signed, the Parties entered into another agreement, undated and entitled *"Agreement about disciplinary sanctions and bonuses"* (hereinafter referred to as *"Complementary Contract"*), wherein the Parties fixed the Player's salaries and bonuses as follows:

> *"2.1. For honest discharge of the duties, for high level of sport scores, for professional and sport mastery, for individual contribution on attainment by FC "Metallurg" victorious sports results, the club makes an additional payment to the football player in the amount of 12 000 USD $ per month;*
>
> *2.2. In the games of the Ukrainian Cup bonus is being given according to the order of the club.*
>
> *2.3. During the term of the contract the Club is compensate the payment of sum for Football-player's dwelling in total 300 USD per month".*

On 11 April 2006, before the expiry of the Employment Contract, the Parties entered into another agreement (the "Additional Contract") wherein they extended the length of the Employment Contract so that it was to expire on 30 June 2010. The rest of the provisions of the Employment Contract remained unchanged.

On 28 May 2008, the head coach of the Club (Mr. Kostov) wrote a letter to the General Director of the Club informing him that the Player *"(…) really decreased* [his] *sport mastery and the playing level because of incorrect fulfilment of* [his] *obligations"*. Furthermore, the head coach also underlined in the same communication that *"(…) the further employment of these players in the play scheme of the team is not possible. Taking into account the abovementioned ask you to consider the possibility of the transfer of the* [Player] *(…)"*.

On 30 May 2008, the Sport Board of the Club decided (i) to put the Player on transfer because of the decrease of his sporting performance and loss of the necessary physical form; and (ii) to cancel the bonus payments and to decrease the salary of the Player by 50%, as from 1 June 2008.

On or about 8 June 2008, the Player left the Club and returned to his family home in Serbia. The Club never called the Player or sent him any notice of default asking him to resume his duties with the Club.

On 23 July 2008, the Player filed a complaint against the Club before the FIFA DRC seeking compensation and claiming that the Club had breached the Employment Contract and asked that his Employment Contract be declared *"terminated at the Club's fault"*.

The Player asked the FIFA DRC to grant him compensation totalling to USD 36,000, which he said was his outstanding salary for the months of June, July and August 2008, averaged at USD 12,000 per month.

During the FIFA DRC proceedings, the Player neither presented nor drew the FIFA DRC's attention to the contents of the Employment Contract. The Player informed the FIFA DRC that the only documents in his possession were the Complementary Contract and the Additional Agreement.

The Player alleged that on 8 June 2008, the Club's Sports Director orally informed him that the Club was no longer interested in his services because the level of his physical and sporting performances had declined and that, accordingly, the Club informed the Player that it was proceeding to terminate the Employment Contract in accordance with its article 3.4 (2).

The Player also stated that the Club informed him that he had been banned from training and that he was to return to his home and look for another club. The Player specifically stated that the Club requested him:

- to stop attending the Club's training sessions, and also to stay away from the Club's premises forthwith.
- to look for another Club, but he would only be free to sign for a new club as long as this new club paid the Club a transfer fee of EUR 300,000.
- to sign an agreement of mutual termination, under which the Player was required to waive his right to claim any obligation from the Club, effective from 30 June 2008. The Player declined to sign this agreement, which was proposed by the Club's Sports Director.

Aggrieved by his contractual condition, the Player unsuccessfully called the Club on several occasions, requesting it to reinstate his services, and asking the Club to pay him his June 2008 salary. He returned home to Belgrade on 9 June 2008.

The FIFA DRC sent several letters to the Club, asking it to file its defence to the Player's claim. No replies were however received from the Club. Consequently, on 21 November 2008, FIFA advised the Parties *"(…) to consider their labour relationship as terminated and to focus on the financial aspects of the dispute without prejudice to the decision to be passed by the Dispute Resolution Chamber (…)"* and ruled that the Club had renounced its right to self defence.

On 9 January 2009, the FIFA DRC admitted the Player's claim and awarded him a compensation of USD 36,000 on grounds that:

- The Complementary Contract and the Additional Contract were a clear evidence of the existence of a contractual relationship between the Club and the Player;
- The Club had not disputed the validity or existence of the two previous contracts and its failure to defend the Player's suit implied that it had renounced its right to self defence;
- In the absence of the Club's defence, the Player's allegations were admissible, with a conclusion that the Club had, without just cause, unilaterally terminated the Employment Contract on 8 June 2008; and
- The Player was entitled to compensation in accordance with article 17.1 of the FIFA Regulations for the Status and Transfer of Players (the "FIFA Regulations"), and granted the Player his financial claim of USD 36,000, as compensation for the unilateral termination of the contract by the Club without just cause.

