**Arbitration CAS 2009/A/1952 Azovmash Mariupol Basketball Club v. Panagiotis Liadelis, award of 9 February 2010**

Panel: Mr Martin Schimke (Germany), Sole Arbitrator

*Basketball*
*Termination of an employment contract without just cause*
*Applicable regulations of the federation and principle ex aequo et bono*
*Duty of care of the club towards its players*

1. **It is possible for CAS panels to decide the dispute *ex aequo et bono* if this is foreseen in the federation's rules and if the parties have explicitly directed and empowered the arbitrator to decide the dispute *ex aequo et bono*. The arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case"*.**

2. **The club, as the employer, owes a duty of care to its players. In circumstances where the club was aware that a player was potentially suffering from a mental health issue, this would in fact raise the bar in terms of the club's ability to terminate a contract for loss of form. Not only would the club have to demonstrate that it initially imposed monthly fines or other sanctions on the player before taking the decision to terminate the contract, but evidence that it had attempted to assist the player in getting help for his potential mental health issue would also be required.**

Azovmash Mariupol Basketball Club ("Azovmash" or the "Appellant") is a professional basketball club with its seat in Mariupol, Ukraine, playing in the Ukrainian Superleague.

Mr Panagiotis Liadelis (the "Player" or the "Respondent") is a professional basketball player of Greek nationality.

On 27 May 2008, an employment agreement (the "Contract") was entered into between the Appellant and the Respondent. It was a fixed-term agreement, effective from 1 August 2008 until 1 June 2009, *i.e.* for the entire 2008/2009 basketball season in Ukraine.

According to Clause 3 of the Contract, the Player was entitled to receive a base salary of EUR 430,000 (four hundred and thirty thousand Euros) payable according to the following schedule:

| | |
|---|---|
| Upon successful passing medicals | 20.000,00 EURO |
| On August 31st 2008 | 23.000,00 EURO |
| On September 30th 2008 | 43.000,00 EURO |
| On October 31st 2008 | 43.000,00 EURO |
| On November 30th 2008 | 43.000,00 EURO |
| On December 31st 2009 | 43.000,00 EURO |
| On January 31st 2009 | 43.000,00 EURO |
| On February 28th 2009 | 43.000,00 EURO |
| On March 31st 2009 | 43.000,00 EURO |
| On April 30th 2009 | 43.000,00 EURO |
| On May 31st 2009 | 43.000,00 EURO |

The Player was also entitled to receive bonuses in case the Appellant won the Ukraine Championship, the ULEB Cup and/or the Ukraine Cup.

Moreover, the relevant provisions of the Contract read as follows:

*"1. Subject of contract*

*(...)*

*1.4. The Player is obliged to carry out his professional activities in strong correspondence with the Internal Rules of BC "Azovmash" in all events stated by BC "Azovmash" within the period stated in the present Agreement.*

*(...)*

*1.6. The Player is obliged to follow the Internal Rules of BC "Azovmash" which are attached to the present agreement.*

*(...)*

*5. OBLIGATIONS OF PLAYER*

*5.1. Player is obliged:*

*(...)*

*- to keep his best sports shape at all practices, sport meetings, games – show and official – organized by the Club during the validity period of the present agreement;*

*- to show his moral and strong will attitude in the show and official games;*

*(...)*

*- to be present at all medical examinations and rehabilitation events organized by the Club for strengthening and improvement of the physical conditions (medical examination, sports and curing massage, physic treatment, etc.);*

*(...)*

*5.2. If the Player does not abide by Club's Rules and Internal Regulations which are an integral part of this contract, then the club can apply sanctions to the extent of termination of the contract.*

*5.3. During the validity period of the present agreement the Player has no right to leave the club by his wish, except the following cases:*

*- illness or disablement which prevents him from performing the job;*

*- breach by the Club the labour laws of Ukraine, the present agreement;*

*- other cases, as per identification by the Basketball Federation of Ukraine (...)".*

