



Arbitration CAS 2010/A/2252 Oleksandr Zavarov v. FC Arsenal Kiev, award of 6 July 2011

Panel: Mr Romano Subiotto QC (United Kingdom), President; Mr David Rivkin (USA); Mr Michele Bernasconi (Switzerland).

Football

Termination of a contract of employment between a coach and his club

Unlawful dismissal of an employee due to his absence from work under Ukrainian labour law

Effective terms contained in an agreement according to Ukrainian law

Moral damages under Ukrainian law

- 1. Under Ukrainian labour law, the dismissal of an employee due to his absence from work is unlawful if a person has a good reason to be absent. Lawful dismissal applies only if one can establish a person's fault or guilt in being absent.**
- 2. An agreement is legally binding, in general, as of the date on which it is signed. An effective term in an agreement generally stipulates at what point in time certain obligations under the agreement become enforceable. An effective term is not an uncertain event in the future upon which contractual obligations are conditional. By signing an agreement, parties are contractually bound from the moment of signature of the agreement to carry out their respective contractual obligations as of the effective date.**
- 3. The amount of moral damages depends on the character and importance of suffering, the character of the moral damage and other circumstances, such as the state of health of the damaged party, the importance of the forced changes in his every-day and professional relationships, the degree of reduction of consideration, his professional reputation, as well as the time and effort necessary to restore the previous state. Courts should act reasonably, fairly and in a balanced way. In any case, the adjudicating bodies enjoy a great deal of discretion in determining the fair of compensation, taking into account the requirements of reasonableness and fairness.**

The Appellant, Mr. Oleksandr Zavarov ("Zavarov"), is the former professional football coach of FC Arsenal Kiev. Zavarov was born on April 20, 1961 and is a citizen of Ukraine and France.

The Respondent, FC Arsenal Kiev (the "Club"), is a professional Ukrainian football club located in Kiev that competes in the Ukrainian Premier League. Zavarov and the Club are collectively referred to as the "Parties".

The Interested Party, the Football Federation of Ukraine (FFU), is the governing body of football in Ukraine. It has its registered office in Kiev, Ukraine.

On July 2, 2007, Zavarov entered into an employment contract with the Club pursuant to which Zavarov became employed as the head coach of the Club until June 30, 2010 (the “Employment Agreement”). In the course of 2009, the Parties entered into four additional agreements each amending the salary of Zavarov (the “Additional Agreements”).

On November 26, 2009, the Parties entered into a fifth additional agreement, extending the term of Zavarov’s employment to June 30, 2013 (the “Extension Agreement”). Article 4 of the Extension Agreement provided that it would become effective on June 30, 2010.

In January 2010, Zavarov organized a training camp for his team in Antalya, Turkey. The first part of the training camp took place from January 13 till January 26, 2010, after which the majority of the players returned to Kiev before flying out again to Antalya for another two weeks on January 30, 2010. Rather than returning to Kiev, Zavarov decided to stay in Antalya with his family during the few days in between the two training camps.

Back in Kiev, on January 26, 2010, the Club’s President, Mr. Vadim Rabinovich (“Rabinovich”), issued an order calling for a management meeting on January 27, 2010, at which Zavarov’s presence was required. Rabinovich issued a second order calling for a training session and medical tests in the period of January 27 till January 29, 2010 for which Zavarov also had to be present. On the same day, the management of the Club signed an act stipulating that Zavarov had failed to appear at work without providing an explanation for his absence.

During a phone conversation that took place on January 27, 2010, Rabinovich ordered Zavarov to return to Kiev in order to attend a second management meeting scheduled for January 28, 2010. On the same day, two further acts were signed by the management of the Club, the first one summarizing the communication between the Parties, and the second one indicating that Zavarov had failed to show up for the medical examination.