On 30 April 2009, the Club filed its "Statement of Appeal" against the FIFA DRC Decision with the Court of Arbitration for Sport (CAS), pursuant to article 62 para. 1 of the FIFA Statutes.

In its Statement of Appeal, the Club requested the CAS to:

- Set aside the FIFA DRC Decision;
- Render a new decision wherein it dismisses the Player's requests, and to admit the Employment Contract was unilaterally terminated by fault of the Player;
- Stay the execution of the FIFA DRC Decision until the appeal has been heard and determined.

On 12 May 2009, the Club filed its "Appeal Brief".

On 5 June 2009, one day after the expiry of the 21 day time limit, the Player filed his "Answer".

The Answer filed by the Player also contained a counterclaim appealing against the amount awarded by the FIFA DRC Decision.

On 11 June 2009, the CAS Court Office drew the Player's attention to the fact that his Answer had been filed outside the time limit established under article R32 of the Code of Sports-related Arbitration (the "CAS Code"), and informed the Parties that it shall be up to the Sole Arbitrator to decide on its admissibility.

Following this communication, the Player's lawyer wrote to the CAS on 11 June 2009, informing the CAS that the reason for the 1 day delay in filing the Player's Answer was as a result of an unfortunate error caused by *"(…) a miscalculation on our part of the initial and final dates of the twenty day deadline, due to the fact that the 2nd of June is a national holiday in Italy"*.

Accordingly, the Player's lawyer requested the CAS not to allow his client to suffer prejudice as a result of his lawyer's mistake. The Player's lawyer says that the Player has at all material times been committed in prosecuting his case by supplying him with all the necessary documents to file the Answer on time.

On 17 June 2009, the Club replied to the Player's lawyer's letter dated 11 June 2009 and objected to the late admission of the Player's Answer, saying that the Player's lawyer's argument that he miscalculated the dates is not a valid reason.

In addition to the objection, the Club enclosed further additional evidences in its letter of 17 June 2009, and asked the CAS Court Office to admit them.

In response to the Club's objection to the admission of the late Answer, and to the Club's attempt to file additional evidences, the Player wrote to the CAS Court Office on 26 June 2009, indicating that he raised *"(…) no objection to the admission by the Panel of the additional submissions of the Appellant strictly subject to the Panel similarly permitting the admission of the Respondent's Statement of Defence also. This would appear to be an equitable solution which would satisfy the interests of both sides"*.

Following the submissions of both Parties in relation to the admission of the late Answer filed by the Player and to the admission of the Club's additional submission and evidences , the Sole Arbitrator delivered his ruling on these issues on 22 July 2009 and:

1. Rejected the Answer filed by the Player on 5 June 2009 on grounds that:
   a. *"The Respondent failed to comply with the time limit fixed under article R55 of the CAS Code;*
   b. *The Appellant has objected to the late admission of the Respondent's answer;*
   c. *The Respondent has failed to demonstrate the existence of any force majeure event which prevented him from filing his answer within the fixed time limit imposed under article R55 of the CAS Code. The reasons given by the Respondent related to the miscalculation of the deadline as a result of the holiday in Italy does fall under the concept of force majeure event, because the invoked cause was not beyond the reasonable control of the Respondent".*
2. Rejected the admission of the additional evidence and documents filed by the Club on 17 June 2009 on grounds that:
   a. *"The Respondent has objected to its admission and expressed his views that such admission is only acceptable on condition that his late answer to the appeal is admitted;*
   b. *The Appellant has failed to demonstrate the existence of any exceptional circumstances which prevented it from submitting the said evidences at the time of filing its appeal brief as required under article R56 of the CAS Code. The Sole Arbitrator acknowledges that the additional evidences were already at the Appellant's disposal at the time of filing its appeal brief. It is also noted that the Appellant has failed to inform in the appeal brief its intention to submit these documents on condition that it had obtained the written consent of the third parties to whom it related for reasons of third party confidentiality".*

On 25 August 2009, the Player filed an application to the CAS requesting the Sole Arbitrator to authorise him to make submissions pursuant to article R56 of the CAS Code since no hearing was to be held and in order to safeguard his right to defence himself. Otherwise, the Respondent's right of defence would be infringed, since he would not have the opportunity to be *"fully heard"*.