The Rules and Internal Regulations of the Appellant, which signature by the Player is contested, read, in their relevant parts, as follows:

*"1. Introduction*

*The given short manual contains the rules for behavior, which must be met by all basketball players of BC "Azovmash" either on court or out court (...).*

*The behavior that opposes these rules or is not up to the level stipulated by them can lead to penalty sanctions.*

*(...)*

*11. Reward and sanctions*

*(...)*

*The sanctions can be imposed by the Vice-President or President. Only the President has the termination powers.*

*The type of sanction and amount of fine depend only on harm level of action taken by the player.*

*In case of violation of sports regime, the loss of sports form, evasion from the struggle, weak will and indifference during the matches and breach of discipline, the Club has a right to impose monthly fines or terminate the contract. The decision according to the termination of contract is made by the Club Vice-President and Coach with the consecutive approval by the President of the Club (...)".*

On 20 or 21 September 2008, the Player got injured during a friendly game against the Russian team of Rostov.

The following day, the Player was examined in a local hospital where the following diagnosis was established: *"partial subfascial rupture of musculus adductor brevis, musculus obliguus abdominis interna, musculus adductor magnus".*

On 27 September 2008, the Player left for Greece where he underwent further medical examination by his personal physician. The above diagnosis was confirmed. Thereafter, the Player returned to Mariupol, Ukraine, for treatment and rehabilitation.

On 18 November 2008, the Player's agent, Mr Tom Angelakis, sent an email to the Appellant complaining about delays in the payment of the Player's October salary in the amount of EUR 43,000 (forty three thousand Euros).

On 19 November 2008, a final medical examination in Mariupol confirmed that the Player was able to progressively resume training with the Appellant, *"reaching the degree of functional readiness of 100% in 7 – 10 days".*

The Player then played three games with the Appellant's team, namely 5 minutes 30 seconds against BC Gran Kanaria (Spain) on 25 November 2008 counting for the ULEB Cup, 5 minutes 2 seconds

against BC Donetsk (Ukraine) on 29 November 2008 counting for the Ukraine Championship, and 3 minutes 39 seconds against BC ASVEL (France) on 2 December 2008 counting for the ULEB Cup.

At the beginning of December 2008, the Appellant paid the Respondent's October salary. No further salary payments have been made by the Appellant since then.

On 5 December 2008, the Appellant sent an email to the Player's agent informing him that the Appellant has decided to terminate the Contract with the Respondent. The Respondent contests having received such email from the Appellant. On the same date, the Appellant sent to the Player's agent an email proposing to reduce the Player's contract to EUR 250,000 (two hundred and fifty thousand Euros).

The Player left the Appellant on 10 December 2008 and did not return since then.

On 25 March 2009, the Respondent initiated proceedings with the FIBA Arbitration Tribunal (FAT) to order the Appellant to pay in its favour an amount of EUR 301,000 (three hundred and one thousand Euros) as compensation for the termination of the Contract by the Appellant without just cause.

On 17 August 2009, the FAT, in its award 0038/09 FAT, accepted the claims of the Respondent, notably on the following grounds:

- The Contract was terminated without just cause as the principle of proportionality required that less radical measures should have been imposed before terminating the Contract. Therefore, the Appellant shall compensate the Respondent.
- In case of unjustified termination of an employment contract, the employee is entitled to compensation equal to the compensation he would have received if both parties had fully complied with the terms of the contract. In other words, the Player is entitled to the salary payments until the termination date provided in the Contract, *i.e.* 1 June 2009. All income otherwise earned during that period shall be deducted. In the present case, the Player is entitled to his full outstanding salary for the 2008/2009 season, *i.e.* EUR 301,000 (three hundred and one thousand Euros).