Later that day, the first management meeting took place as planned. The issues on the agenda were Zavarov’s failure to show up at work, and the fact that Zavarov had refused to allow a newly appointed administrator to attend the training camp in Antalya. After the meeting, another act was signed by the management of the Club, stating that Zavarov’s absence at the management meeting constituted a gross breach of the Employment Agreement.

On January 28, 2010, a press release on the official website of the Club announced that Zavarov was dismissed as the head coach of the Club, and that he had been replaced by Mr. Vyacheslav Grozny.

On the same day, the second management meeting took place as planned, while a number of additional acts and orders were signed by the management of the Club regarding Zavarov’s absence.

On February 2, 2010, Zavarov sent a letter to the Club explaining the reason for his absence. According to Zavarov, the days in between the two training camps were holidays, and he had decided

to spend these in Antalya in order to organize the second training camp. Following receipt of this letter, the management of the Club signed another act, noting that Zavarov had failed to explain his reasons for not allowing the new administrator to join the team to Turkey. On the same day, the director of the Club, Mr. Pustovarov, signed an order dismissing Zavarov from February 2, 2010.

After Zavarov commenced proceedings against what he considered to be an unlawful dismissal, the relationship between the Parties deteriorated further. A number of articles posted on the Club's website portrayed Zavarov as an alcoholic whose drinking habit interfered with his professional responsibilities. Also, a recording of a conversation between Zavarov and Rabinovich that negatively portrays Zavarov was circulated on the Internet. Zavarov denies that the conversation ever took place, and believes that the tape has been modified to damage his reputation.

Zavarov, through his former legal representative Mr. I.A. Skoropashkin, published a number of statements accusing Rabinovich of being engaged in criminal activities, and referred to Rabinovich's past convictions in Ukraine (long since reversed).

Immediately following his dismissal, Zavarov filed a claim with the Ukrainian Premier League Disciplinary Committee, requesting compensation for both material and moral damages resulting from the alleged unlawful dismissal. The Disciplinary Committee issued a decision on May 13, 2010, holding that the termination of Zavarov was unlawful. According to the Disciplinary Committee, the documents on which Zavarov's termination was based were not signed by individuals with the right capacity. Moreover, since Zavarov had organized a vacation in between the two training camps, his absence in Kiev at the end of January did not constitute a violation of the terms of his Employment Agreement.

The Disciplinary Committee awarded Zavarov compensation under the Employment Agreement of 219,024 Ukrainian Hryvna (UAH) and an additional US\$ 1.08 million for salary due under the Extension Agreement.

Both Parties appealed the decision of the Disciplinary Committee to the FFU Supervisory Committee, which issued a decision on June 24, 2010. The Supervisory Committee largely followed the decision of the Disciplinary Committee, and added that the procedure around the dismissal of Zavarov appeared to be fabricated and to be the result of a pre-arranged decision.

The Supervisory Committee further found that the Extension Agreement had not yet come into effect at the date of Zavarov's dismissal, and therefore denied Zavarov's claim for damages under the Extension Agreement. The Supervisory Committee further found that Zavarov had incurred moral damages, and ordered the Club to pay him € 500,000 in compensation. The Supervisory Committee also ordered the Club to apologize for the inappropriate allegations concerning Zavarov's drinking habits, and to publish this apology on its official website.

Both Parties appealed the decision of the Supervisory Committee to the FFU's Appellate Committee, which issued a decision on September 17, 2010 (the "FFU Decision"). Like the Supervisory Committee, the Appellate Committee only awarded material damages under the Employment

Agreement, and rejected Zavarov's claim under the Extension Agreement since it had not yet come into effect at the date of Zavarov's dismissal.

The Appellate Committee declined to award any moral damages on the ground that such claims are outside the scope of the judicial sports bodies, and instead ordered each Party to pay UAH 10,000 to the FFU for unsportsmanlike behavior.

