



Arbitration CAS 2009/A/1874 Arunas Klimavicius v. FC Dynamo Moscow, award of 14 January 2010

Panel: Mr Mark Hovell (United Kingdom), President; Mr Mika Palmgren (Finland); Mr Andrés Gurovits (Switzerland)

Football

Contract of employment between a player and a club

Entitlement of a player to a contractual bonus

A player who has signed a “Team Bonus Schedule” has a *prima facie* entitlement to the bonus provided therein since then the player reached all contractually agreed targets. Moreover, weighing up the information provided by the parties and the wording of the “Team Bonus Schedule” it appears that a player signing an employment contract in good faith cannot reasonably be expected to understand and acknowledge, as long as there is no express provision to this effect, that by signing the contract he will be fully exposed to and depending on the goodwill and discretion of the general manager who will have an unrestricted right to – irrespectively of the player’s performance during the entire season and the club’s final ranking – determine the amount of the bonus (or to decide that no bonus at all shall be paid). Even if the “Team Bonus Schedule” confers to the general director certain rights to determine the final amount of the bonus, such rights must be restricted to cases where a player has misbehaved in a way that triggers application of the applicable provision and may lead to a reduction of the bonus otherwise earned.

Mr Arunas Klimavicius (the “Player” or as the “Appellant”) is a professional football player.

Football Club Dynamo-Moscow (the “Club” or the “Respondent”) is a football club with its registered office in Leningradsky, Moscow. It is a member of the Russian Football Union.

The Appellant is a professional football player of Lithuanian nationality. On 15 February 2007, he signed a fixed-term labour contract with the Club (the “Contract”).

The Contract was effective from 15 February 2007 until 31 December 2008. This Contract provided, inter alia, for the payment to the Player of a monthly wage of RUB 8,300.

Further to the Contract the Player and Club (and the other players at the Club) signed a further document entitled “*Regulations for Paying and Depriving Bonuses for Professional Football Players of Dynamo-Moscow Football Team*” (the “Team Bonus Schedule”). This document was dated 14 March 2008.

The Team Bonus Schedule determined the type, amount and grounds for bonuses for the professional football players of the Club for the sports results achieved in the Russian Championship of 2008 season. Players could get a bonus for games won or drawn, in which they either entered the field of play or were in the squad and on the bench. There was the potential for a further positional bonus if the Club finished in one of the top 3 positions at the end of the 2008 season.

In January 2009, and due to the absence of payment of bonuses the Player believed he was entitled to, as provided in the Team Bonus Schedule, the Player filed a claim to the Dispute Resolution Chamber of the Russian Football Union (the “Russian DRC”).

On 16 February 2009, the Russian DRC delivered a decision dismissing the Player’s claim.

On 15 May 2009, the decision of the Russian DRC (hereinafter referred to as the “Appealed Decision”) was notified to the Player.

On 3 June 2009, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (the “CAS”). He challenged the above mentioned Appealed Decision, submitting the following request for relief:

“...to revise the decision of the Russian DRC and oblige FC Dynamo to pay [me]”.

He considered that all the conditions stipulated in the Team Bonus Schedule had been fulfilled and therefore *“the total sum of the Club’s debt owed to me for the season 2008 is 4, 718,000 rubles, equal approximately to 102,850 Euros”.*

On 19 June 2009, the Appellant notified the CAS of the fact that the statement of appeal was to be considered as the appeal brief too.

The Appellant’s submissions, in essence, may be summarised as follows:

- a) On 15 February 2007 the Player signed the Contract with the Club.
- b) In accordance with article 1.2.1 of the Team Bonus Schedule the Player, as a first team football player, was entitled to the basic bonus amount during the 2008 Russian Football Championship including a win bonus (the amount of RUB 370,000) and for a tie game (the amount of RUB 185,000). In accordance with article 1.3.1:

“For the occupied position by Dynamo-Moscow football team in the standings table according to the results of 2008 Russian Football Championship is determined the following additional simultaneous bonus to each player of the first Dynamo-Moscow football team:

a)...

... B) for the 3rd place – in the amount equivalent to 100% of the total amount of bonus received by each Player during 2008 season paid according to the present Regulation”.

The Club finished in 3rd place that season.

- c) As the Contract was due to expire on 31 December 2008, the Player was offered to extend the Contract in November 2008; however the Player declined the offer.