As a result, on 17 August 2009, the FAT decided, the following:

> *"1. Azovmash Mariupol Basketball Club is ordered to pay Mr. Panagiotis Liadelis EUR 301,000.00 together with 5% interest p.a. from 11 December 2008.*
>
> *2. Azovmash Mariupol Basketball Club is ordered to pay Mr. Panagiotis Liadelis EUR 5,700.00 as a reimbursement of the advance of the FAT costs.*
>
> *3. Azovmash Mariupol Basketball Club is ordered to pay Mr. Panagiotis Liadelis EUR 9,200.00 as a contribution towards Mr. Panagiotis Liadelis' legal fees and expenses.*
>
> *4. Any other or further-reaching claims for relief are dismissed".*

On 17 August 2009, the Appellant and the Respondent were notified of the award issued by the FAT.

It is undisputed that, to date, the Appellant has not paid any compensation to the Respondent.

On 7 September 2009, Azovmash filed a statement of appeal with the Court of Arbitration for Sport (CAS). It challenged the decision rendered by the FAT to grant damages to the Player.

The statement of appeal contained requests for relief, which read as follows:

> *"1. To set aside the arbitral award rendered by the FIBA Arbitral Tribunal on 17 August 2009 in case No. 0038/09 FAT (Mr Panagiotis Liadelis vs. Azovmash Mariupol Basketball Club).*
>
> *2. To render a new arbitral award holding that (i) the Contract was properly terminated by the Appellant on 5 December 2008 in full conformity with its terms and conditions, and (ii) the Appellant is not liable to pay the Respondent any remaining salaries which the Respondent was entitled to receive under the Contract after 5 December 2008.*
>
> *3. To hold that the Respondent shall bear all costs of the present arbitration.*
>
> *4. To order the Respondent to pay to the Appellant its reasonable legal fees in connection with the present arbitration".*

On 17 September 2009, the Appellant filed its appeal brief, which contain a statement of the facts and legal arguments accompanied by supporting documents.

On 14 October 2009, the Respondent filed his answer, with the following requests for relief:

> *"The Appellant's Appeal be rejected, and*
>
> *The Appellant be ordered to bear all legal expenses, fees and costs relating to this Arbitration".*

Only the Appellant asked for a hearing to be held in the present dispute, the Respondent requesting that the Sole Arbitrator issues an award on the basis of the written submissions.

In accordance with Article R57 the Code of Sport-related Arbitration (the "Code"), the Sole Arbitrator decided to hold a hearing. The parties were duly summoned to appear and all agreed on the date of 17 December 2009.

At that scheduled time, a hearing was held in Lausanne, Switzerland.

During the hearing, the attending parties declared that they had no objection with regard to the composition of the Panel. They made full oral submissions. After the parties' final arguments, the Sole Arbitrator closed the hearing and announced that his award would be rendered in due course. Upon closure, the represented parties expressly stated that they did not have any objection in respect to their right to be heard and to be treated equally in these arbitration proceedings.

The Sole Arbitrator, immediately after the hearing and by way of letter, granted a deadline to the parties until 18 January 2010 in order to reach a settlement agreement, failing which the CAS would issue an award. No further news from the parties in this respect was sent to the CAS Court Office.

## LAW

### CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from Article 17 of the FAT Arbitration Rules (the "FAT Rules") and Article R47 of the Code of Sports-related Arbitration (the "Code").

2. The jurisdiction of the CAS has been further confirmed by the signature of the Order of Procedure by both parties.

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

4. Pursuant to Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

### Applicable law

5. With respect to the law governing the merits of the dispute, Article 187(1) of the Swiss Federal Code on Private International Law ("PIL") provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PIL adds that the parties may authorize the arbitrators to decide *"en équité"*. Article 187(2) PIL is generally translated into English as *"the parties may authorize the arbitral tribunal to decide ex aequo et bono"*.

6. 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"*.

7. In the present matter, the Sole Arbitrator shall decide this dispute according to the applicable provisions contained in the FAT Rules.

8. Pursuant to Article 15.1 of the FAT Rules, *"[u]nless the parties have agreed otherwise the Arbitrator* [FAT Arbitrator] *shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without the reference to any particular national or international law"*.