Zavarov appealed the FFU Decision to the CAS by his Statement of Appeal dated October 18, 2010, in which he identified the Club and the FFU as respondents. Zavarov appointed Mr. David W. Rivkin as arbitrator. The Club appointed Mr. Michele Bernasconi as arbitrator, after Mrs. Alexandra Brilliantova, who it had appointed first, had to resign for personal reasons. By letter of December 28, 2010, the CAS advised the parties that the President of the CAS Appeals Arbitration Division had nominated Mr. Romano Subiotto QC as President of the Panel.

By letter dated October 25, 2010, the FFU indicated its preference not to be involved in the case as a respondent. Zavarov proposed changing the status of FFU to "Interested Party", meaning that the FFU would not actively participate in the proceedings before the CAS, but that it would agree to comply with the current Award. As the FFU did not object, the counsel for CAS confirmed that the FFU would be considered as an Interested Party by letter dated November 23, 2010.

After having received an extension of five days, Zavarov filed his Appeal Brief on November 2, 2010. By letter dated November 25, 2010, the Club asked for an extension of 10 days to file its response to the appeal brief. By letter dated November 26, 2010, Zavarov agreed to an extension of only five days. On November 30, 2010, the Deputy President of the CAS Appeals Arbitration Division decided to deny the Club's request for the additional five days extension. Accordingly, the deadline for the Club to file its appeal brief was December 4, 2010.

By letter dated December 1, 2010, the Club asked for the deadline for filing its answer to be fixed after the payment of the advance of costs by Zavarov in accordance with Rule 55 of the Code of Sport Related Arbitration (the "Arbitration Code"). Counsel for CAS confirmed that the deadline would be fixed only after the payment of the advance of costs by Zavarov. The deadline was postponed accordingly, and the Club submitted its Response to the Appeal Brief on December 23, 2010.

In his Appeal Brief, Zavarov included witness testimonies of Mr. Igor Ivanovych Belanov and Mr. Oleg Volodomyrovych Blokhin, both dated October 25, 2010. The Club also indicated a number of witnesses it wished to be heard but did not provide any witness statements.

By letter dated December 28, 2010, counsel for CAS asked the Parties about their preference for an oral hearing. Both Parties requested an oral hearing, which accordingly took place in Lausanne on March 31, 2010.

After the Club failed to provide a summary of the expected testimonies when it provided the list of witnesses it would call at the hearing, the President of the Panel by letter of March 28, 2011, and in accordance with Rule 55 of the Arbitration Code, directed the Club to indicate the subject of the

witness testimonies. The Club replied that the subject of each of the testimonies should be clear from its Response as well as from their respective position and functions within the Club.

LAW

CAS Jurisdiction

1. Rule 47 of the Arbitration Code provides, in part, as follows:

Rule 47 Appeal

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

2. Article 51 of the Charter of the Ukrainian Sports Public Organization Federation of Football of Ukraine provides that the CAS shall have exclusive competence to consider appeals against decisions of the FFU Appellate Committee as the tribunal of last instance. The Panel therefore has jurisdiction to consider Zavarov's appeal, as also confirmed by the Parties' signed Orders of Procedure, signed by the Club on March 22, 2011 and by Zavarov on March 23, 2011.

Applicable Law

3. Rule 58 of the Arbitration Code provides as follows:

Rule 58 Law Applicable

This 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.

4. The FFU Decision, against which the appeal was brought, was issued under the FFU Regulations, and there is no dispute as to the applicability of the FFU Regulations.
5. Moreover, Ukrainian law is applicable as the FFU Appellate Committee, which has issued the challenged decision, is domiciled in Ukraine. There is no dispute as to the applicability of Ukrainian law.