- d) After the Player informed the management of the Club about his decision the General Director of the Club, Mr Dmitry-Ivanov, informed him that he would no longer receive any further bonuses, since he refused their offer.
- e) That the Club breached the Team Bonus Schedule's provisions and did not pay the Player the additional positional bonus payment for the season 2008.
- f) That the Player had taken part in 26 games for the Club and the Club had finished third place in the Championship. He had been paid the win/draw bonuses in the sum of RUB 4,718,000, but not his positional entitlement, in the same amount.
- g) The Appellant maintains that the only real reason for not paying him was the Player's refusal to extend the Contract.
- h) That the decision of the Russian DRC was not discretionary and was unjustified. That the composition of the Russian DRC, involving an arbitrator who was an employee of the Club in the role of Administrative Director, totally contradicts the FIFA National Dispute Resolution Chamber Standard Regulations.
- i) That the main violations in the Russian DRC's organisation are that *"the representatives of the Clubs cannot be considered independent in the accordance with rules of FIFA since they are employees of the Clubs, the head of the Russian DRC, (Mr Tolstib), is the former President of Dynamo (Moscow) and is the President of the Professional Football League (uniting 105 clubs) and as the Vice-President of the Football Union of Russia) there are no representatives of the union recognised by FIFPro in the DRC who could represent the Players and guarantee fair proceedings, there is no protocol of the Hearings (audio recorded), the appeal body (the players status committee of FUR) is composed mainly by the same people that are already members of the DRC). Moreover the committee is again headed by Mr Tolstib"*.

It was noted that the Appellant had not included within his request for relief a claim for interest on the late payment of the sums claimed.

On 14 July 2009, the Respondent filed its answer, with the following request for relief:

"FC Dynamo-Moscow considers the claims stated by the professional football player Arunas Klimavicius in his Statement of Appeal dated 3 June 2009 illicit and unfounded and not to be satisfied".

The submissions of the Respondent may be summarised as follows:

- a) That the Club and the Player no longer have any labour relations since the Contract expired on 31 December 2008 and the Player was *"dismissed"* on 31 December 2008 in accordance with the Russian Federation Labour Code.
- b) That the Appellant, having disagreed with the Appealed Decision, should have first filed an appeal with the RFU Players' Status Committee, then, if needed, turn to the FIFA Dispute Resolution Chamber and only after that to the CAS, so as such, the CAS has no jurisdiction here. The Respondent points to article 10.3 of the Contract on this point.
- c) That according to article 6.2 of the Contract, the Club is eligible to establish differences in terms of bonuses and other similar payments. The amount and entitlement being

- regulated by the Club's Team Bonus Schedule, and then as approved by the General Director.
- d) That the labour bonuses are paid in accordance with Article 191 of the Labour Code of the Russian Federation (hereinafter referred to as the "Labour Code"), which states:
- "Employer encourages employees who have bona-fide fulfilled labor obligations (express gratitude, provides reward, provides valuable present, diploma, recommends for a rank of the best in profession).*
- Other kinds of encouragements of employees for work are defined by the collective agreement or rules of internal labor orders, also by regulations and discipline status. For exceptional labor services before society and State employees can be recommended for state awards".*
- e) That the "norms" of the existing Russian legislation *"stipulate that the bonus is a sum of money paid to an employee as an encouragement for labour achievements and considered a stimulating payment. The encouragement of an employee is a right not an obligation of an employer"*.
- f) That article 3.3 of the Team Bonus Schedule stipulates that the General Director shall make a final decision on the amount and payment (non payment) of all bonuses (remuneration) to the Club's players, as well the deprivation of bonuses.
- g) That *"on 12 January 2009 the Club's General Director approved the Order No. 1 setting the final list of Dynamo-Moscow football teams professional football players to receive the additional one time bonus for the 2008 Russian Championship results (third place) according to item 1.3 of the Regulations"*. The order contains a list of Players who do not receive the said bonus, including the Player, as well as others.
- h) That the Russian DRC does indeed have two representatives of the Profession Union of Football Players and Coaches. Further *"each RFU DRC meeting is duly recorded, whilst its decisions are made in writing and sent to the parties of a dispute within 3 days after taking, the RFU Executive Committee annually approves the composition of the RFU DRC including the chambers president N. Tolstykh, the RFU DRC President N. Tolstykh used to be FC Dynamo-Moscow's General Director (Manager), not the Club's President. Moreover, N. Tolstykh hasn't worked nor filled any vacancy in the Club since 2001, i.e. for 8 years. Besides, N. Tolstykh is not the RFU Players' Status Committee President, the RFU Charter (Article 36) allows a member of the RFU executive committee (herein N. Tolstykh) to head an RFU jurisdictional body – herein the Dispute Resolution Chamber, the FIFA National Dispute Resolution Chamber (NDRC) standard Regulation allows clubs' representatives to be members of the DRC"*.
- i) That Mr Ivanov left the meeting when the Russian DRC examined the Player's claim.
- j) That the Player had the right to challenge Mr Ivanov but did not do so.
- k) Since its foundation in 2003 the Russian DRC has found, in more than 90% of the cases, in favour of players.
- l) That the Russian Football Union and the Russian DRC act in complete accordance with the respective Russian law and the FIFA and UEFA guidelines, including those of voluntary nature.