Consequently, on these grounds[1] and in consideration of the exceptional circumstances provided for under article R56 of the CAS Code, the Sole Arbitrator decided on 27 August 2009 to invite the Parties to file further supplementary written submissions in relation to the case, and new exhibits, if necessary, while reminding the Parties that the said supplementary submissions were limited to the subject matter of the appeal and that the Player's counterclaim remained dismissed.

The Club reverted on 14 September 2009, asking the Sole Arbitrator to refer to the Appeal Brief and to the additional documents and evidences referred to at paragraphs 35 and 37 above as its supplementary arguments.

The Club adduced a calculated payment statement purporting to show evidence of payments made to the Player from June to August 2008, in Ukrainian hryvnias in the sum of 27.842,27, 27.842,27 and

[1] The Player had also requested in his Answer that the CAS admits Mr. Ivan Gozdenovic, a professional footballer who was his colleague at the Club at the time of the termination, as a witness, and asked the CAS to allow him to testify by way of telephone, in the unlikely event that he would be unable to attend the hearing.

1.400,18 for the three months respectively. The Club also reiterated its right to transfer the Player in accordance with article 3.4 of the Employment Contract and its support for the cancellation of the FIFA DRC Decision based on the fact that the Player breached the Employment Contract

The Club makes a similar conclusion to the one contained in its Appeal Brief.

The Player reverted with his supplementary arguments on 24 September 2009, wherein he sets forth the facts of the case and re-introduced his counterclaim on the same grounds as raised in his Answer, claiming that his counterclaim fell under the subject matter of the appealed case.

The Player generally reiterated the facts as highlighted in his Answer, summarised on section V.2 of this award. More specifically, the Player stated that the decision taken by the Club's board meeting to place him on the transfer list following the coach's recommendation that his sporting skills had declined, was biased, unfair and taken in violation of his right to be heard. The Player also asserts that a player can only be transferred with his consent.

In addition, the Player states that the Club stopped paying his salary from June 2008, and that this amounted to a termination of contract.

LAW

Jurisdiction of the CAS

1. The jurisdiction of the CAS, which is not disputed, derives from article 62.1 of the FIFA Statutes and article R47 of the CAS Code.

2. The parties confirmed the jurisdiction of CAS by signing the Order of Procedure.

3. It follows that the CAS has jurisdiction to decide this dispute. The mission of the Sole Arbitrator follows under article R57 of the CAS Code, according to which the Sole Arbitrator has full power to review the facts and the law of the case. Furthermore, the same article provides that a Sole Arbitrator may issue a new decision which replaces the challenged decision, set the decision aside or refer the case back to the previous instance.

Applicable law

4. Article R58 of the CAS 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. In accordance with the provisions of article 62, para. 2, of the FIFA Statutes, the Sole Arbitrator finds that the dispute must be decided according to FIFA Regulations and, complementarily, if necessary, Swiss law.

6. The Parties have not agreed on the application of any specific national law and, as a result, FIFA Regulations shall apply to the present dispute, supplemented by Swiss law, if necessary.

7. Since the matter in dispute was submitted to FIFA on 23 July 2008, the Sole Arbitrator confirms that, in accordance with articles 26.1 and 26.2 of the FIFA Regulations (edition 2008), the relevant FIFA regulation applicable to the present appeal, in as far as its substance is concerned, is the 2008 FIFA Regulations for the Status and Transfer of Players.

Admissibility of the appeal and inadmissibility of the answer/counterclaim

8. According to article R49 of the CAS Code, the appeal has to be filed within a certain time limit. The provision makes specific reference to the time limits fixed under the FIFA Statutes and to those fixed by the regulations of the federation which decision is being appealed.

9. It is undisputed that the Club filed the appeal within the deadline established under article R49 of the CAS Code.

10. However, the Player failed to file his Answer within the deadline established at article R55 of the CAS Code.

11. As established by article 32 of the CAS Code (time limits):

"The time limits fixed under the present code shall begin from the day after that on which notification by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. The time limits fixed under the present code are respected if the communications by the parties are sent before midnight on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the country where the notification has been made, the time limit shall expire at the end of the first subsequent business day".