9. Pursuant to Article 17 of the FAT Rules, *"(…) The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure"*.

10. In the Contract, the parties have explicitly directed and empowered the FAT Arbitrator to decide the dispute *ex aequo et bono*.

11. Consequently, in the present proceedings, the Sole Arbitrator shall adjudicate the present matter *ex aequo et bono*.

12. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case"* (see POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, no 717, pp. 625-626).

**Admissibility**

13. The appeal was filed within the deadline provided by the FAT Rules and stated in the award issued by the FAT on 17 August 2009. It complied with all the other requirements of Article R48 of the Code.

14. It follows that the appeal is admissible.

**Merits**

15. The main issues to be resolved by the Sole Arbitrator in deciding this dispute are the following:
    A. Did the Appellant terminate the Contract with just cause?
    B. If the Contract was terminated by the Appellant without just cause, what are the consequences thereto?
    C. The calculation of the outstanding salaries.

*A. Did the Appellant terminate the Contract with just cause?*

a) In general

16. In most jurisdictions, the duration of the employment contract is set by agreement of the parties. It is indefinite, except where a fixed term has been agreed by the parties or is dictated by the nature of the work. Typically, fixed-term contracts terminate without requiring notice upon the expiry of the agreed period (see for example Article 334 par. 1 of the Swiss Code of Obligations - "CO") and are presumed without any trial period, as such a period shall be introduced and agreed upon by written agreement.

17. It is generally the case that fixed-term contracts cannot come to an end before the expiration of the agreed period unless there is a just cause for termination of the employment relationship or if the employer becomes insolvent. However, typically, in the presence of a just cause, the

employer or the worker may terminate the contract with immediate effect at any time (see for example Article 337 par. 1 CO). It is widely accepted that such a just cause exists whenever the terminating party can in good faith not be expected to continue the employment relationship (for example see Article 337 par. 2 CO). In other words, the event that leads to the immediate termination must so significantly shatter the trust between the parties that a reasonable person could not be expected to continue to work with the other party who is responsible for the just cause.

18. The question therefore becomes whether the just cause threshold was crossed. In principle, the parties can specify in the contract what equates to a "just cause" for termination.

19. An employer will not, however, have just cause to terminate an employment contract as a result of the employee exercising his or her rights in a legitimate manner (see for example, par. 612a of the German Civil Code which makes clear that *"The employer may not discriminate against the employee in any agreement or measure because the employee has exercised his or her rights in a legitimate manner"*).

20. It is an employee's right to refuse to enter into negotiations regarding a reduction in salary.

21. Across the jurisdictions, the employment relationship is characterized by the fact that one person will carry out work in return for a salary from the other. As an example of the codification of this concept, Article 321 CO clearly sets out the typical distribution of obligations between the employer and the employee. On the one hand, the employee must personally perform the work contractually undertaken, unless otherwise agreed upon, or unless circumstances indicate otherwise. The employee must carefully perform the work assigned to him and loyally safeguard the employer's legitimate interests. He must in good faith observe the general directives and the specific instructions established by the employer in relation to the execution of the work and the conduct of workers.

22. On the other hand, the employer provides the work and is in a position of authority with regard to the worker. He determines the amount of work to be accomplished, supervises the work, and controls the worker's activities. In exchange for the services of the employee, the employer pays him the agreed wages.

23. While, in a sporting context, a player's poor performance on the pitch or court is capable of constituting a breach of contract establishing just cause for termination by the club, this will only be the case where the poor performance is so severe and continuing that a reasonable club could not be expected to continue to employ the player. In such cases, evidence not only of the player's poor performance (*i.e.* video or statistical evidence) but also of meetings and/or discussions held with the player regarding his performance, and any other actions taken by the club before taking the decision to dismiss, would be required.

b) In particular

24. Although there is confusion regarding how exactly the termination of the Player's contract was effected, it remains undisputed that the Contract was terminated by the Appellant on or around 10 December 2008, *i.e.* the date on which the Player left Azovmash. Accordingly, the crucial question remains whether the Appellant terminated the Contract for just cause.