Admissibility

6. The statement of appeal was filed on 18 October 2010 and this is within the deadline established under article 51 of the Charter of the Ukrainian Sports Public Organization Federation of Football of Ukraine and article 49 of the CAS Code, and therefore it is admissible.
7. One of the main disputes between the Parties is whether the dismissal of Zavarov by the Club was lawful. The FFU Appellate Committee found the dismissal to be unlawful. Paragraph 1.1 of the FFU Decision reads as follows: *“1. To render termination of Zavarov O.A. from the position of the head coach of FC Arsenal Kyiv as illegal”*.
8. During the procedure, the Respondent has consistently requested the CAS to set aside that part of the FFU Decision and to determine that the dismissal of Zavarov was lawful. In its Closing Submission, the Club requests the CAS, among other things, as follows:
“3. To issue a new decision and held that FC Arsenal’s Kiev termination of Mr. Zavarov’s labour contract was lawful and did not cause any damages to Mr. Zavarov, which are due to be reimbursed under Ukrainian law”.
9. The Appellant argues that, on the basis of Rule 55 of the Arbitration Code, the Club cannot challenge paragraph 1.1 of the FFU Decision, so that the Club’s request for a finding that the termination was lawful is inadmissible. Since the 2010 version of the Arbitration Code entered into force on January 1, 2010, Rule 55 no longer includes the possibility for a respondent to file counterclaims in its answer in appeal procedures. Rather, in view of Appellant, if a potential respondent wants to challenge part or all of a decision, it must file an independent appeal with the CAS within the applicable time limit for appeal. This has been stated in cases *CAS 2010/A/2098*, paras. 51-54 and *CAS 2010/A/2108*, paras. 181-183.
10. However, in this case, the Panel need not decide the scope or applicability of Rule 55 of the 2010 Code, because the Appellant put the issue of lawfulness of the FFU Decision into the case. In its Statement of Appeal, the Appellant requested the Panel to set aside the entire FFU Decision, not just the portion of the Decision disallowing Zavarov certain damages.
11. Moreover, in the Appellant’s closing submission, he explicitly confirmed that his prayers for relief are those which were set out in its Appeal Brief. These prayers for relief read, in part, as follows:
 - (i) *Confirming paragraph 1.1 of the Decision under appeal.*
 - (ii) *Holding that FC Arsenal Kiev’s termination of Mr Zavarov’s employment contract was unlawful.*
12. It appears *prima facie* that the Appellant is requesting a declaratory ruling of the CAS Panel to the effect that the termination of Zavarov’s employment contract was unlawful.
13. During the Oral Hearing, the Appellant sought to explain that the first four prayers, which all concern the contractual claim for unlawful termination of the Employment Agreement, are only raised in the alternative, *i.e.* in the event that the Panel were to consider that the counterclaim of the Respondent would be admissible. The Appeal Brief did not so state. In any event, the

Panel cannot determine the principal claim of the Appellant that he is entitled to damages under the Extension Agreement without determining that his termination was unlawful. For the reasons set forth below in Section VIII below, which contains the Panel's legal analysis of the Parties' substantive arguments, the Panel does find that the termination was unlawful.

14. Therefore, whether or not Respondent's prayer for relief constitutes a counterclaim and is inadmissible under Rule 55, the issue of the lawfulness of the termination is properly before this Panel. The Panel therefore does not make any ruling regarding admissibility.