12. It therefore follows that the provisions of article R55 of the CAS Code, read together with article R32, must be applied strictly and without any restrictions, except in situations of *force majeure*, which have not been alleged nor proved by the Respondent.

13. As mentioned under paragraphs 26 and 27 hereinabove, the Player's Answer and counterclaim was filed one day late and outside the 21 day time limit fixed under R55 of the CAS Code.

14. The Answer and the counterclaim filed by the Player are consequently declared inadmissible for the reasons stated above and shall not be taken into consideration by the Sole Arbitrator in his assessment of the merits of the appeal.

15. The reasons for the said delay had already been submitted by the Player and ruled upon by the Sole Arbitrator on 23 July 2009.

16. The Sole Arbitrator shall only consider the supplementary submissions and evidences filed by the Player on 24 September 2009.

Merits

17. The Sole Arbitrator has identified the following issues for determination in order to arrive at a final decision:

    a) Which Party terminated the Employment Contract?

    b) Was the termination of the Employment Contract based on just cause?

    c) In case the Employment Contract has been terminated without just cause, what are the legal consequences for the breaching Party?

    d) Should sporting sanctions be imposed on the Player or on the Club, depending on the answers to a) and b) above?

    e) Other prayers for relief.

A. Which Party terminated the Employment Contract?

18. The Sole Arbitrator underlines the following proven facts as the most relevant in deciding the present appeal and in particular in deciding which Party terminated the Employment Contract:

    - The Employment Contract was signed on 1 January 2006 and the Player was employed by the Club in the capacity of football player of the professional football team of the Club. The initial duration of the contract was from 1 January 2006 to 1 January 2007.
    - In accordance with the Complementary Contract, the Player's monthly salary was USD 12.000.
    - As per the Additional Contract (signed on 11 April 2006), the Employment Contract was extended from 1 January 2007 to 30 June 2010.
    - On 28 May 2008, the head coach of the Club informed Mr. Donetsk, the Club's General Director, that the Player had decreased his sporting mastery and that his level of play was not good, proposing his transfer to another club.
    - On 30 May 2008, the Sporting Board of the Club passed a resolution wherein the Club decided to place the Player on a transfer, to cancel the bonus payment and to lower his salary by 50% as from 1 June 2008.

- The Club's head coach, the sporting director and the rest of the players were in favour of the Player being transferred owing to his performance.
- On or about 8 June 2008, the Player returned to his family home in Belgrade, Serbia, and has since not taken part in any of the Club's activities.
- The Player never sent any notice or written communication to the Club asking to resume his activities or to terminate the Employment Contract.
- The Club never requested the Player to resume his duties or activity, and never sent any formal communication or notice of default to the Player requiring his presence for the Club's activities.
- On 23 July 2008, the Player filed a claim against the Club before FIFA asking for the payment of his outstanding salaries and compensation for breach of contract by the Club. The Player sought payment of EUR 36,000.

19. As held by the FIFA DRC and acknowledged by the Club, the Sole Arbitrator is also of the opinion that the Employment Contract came to an end when the Player returned to Belgrade on or about 8 June 2008.

20. The Club asserts that it was the Player who unilaterally terminated the Employment Contract not only by failing to attend training sessions but also by failing to serve the Club with a written notice of termination. The Player argues that the Club denied him access to the Club's training facilities and stopped him from attending its training sessions.

21. The Sole Arbitrator shall now analyse the facts and circumstances related to the Player's decision to return to Belgrade, and examine the Parties' conduct in deciding which Party effectively terminated the Employment Contract and is responsible for such termination.

22. Based on the abovementioned facts and circumstances, in particular the letter dated 28 May 2008 from the Club's head coach to the Club and from the minutes of the Club's board meeting held on 30 May 2008, it seems clear that the Club was no longer interested in retaining the Player's services due to the alleged decrease of his sporting performance. These facts and circumstances are further reinforced by the Club's statement that the head coach, the sporting director and the rest of the players confirmed that the Player's sporting skills and performances had declined.

23. The Club's lack of interest in the Player and/or in its Employment Contract with the Player is further corroborated by the Club's silence and failure to inquire on the whereabouts of a Player with whom they had a contract over the period of his absence.