25. The Appellant relies on Clause 5.2 of the Contract and Clause 11.5 of the Rules and Internal Regulations of the Appellant when arguing that it had just cause to terminate the Contract. As previously stated at par. 5 of the present award, Clause 5.2 of the Contract stipulates:

*"If the Player does not abide by the Club's Rules and Internal Regulations which are an integral part of this contract, then the club can apply sanctions to the extent of termination of the contract".*

26. As stated above, Clause 11.5 of the Rules and Internal Regulations of the Appellant stipulates:

*"In case of violation of sports regime, the loss of sports form, evasion from the struggle, weak will and indifference during the matches and breach of discipline, the Club has a right to impose monthly fines or terminate the contract. The decision according to the termination of contract is made by the Club Vice-President and Coach with the consecutive approval by the President of the Club".*

27. These clauses set out circumstances in which the Appellant may have just cause to terminate the Contract, including *"loss of sports form"*. However, and as pointed out in the FAT award at par. 67, termination of the Contract is not the only remedy open to the Appellant in these circumstances. It is merely one option available (the other being monthly fines) and, as noted by the FAT, is in particular *"the ultimate solution"* once all other options have been exhausted. This is in line with the principle of proportionality.

28. No evidence was presented to the Sole Arbitrator that the Appellant imposed monthly fines on the Player prior to terminating the Contract. While the Sole Arbitrator did hear testimony from Mr Maletskiy indicating that the Appellant *"tried to help"* the Player, no detailed evidence was provided regarding any meetings held with the Player (nor the topics discussed at these meetings) or any sanctions of any kind imposed on the Player prior to termination.

29. Furthermore, Mr Maletskiy indicated that the Appellant was aware of the fact that the Player had suffered family drama and that he was demoralized. The Appellant, as the employer, owes a duty of care to its players. In circumstances where the Appellant was aware that the Player was potentially suffering from a mental health issue, this would in fact raise the bar in terms of the Appellant's ability to terminate the Contract for loss of form. Not only would the Appellant have to demonstrate that it initially imposed monthly fines or other sanctions on the Player before taking the decision to terminate the Contract, but evidence that it had attempted to assist the Player in getting help for his potential mental health issue would also be required (in other words, the Appellant's obligations towards the Player would have been enhanced). No such evidence was presented to the Sole Arbitrator.

30. In any event, even if the Appellant was not aware of the Player's "family drama" and "demoralization", the Sole Arbitrator is not of the view that the Appellant had just cause to

terminate the Contract based on alleged poor performance. The Sole Arbitrator has studied the DVD footage provided by the Appellant and is not of the view that the Player stood out as playing particularly bad in any of the three games spanning 10 days in which the Player cumulatively played for 14 minutes and 11 seconds. This length of time (in terms of minutes played as well as number of days spanned) is not adequate to properly assess whether any player should be terminated for poor form, let alone a team's star player who happened to be recovering from injury and potentially suffering from a mental health problem. The Appellant simply has not demonstrated that it seriously considered other options before taking the decision to terminate the Player and, accordingly, the Sole Arbitrator is of the view that the Appellant did not have just cause for the termination.

31. Based on the evidence presented, it appears to the Sole Arbitrator that what happened in this case is that the Appellant, for reasons unknown to the Sole Arbitrator (but which may have included a belief on the Appellant's part that the Player had lost some of his sporting form as a result of personal trauma), decided in December 2008 that it required to reduce the Player's salary. It entered into negotiations with the Player, via the Player's agent, regarding a proposed reduction in salary to EUR 250,000 (two hundred fifty thousand Euros). When the Player exercised his right to reject this reduction, the Appellant took the decision to terminate the Contract. As outlined above, employers may not discriminate against employees in any agreement or measure because the employee has exercised his or her rights in a legitimate manner. Accordingly, the Appellant did not have just cause to terminate the Contract for this reason.