A hearing was convened on 21 October 2009 at the Hotel De La Paix in Lausanne.

At the hearing, the Club and the Panel accepted the production by the Player's representative of a copy of FIFA Circular 1010.

The hearing followed on immediately from the hearing of CAS 2009/A/1905 at which exactly the same parties were present. It was agreed in this hearing, that any matters dealt with in the other case that were relevant to this case could be applied herein. During the hearing, the representatives of both parties made full oral submissions. No witness was called to testify, but the representative of the Player was examined by the Panel and the representative of the Defendant; the Respondent was examined by the Panel and the representative of the Appellant. During the hearing the parties confirmed, in particular, that the Player had received bonus payments in accordance with article 1.2.1 of the Team Bonus Schedule, but not under article 1.3.1 of the Team Bonus Schedule.

After the parties' final arguments, the chairman of the Panel closed the hearing and announced that the award would be rendered in due course. Upon closure, the parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings

LAW

CAS Jurisdiction

1. In CAS 2009/A/1905 it was confirmed that the jurisdiction of the CAS derives from article 50.6 of the Football Union of Russia Regulations for the Status and Transfer of Players, as well as Article 47 of the Code of Sports-related Arbitration ("the Code").
2. The Panel notes the Respondent's submissions that all internal procedures and remedies have not been exhausted, as the Player has not complied with Article 10.3 of the Contract, but is of the opinion that the Player has gone through the Russian DRC, in accordance with the terms of the Contract and now has a final decision, the Appealed Decision, which under article 50.6 above, he has appealed to the CAS. Moreover, during the hearing the representative of the Respondent confirmed that the route chosen by the Player was permitted under the pertaining rules of the Russian DRC and the Contract.
3. The Panel notes that the CAS has jurisdiction to decide the matter at hand. This is further confirmed by the order of procedure duly signed by the parties.
4. Under article R57 of the Code, the Panel has the full power to review the facts and the law.

Applicable law

5. 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”.

6. Regarding the issue at hand, the Panel is of the opinion that whilst the parties have not agreed on the application of any specific national law, it is comforted in its position by the fact that, in the Contract reference is made to Russian legislation and to *“the norms of FIFA”*. As a result, subject to the primary application of the Russian Law, the various regulations of FIFA shall also apply subsidiarily.

Admissibility

7. The appeal was filed within the deadline provided by article R49 of the Code, the RFU regulations appearing to be silent on any such deadline. They complied with all other requirements of article R48 of the Code, including the payment of the CAS Court office fees.
8. The Respondent had argued that as the Contract had expired on 31 December 2008 and the Appellant had been *“dismissed”* on that date, he could not bring any claims under the Contract. The Panel were provided with no evidence of a dismissal, and felt that as the Russian DRC had heard his claim after the date of the expiry of the Contract, the Panel could hear his appeal.
10. It follows that the appeal is admissible.

Merits

11. The Panel had to determine the following:
- (a) Does the Player have a prima facie entitlement to the positional bonus, under article 1.3.1 B) of the Team Bonus Schedule?
 - (b) What is the intention of the Russian Labour Code in relation to bonuses?
 - (c) Does article 3.3 of the Team Bonus Schedule provide the Respondent’s General Director with the complete discretion as to whether the Respondent has to pay any bonuses?
12. Despite the apparent difference in the parties’ written submissions, it was confirmed at the hearing that the Player made 9 appearances on the field of play and was on the bench for another 17 matches. It was also noted that the Respondent had already paid the Player his bonuses, due under article 1.2 of the Team Bonus Schedule. It was also confirmed by the parties that the Club finished the 2008 season in 3rd position.