24. No evidence has been adduced by the Club rebutting the Player's submissions that it stopped the Player from attending its training sessions and also that it prevented the Player from accessing its premises. There is no evidence of the Club having instituted any disciplinary actions for breach of contract or violation of the regulations of the Football Federation of Ukraine and the FIFA Regulations for the Status and Transfer of Players as it claims to have had the right to do so. This notwithstanding, the Sole Arbitrator reiterates that in preventing

the Player from attending its training sessions, the Club acted contrary to its duty as an employer to support and provide work to its employee and to provide an environment wherein its employee could develop, practice and expose his skills and by paying his salaries and benefits. The Club's decision to instantly reduce the Player's salary by 50%, without even hearing the Player or notifying him of such fact, amounts to a total lack of respect and consideration for a Player in his capacity as an employee.

25. It is true that no notice of default was sent by the Player to the Club asking it to stop its actions. The overall circumstances created by the Club in which the head coach, the sporting director and the rest of the players did not consider the Player as part of the team left the Player with no choice but to return to his home in Belgrade. However, considering the aforementioned circumstances and the fact that the Player filed a complaint before the FIFA DRC on 23 July 2008, which the Club ought to have considered, the Sole Arbitrator views the claim filed before the FIFA DRC to be, in practical terms, a notice of default.

26. The Player's claim before the FIFA DRC was not a termination of the Employment Contract, but rather a request for FIFA to intervene and assist him in moving the Club so that it could fulfil its contractual obligations, as is also evidenced in his letter dated 23 July 2008 to FIFA entitled *"Request for the breaking of the contract to the disadvantage of the football club"* wherein he concluded and asked FIFA to *"kindly asking to help me solve this problem"*.

27. The Sole Arbitrator additionally points out that the last and most formal opportunity at which the Club had to show its interest in the Player was when it was called upon to file its defence before the FIFA DRC but failed to do so, an indication that it deemed the Employment Contract as having been terminated.

28. It therefore follows from the conduct and acts displayed by the Club that any decision by the Player to *"walk away"* from the Club without notice could only have been a result of the Club's creation of an unfavourable working environment.

29. The Club cannot argue that in declining the offer to transfer to FC Stal Alchevsk, the Player was acting in breach of the Employment Contract. It is a well established FIFA jurisprudence that a Player can only be transferred with his express consent. Any such move or offer from his club to forcibly transfer him amounts to a clear breach of the FIFA jurisprudence and principles of contractual stability. In relation to this particular aspect, the Sole Arbitrators underlines that the Club did not prove that the Player was informed of FC Stal Alchevsk's interest in his services, or that he was aware of the contractual conditions which had been proposed by FC Stal Alchevsk and of the reasons why the deal never went through.

30. The Sole Arbitrator refers to the principle of *venire contra factum proprium*. The Sole Arbitrator notes in this case that the Club's general conduct towards the Player and the manner in which it treated him legitimately led the Player to believe that the Club no longer viewed the Employment Contract as still being in force. The Club's attitude towards the Player was clear that his services were no longer required by it.

31. Considering the aforesaid facts and circumstances, combined and related together, and considering that the Club did not mind the Player's absence, and the fact that it never took any concrete measures to oblige the Player to provide his services, the Sole Arbitrator concludes that it was the Club which terminated the Employment Contract on the basis that the Player failed to collaborate with the Club to be transferred to another club, as he was *"obliged"* to be put on a transfer pursuant to article 3.4 (2) of the Employment Contract.

32. Consequently, the Sole Arbitrator proceeds to address the issue whether the alleged violation by the Player of article 3.4 (2) of the Employment Contract can be considered a just cause for termination.

B. Was the termination of the Employment Contract based on just cause?

33. The Club states that, in accordance with clause 3.4 (2) of the Employment Contract, it had the right to transfer the Player on grounds of a decline in his sporting performance. This argument is stated in the Appeal Brief wherein it concedes that *"according to the point 3.4 of the Contract on 1 June 2008 the Club had to put the player for the transfer because of the great decrease of the sport mastery and lost of the necessary physical form on the ground of the decision of the sport board of the club"*.

34. In deciding to sign a player, a club undertakes the risk that the player might or might not turn out to be a successful signing. The risk of the player performing below the expected level is foreseeable and always present and unavoidable. This risk cannot therefore be invoked into the contract as a ground for placing the player on the transfer list in case of a decline in his sporting performances and skills.