Procedural issues

15. The Appellant raised a number of procedural issues during the proceedings.
16. First, by letter dated December 3, 2010, Zavarov objected to the application of Rule 55 of the Arbitration Code with respect to the requested extension of the Club to file its Response until after Zavarov had paid the advance of costs. Counsel for CAS replied that it would not fix the time limit for the Club to file its Response until after the payment of all the advance of costs by Zavarov.
17. Zavarov complained by letter of December 6, 2010, arguing that he could not be ordered to also pay the Club's share of the advance of costs. By letter of December 9, 2010, Counsel for CAS acknowledged that Zavarov was only responsible for his own share of the advance of costs, which had now been received. The deadline was therefore fixed at December 24, 2010. Zavarov complained that this extension lead to unequal procedural treatment in favor of the Club.
18. Having considered the circumstances of the case, and taking notice of the fact that the provision on which Zavarov relies is recent and its interpretation is not completely settled as of yet (as Zavarov acknowledges), the Panel does not consider that this procedural issue was of such nature that it has lead to unequal procedural treatment of the Parties.
19. Second, in its Closing Submission the Appellant challenged the admissibility of the witness testimonies presented by the Respondent. The Appellant argues that the testimonies are inadmissible due to the Respondent's refusal to provide a summary of the issues on which the witnesses would testify, and since one of the testimonies had already been available prior to the hearing but was not provided until after the hearing. Moreover, a number of witnesses could not be considered as independent, as they are representatives of the Club.
20. As indicated during the hearing, the Panel is very well aware of the status of each of the witnesses as well as of the content of their statements, the content of the Response, and of its own letter to the Respondent of March 28, 2011, and has taken due account of this in considering each of the witness statements.

Submissions of the parties

21. The summary below refers to the substance of the Parties' allegations and arguments without listing them exhaustively in detail.
22. In its discussion of the case and its findings under Section VIII of this award, the Panel has nevertheless examined and taken into account all of the Parties' allegations, arguments and evidence on record, whether or not expressly referred to.
 - A. *Zavarov's Appeal*
 - a) Zavarov's dismissal was unlawful
 24. Zavarov requests the CAS to confirm the finding of the FFU Appellate Committee that his dismissal was unlawful. Zavarov maintains that the entire procedure around his dismissal was staged and that he did not have to comply with orders of the Club's management to return to Kiev.
 25. Zavarov recognized that under Ukrainian law, an employee that has been dismissed and claims for damages must, in principle, request reinstatement. However, Zavarov's legal expert explained that the principles of fairness and reasonableness – introduced to Ukrainian contract law by Article 3 of the UCC – imply that Zavarov could not be expected to request reinstatement since a new head coach had already been appointed.
 - b) Compensation under the Employment Agreement
 26. Zavarov further requests the CAS to confirm the finding of the FFU Appellate Committee that he is entitled to salary under the Employment Agreement until June 30, 2010 on the basis of Article 9 of the FFU Regulations.
 27. An unofficial translation of paragraph 2 of Article 9 of the FFU Regulations, provided by the Appellant (and not contested by the Respondent), reads as follows:

Article 9 Termination of Contract

2. In the instances of termination of the Contract by the Football Club on the grounds not provided by the law of Ukraine and not stipulated the player's contract the Football Club is obligated to pay the other Party a salary for the remaining period under the Contract, as well as the any existing and outstanding debt from the period of employment by the Football Club.
 28. Zavarov claims that on the basis this article, a club unlawfully terminating a contract is obliged to pay the other party the salary for "the remaining period under the contract". Therefore, Zavarov is entitled to UAH 219,024.