13. Article 1.3.1 B) of the Team Bonus Schedule was therefore triggered. The translation provided by the Respondent is that it is the position of the club that “*determined the ...additional bonus to each player of the first team*”. The second relevant limb to this article states the amount of the bonus as “*100% of the total amount of the bonus received by each player during 2008 season...*”.
14. The Panel noted that all players, including the Appellant, had signed the Team Bonus Schedule, as had the Respondent, and felt that the Appellant had a prima facie entitlement to the article 1.3.1 B) bonus, in the amount claimed.
15. The Respondent stated that article 6.2 of the Contract allowed it to award bonuses to the Appellant, in accordance with Article 191 of the Labour Code and had produced copies of the relevant parts of the Labour Code, with translations, in the hearing of *CAS 2009/A/1905*. The Respondent’s representative during the hearing and the Respondent itself in its written submissions stressed that these bonuses are a right of the Respondent to award, not an obligation to pay. The Labour Code stipulates that such bonuses are intended to act as an “*encouragement for labour achievements*”.
16. Unfortunately, the Player was not present to tell the Panel what he believed the bonus was for and whether he believed that it was his as of right, if the Club came 3rd or better that season.
17. The Panel then had to examine article 3.3 of the Team Bonus Schedule and asked itself that how could articles 1.2.1 and 1.3.1 encourage any further labour achievements if a Player knows that notwithstanding the fact that he has reached all contractually agreed targets (as set out on articles 1.2.1 and 1.3.1 of the Team Bonus Schedule) the General Director still has full discretion to award or withhold the bonus earned? The Respondent confirmed at the hearing that the decision of the General Director was taken on 12 January 2009, i.e. after all the fixtures had been played.
18. The Respondent was firm in its view that this enabled the General Director to determine who gets a bonus and who is deprived of it. They rightly say the Player signed up to this clause in the Team Bonus Schedule and he was not present to provide the Panel with his interpretation of the article. The Respondent also provided an Order demonstrating that it was not just the Appellant who was deprived of this bonus.
19. The Panel did note that there were other provisions within the Team Bonus Schedule (namely article 2 – entitled “*Depriving Bonuses*”) which allowed the General Director along with the Head Coach, to determine to deprive players’ bonuses in the event they received red or yellow cards or showed poor discipline. The Panel asked why these provisions would be needed at all if article 3.3 gave this wide discretion to deprive any player of any bonus?
20. Again, unfortunately, the General Director of the Respondent was not present at the hearing to provide the Panel with an explanation as to why he deprived a number of players the positional bonus. The Respondent did not comment in its written submissions on the

Appellant's allegation that the reason he was not paid was because he refused to accept their offer of a contract extension.

21. Left without the individuals who could answer some of these questions present at the hearing, the Panel had to weigh up the information they had and the wording of the Team Bonus Schedule itself and determined that it was not the parties intention that article 3.3 should give complete discretion to the General Director to deprive a player of a bonus he had earned by playing his part in earning the Club sufficient points to come third in the 2008 season. The Panel, in particular, holds that the wording of the Team Bonus Schedule does not make any significant difference between the entitlements under article 1.2.1 and article 1.3.1 and that it would be contradictory, on the basis of the Team Bonus Schedule's wording, to argue that the Player shall be entitled to receive the bonus under article 1.2.1, but not under 1.3.1. The Panel further holds that article 3.3 confers to the General Director certain rights to determine the final amount of the bonus, but takes the position that such rights must be restricted to cases where a Player has misbehaved in a way that triggers application of article 2 of the Team Schedule Bonus (*Depriving Bonuses*) and that may lead to a reduction of the bonus otherwise earned. If it was the Club's intention that the General Director shall have a farer reaching right to determine, at the end of the season, at his sole discretion any kind of bonus earned (under articles 1.2.1 and 1.3.1) the Team Bonus Schedule and the Contract should expressly state so as otherwise a player signing the Contract in good faith cannot reasonably be expected to understand and acknowledge that by signing the Contract he will be fully exposed to and depending on the goodwill and discretion of the General Manager who will have an unrestricted right to – irrespectively of the Player's performance during the entire season and the Club's final ranking – determine the amount of the bonus (or to decide that no bonus at all shall be paid). Whether any such provision could be introduced and could be deemed valid at all is another question that, however, does not have to be assessed in the present case.
22. On a side note, the Panel is, by virtue of R57 of the Code, able to hear the appeal *de novo* and has in any event determined to allow the appeal. That said, it did note the provisions of FIFA Circular 1010 and concludes it would be recommendable for the Russian DRC to reconsider its present rules and procedures and to, in particular, remove any potential challenges to the fairness or otherwise of their proceedings by ensuring any persons connected with any party (whether due to present or previous employment) should not be present or active as a member of the DRC in that particular matter; that if at all possible try to ensure a balance of “club” members and “player” ones in club v player hearings; and to provide a more detailed decision to the parties, explaining any decisions delivered.

The Court of Arbitration for Sport rules:

1. The appeal filed by Arunas Klimavicius against the decision of the Russian Dispute Resolution Chamber dated 16 February 2009 is granted.
2. The Respondent Dynamo Moscow is to pay the sum of RUB 4,718,000 to Arunas Klimavicius within 30 days of this award.

(...)

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