35. The decision or right of a club to transfer their players cannot be considered as a breach of the Employment Contract. The breaching of the contract may exist, as it is the case in hand, if a Club starts to change its behaviour towards the Player in such a way as to force him to accept to be transferred.

36. The Sole Arbitrator cannot ignore the fact that the Player's Employment Contract was extended from 1 January 2007 for another 3 years and that such extension took place 4 months after the initial contract had been signed. Furthermore, the USD 12,000 monthly salary paid to the Player was not only relatively reasonable and healthy but also represented a serious interest by the Club in the Player.

37. A decline in a player's sporting performances cannot be used by the Club in a discretionary manner in such a way which could cause or lead to the frustration of the performance of the Employment Contract.

38. The principle of contractual stability envisaged under article 13 of the FIFA Regulations would seriously be evaded if clubs would not only have the right to force players to be transferred, but also the right to view the refusal by the player to be transferred as a just cause to terminate his contract.

39. This unjust cause of right of a club to forcibly transfer a player is even more serious if the reasons behind it relate to poor skills and performance on the part of the player. This was brought out by FIFA DRC Jurisprudence (DRC Case No. 75975 of 28 July 2005, which held that *"(…) a player's lack of performance cannot and does not constitute just cause for a club to unilaterally terminate an employment contract (…)".*

40. For all the foregoing, the Sole Arbitrator finds that the Club had no grounds to act towards the Player in the manner in which it did, and for this reason concludes that the termination of the Employment Contract was an unjust ground and contrary to the spirit of contractual stability envisaged under article 13 of the FIFA Regulations.

C. Legal consequences of terminating the Employment Contract without just cause

41. In the present dispute, the FIFA DRC concluded and accepted the Player's claim, awarding the total amount of EUR 36,000 as compensation for breach of the Employment Contract by the Club.

42. The Sole Arbitrator has to now decide whether the amount of compensation as calculated by the DRC is reasonable and fair in accordance with the conditions provided for under article 17.1 of the FIFA Regulations, which establishes the consequences of terminating an employment contract without just cause by a club.

43. Article 17.1 of the FIFA Regulations provides that:

"The following provisions apply if a contract is terminated without just cause: In all cases, the party in breach shall pay compensation. Subject to the provisions of Art. 20 and annex 4 in relation to training compensation, and unless otherwise provided in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of the sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the Player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period".

44. With the aim of interpreting article 17 of the FIFA Regulations, the Sole Arbitrator refers to Swiss law, in particular article 97 of the Swiss Code of Obligations (hereinafter referred to as "Swiss CO") which requires that the injured party must receive integral reparation of his damages. Article 97 of the Swiss CO reads:

"The debtor who fails to perform his obligation or does not fulfil it properly is liable for damages, unless he proves that there is no fault on his part. (…)"

45. Article 337 (c) of the Swiss CO is also relevant in this case as it addresses the consequences of unjustified termination of employment contracts. Article 337 (c) of the Swiss CO reads:

"If the employer dismissed the employee without notice in the absence of a valid reason, the latter shall have a claim for compensation of what he would have earned if the employment relationship had been terminated by observing the notice period or until the expiration of the fixed agreement period".

46. The Sole Arbitrator also underlines the importance of article 337 (c) (1) of the Swiss CO, which importance is evidenced by the fact that in accordance with article 362 (1) of the Swiss CO, the Parties cannot deviate from the provisions of article 337 (c) (1) of the Swiss CO to the detriment of the employee. If the Parties were to do so, such detrimental stipulations or provisions would be considered null and void under article 362 (c) (2) of the Swiss CO.

47. Under Swiss law, therefore, the Player would be entitled to claim payment of the entire amount he would have earned, and compensation for the damages he would have avoided if the employment relationship had been implemented up to its natural maturity. As a result, the compensation should be calculated taking into consideration all the amounts due to the Player until 30 June 2010. In other words, he would receive all his outstanding salaries from June 2008 to June 2010 in the total amount of EUR 300,000.