- c) The term under the Employment Agreement was extended by the Extension Agreement
29. According to the FFU Appellate Committee, the Employment Agreement ended on June 30, 2010. Regarding the Extension Agreement, the FFU Appellate Committee ruled as follows:
- “When applying part 2 of Article 9 of Regulation of FFU with regard to the status and transfer of players, additional agreement No. 5 as of 26.11.2009 to the contract with Zavarov O.S. cannot be taken into account, whereas the parties to that agreement (and the contract) – unlike additional agreements No. 1-4 – expressly stated that it would take effect from 30.06.2010, or from the date on which the contract itself did not exist”.*
30. Zavarov claims that on the basis of the Extension Agreement, he is also entitled to compensation for the period of June 30, 2010 till June 30, 2013. The Extension Agreement provides as follows:
- The Parties have agreed to extend the effective term of the Contract until June 30, 2013.*
- 1) The Parties have agreed that starting from July 1, 2010, the Head Coach shall be paid a monthly salary in the Ukrainian Hryvnia equivalent of 30,000.00 (thirty thousand) U.S. Dollars.*
 - 2) All of the remaining terms and conditions of the Contract shall be unaffected.*
 - 3) This Additional Agreement has been executed in three counterparts – one for each of the Parties and one for Premier League.*
 - 4) This Additional Agreement shall become effective on June 30, 2010.*
 - 5) This Additional Agreement shall constitute an integral part of the Contract.*
31. According to Zavarov, it is plain from this contractual wording that he had an employment contract which was to expire on 30 June 2013. In this respect, he refers to paragraphs 3 and 4 of Article 213 of the Ukrainian Civil Code (the “UCC”), which provide as follows¹:
- 3. When interpreting a legal act, one must take into account the meaning of words and notions which is the same for the entire legal act, as well as generally recognized meaning of terms in a particular area of relationship. If the literal meaning of words and notions as well as meaning of terms generally recognized in the specific area of relationship do not allow to understand the meaning of certain parts of the legal act, their meaning is ascertained by comparison of the relevant part of the legal act with the content of the other parts of the legal act, its whole content and intentions of the parties.*
- 4. If the rules established in subsection 3 above do not allow to ascertain the real intent of a party to the legal act, one should take into account the purpose of the legal act, the content of the pre-contractual negotiations, established practice of relationship between the parties, business usages, subsequent behavior of the parties, content of a typical agreement and other circumstances which have substantial importance.*
32. During the oral hearing, the legal expert of Zavarov, Dr. Bersheda, explained that under Ukrainian law, the primary rule of interpretation is the wording of the contract. Other interpretation rules apply only when the wording is unclear. According to Dr. Bersheda, the wording in the Extension Agreement is clear: it shows the Parties’ intent to extend the duration

¹ The following is an unofficial translation, provided by the Appellant.

of their contractual relationship until June 30, 2013. This is supported by the fact that the extension of Zavarov's term as head coach was publicly announced and registered with the Ukrainian Premier League.

33. During the oral hearing, Dr. Bersheda referred to her legal opinion that was annexed to the Appeal Brief, in which she explains the principle of the freedom to contract in Ukraine.
 34. Dr. Bersheda further explained that the specified date at which the agreement would enter into force is a term of the contract. The date is not a condition, as it is not an uncertain event that lies in the future. The contract would be an empty commitment if it were interpreted differently. According to Zavarov, paragraph 4 merely means that the new contractual conditions will apply starting on the effective date; the Extension Agreement was nevertheless binding as of the moment it was signed.
 35. The Appellant claims that the amount of salary due is a monthly salary of \$ 30,000 for the period July 2010 through June 2013. Consequently, Zavarov claims compensation for salary due until June 30, 2013, which amounts to a total of US\$ 1.08 million.
- d) Further damages
36. Zavarov further claims material and moral damages resulting from defamatory statements from the Club. Zavarov mainly refers to public allegations of the Club denouncing Zavarov's performance as a coach, accusing him of having a drinking habit and spreading false information over his private life.
 37. First, Zavarov claims that his professional reputation "*has gone from that of a respected football coach to that of an outcast from the football world who will have extreme difficulties in finding employment in the future*" as a result of these statements. Zavarov believes there is a real possibility that he will never find work again as head coach for a professional football club.
 38. In support of his claim, Zavarov provided witness statements of two well-known figures in the world of football, Mr. Blokhin and Mr. Belanov, winners of the prestigious *Ballon d'Or* in 1975 and 1986, respectively. Both testified that the defamatory statements by the Club have seriously tarnished Zavarov's reputation and will cause him difficulty in finding a position as head coach of a football club.
 39. Therefore, Zavarov believes damages are to be calculated on the basis of the prospective earnings of the entire remainder of his career. Considering that he has 11 years of his working life left, and that his last monthly salary was US\$ 30,000, Zavarov believes that a total amount of US\$ 4 million would be reasonable (the figure is slightly rounded up, which is justified by the fact that his monthly salary should go on increasing).