32. It would be remiss for the Sole Arbitrator to neglect to mention the Player's allegation regarding the forgery of his signature on the Internal Rules and Regulations of the Appellant. However, the Sole Arbitrator has not required to consider this matter in any detail, as, as detailed above, even if the signature was genuine, the Sole Arbitrator is not of the view that the Appellant would have had the requisite just cause to terminate the Contract. Accordingly, this is a moot point.

33. As an alternate argument, the Appellant argues that the Contract was not *"guaranteed for any fault, injury or loss of form of the Player"*, *i.e.* that the Appellant had the right, irrespective of the above noted Clauses 5.2 of the Contract and 11.5 of the Rules and Internal Regulations of the Appellant, to terminate the Contract as a result of any fault, injury or loss of form of the Player. The Sole Arbitrator simply does not agree with this contention. If this was the case, what would be the point of including Clauses 5.2 of the Contract and 11.5 of the Rules and Internal Regulations of the Appellant (*i.e.* clauses which purport to define what would constitute just cause for termination) within the Contract?

34. Furthermore, if the Appellant honestly believed that it had an overarching right to terminate the Contract on these grounds, why would it have originally attempted to *"find an amicable settlement with the Player re termination of the Contract"* as noted by Mr Maletskiy in his evidence? This indicates to the Sole Arbitrator that the Appellant in fact knew it was breaching the Contract with its actions and that the Player would seek compensation for this breach.

35. Despite the Appellant's argument in relation to the Contract not being "guaranteed", the fact remains that the Contract was a fixed-term contract and, accordingly, just cause or the Appellant's insolvency were prerequisites for its termination.

36. For the reasons outlined above, and following the FAT's reasoning, the Sole Arbitrator finds that the Appellant did not have just cause to terminate the Contract.

*B. The consequences of the termination of the Contract without just cause*

a) In general

37. In case of unjustified termination of an employment contract by the employer, the employee is entitled to compensation equal to the compensation he would have received if both parties had fully complied with the terms of the contract. This is subject to the proviso that the employee's claim for compensation is reduced by everything which he saved as a direct consequence of the termination of the employment relationship and which he earned or intentionally failed to earn through other work.

b) In particular

38. As outlined above at par. 4 of the present award, under the terms of the Contract, the Player was entitled to receive a base salary of EUR 430,000 (four hundred and thirty thousand Euros). The Player was also entitled to receive bonuses if the Appellant won the Ukraine Championship, the ULEB Cup and/or the Ukraine Cup.

39. It is undisputed that the Appellant did not win the Ukraine Championship, the ULEB Cup or the Ukraine Cup.

40. It is undisputed that the Appellant has only paid the Respondent EUR 129,000 (one hundred twenty nine thousand Euros).

*C. Calculation of the outstanding salaries*

41. No evidence was presented that the Player saved any monies as a direct consequence of the termination of the employment relationship, nor that he earned or intentionally failed to earn any monies through other work between 10 December 2008 (the date the Player left the Appellant) and 31 May 2009 (the date on which the final installment under the Contract was due to the Player). Accordingly, the Sole Arbitrator concurs with the FAT award, namely that the Player is entitled to the full outstanding salary for the 2008/2009 season, calculated as follows:

EUR 430,000 (total amount the Player entitled to under the Contract)

–

EUR 129, 000 (amount already paid by the Appellant to the Player under the Contract)

=

EUR 301, 000 (amount outstanding under the Contract).

**The Court of Arbitration for Sport rules:**

1. The Appeal filed by Azovmash Mariupol Basketball Club on 7 September 2009 is dismissed.

2. The arbitral award rendered by the FAT on 17 August 2009 in case No. 0038/09 FAT (Mr Panagiotis Liadelis vs. Azovmash Mariupol Basketball Club) is confirmed.

3. (…)

4. (…)

5. All other or further claims are dismissed.