48. CAS jurisprudence is also in line with the understanding that *"in principle the harmed party should be restored to the position in which the same party would have been had the contract been properly fulfilled"* (CAS 2005/A/801; CAS 2006/A/1061; CAS 2006/A/1062; and CAS 2008/A/1517). CAS 2007/A/1477, para. 91, states that *"[a]ccording to Swiss legal doctrine, the injured party is entitled to an integral reparation of its damages pursuant to the general principles set forth in article 97 of the SWISS CO. Thus, the damages taken into account are not only those that may have caused the act or the omission that justify the termination but also the positive interest. The positive damages of the employee are the salaries and other material income that he would have had if the contract would have been performed until its natural experiation. (…) (ENGEL, Pierre, Contrats de droit Suisse, Staempli Editions SA Berne (2000), pag. 499, section 2.2.1".*

49. As it can be seen from the calculations of the Player's salaries until the end of the Employment Contact, which was extended to 30 June 2010 by the Additional Contract, the Player would be entitled to a larger amount of compensation under the FIFA Regulations and Swiss Law than the one awarded by the DRC. However, since the Player only asked the DRC to condemn the Club to compensate him with the amount of EUR 36,000 (amount ordered to be paid by the Club to the Player in the FIFA DRC Decision) and the counterclaim filed cannot be taken into consideration as stated previously due to its late filing, the Sole Arbitrator cannot rule *ultra petita* and will have to abide by the compensation amount awarded by the DRC (cf. CAS 2007/A/1233 & 1234; and CAS 2008/1517). The Sole Arbitrator further notes that the Player did not file an appeal against the FIFA DRC decision and only tried, although outside the fixed time limit, to increase the compensation through a counterclaim.

50. Considering the amount awarded by the FIFA DRC Decision and the amount which would result from the application of the FIFA Regulations and Swiss law, it is irrelevant to analyse whether or not the Player's salaries for June, July and August 2008 were ever paid, or were paid in part or full as argued by the Parties.

51. In conclusion, the Sole Arbitrator upholds the FIFA DRC Decision's finding in relation to the amount of compensation to be paid by the Club to the Player.

D. The failure to impose sporting sanctions on the Club

52. The Sole Arbitrator is also called to decide upon the Club's application that sporting sanctions be imposed on the Player.

53. Since the Player has not been considered to have breached the Employment Contract, the Club's application that a sporting sanction be imposed on the Player is dismissed.

E. Other Prayers for Relief

54. In his Answer and Supplementary submissions, the Player requests the revision and the increase of the compensation amount due to the Player in at least to the amount of USD 300,000 and applies for sporting sanctions on the Club for breaching the Employment Contract.

55. In order to successfully cause the revision of the FIFA DRC Decision, the Player ought to have filed his counterclaim within the same deadline fixed for filing its Answer. This was however not the case.

56. As per the considerations and decision on section VI.3 hereinabove, the Player's Answer and counterclaim has been ruled inadmissible on grounds of time limit, and in application of the legal provisions of article R55 of the CAS Code, the Sole Arbitrator herein proceeds with the delivery of the award without powers to rule on the counterclaim. However, the defence submitted with the Supplementary Submissions was taken into consideration as decided above.

57. The Player also considers in his supplementary submissions that the DRC disregarded article 17.4 of the FIFA Regulations by not imposing a sporting sanction on the Club. The said provision states that *"in addition to the obligation to pay compensation*, *sporting sanctions shall also be imposed on any club found to be in breach of contract or found to be inducing a breach of contract (…)".*

58. The Sole Arbitrator analyses this issue independently from the Player's request in his rejected counterclaim, to avoid the misunderstanding that the application of sporting sanctions under article 17.4 of the FIFA Regulations could be decided *ex officio* by CAS considering the wording of this provision: *"sporting sanctions* s*hall be imposed on any club found to be in breach of contract"*. The Sole Arbitrator considers that the above mentioned provision gives the competent FIFA body the power to decide to impose a sporting sanction on a club found to be in breach of contract during the protected period. However, since the FIFA DRC did not impose any sanction and this request is part of the rejected counterclaim, the application for sporting sanctions is also dismissed.

59. Therefore, and in accordance with the conclusions hereinabove, all other prayers and requests for relief filed by the Parties are dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed by the club FC Metallurg against the FIFA Dispute Resolution Chamber's decision dated 9 January 2009 is dismissed and rejected in full and the FIFA Dispute Resolution Chamber decision dated 9 January 2009 is confirmed and upheld in full.

(…)

5. Any and all other prayers for relief are dismissed.