40. With respect to moral damages, Zavarov claims that “*his life has changed profoundly due to the Club’s attacks*”. The behavior of the Club not only had a strong impact on his psychological well-being, but it also causes physical, stress related problems.
41. Zavarov leaves the amount of damages to the Panel’s discretion, but claims that it should in any event not be less than € 500,000, which is the amount that was awarded by the FFU Supervisory Committee (but which was not upheld by the Appellate Committee).
- B. *The Club’s Response*
- a) Zavarov’s dismissal was lawful
42. The Club argues that Zavarov’s dismissal was lawful since he was absent from work without good reason. Zavarov failed to comply with a number of orders that were issued by the management of the Club while Zavarov was still in Turkey. These orders required him to attend a number of management meetings, training sessions and a medical examination in Kiev. According to the Club’s legal expert, Zavarov’s absence – despite explicit orders to be present – violates Article 40 of the Ukrainian Labor law, Ukrainian regulations on business trips and the terms of the Employment Agreement.
43. Article 40(1) of the Ukrainian Labor Code provides as follows²:
- Article 40. Termination of an employment agreement on the owner’s initiative*
- An Employment agreement made for an indefinite period or a fixed-term employment agreement, before its expiration, may be terminated by the owner or the owner’s authorized body only in the following cases:*
- (4) unauthorized absence from work (including absence from work for over three hours within one work day) without a good reason.*
44. Furthermore, the Club argues that, in line with Articles 235 and 240(1) of the Ukrainian Labor Code, Zavarov’s dismissal cannot be considered unlawful since he has not requested reinstatement. Such a request is essential under Ukrainian labor law before a dismissal can be found to be unlawful.
45. Besides these formal reasons, the Club has repeatedly insinuated in numerous press releases (and also during the current arbitration procedure) that the real reason for Zavarov’s dismissal was his alleged alcoholism.

² The following is an unofficial translation, provided by the Respondent.

b) Compensation under the Employment Agreement

46. The Club finds that Zavarov is not entitled to compensation under the Employment Agreement since, based on the reasons explained above, his dismissal was lawful.

47. Moreover, the fact that Zavarov never requested reinstatement not only entails that the dismissal cannot be considered unlawful but also implies that Zavarov has forfeited any right to claim compensation: *“Even in the case of illegal dismissal an employee can claim only payment for the period of ‘forced absenteeism’ which by definition could not be an issue here because Mr. Zavarov never claimed his reinstatement at his place of job”*.

c) The Extension Agreement never came into force

48. Referring to the expert report of Dr. Kuznetsova, the Club argues that the principle of freedom to contract under Ukrainian law entails that parties may agree on a clause according to which an agreement does not become effective immediately but at a later stage in time. This is further supported by the Decree of the Cabinet of Ministers of Ukraine no 170 of March 19, 1994 on “Regulation of application of the contract form of employment agreements”, which entitles parties to a labor agreement to agree on a future date on which the agreement comes into force.

49. Regarding the interpretation of the relevant paragraph of the Extension Agreement, Dr. Kuznetsova also refers to paragraphs 3 and 4 of Article 213 of the UCC and concludes that there is no dispute regarding the meaning of words and concepts used in the Extension Agreement. Therefore, in this case, *“the purpose of the transaction, the substance of previous relations between the parties, and the customary practice in establishing such relations, i.e. the things that can help ascertain the true will of the parties, are of much greater importance for the correct interpretation of the content of the agreement”*.

50. Dr. Kuznetsova concludes that the Parties intended to make the Extension Agreement conditional upon reaching the effective date for two reasons.

51. First, she compares paragraph 4 of the Extension Agreement to paragraphs 1.4 and 6.2 of the Employment Agreement, which provide as follows:

1.4 The Contract shall be effective from July 2, 2007, through June 30, 2010.

6.2 In the event that upon expiration of this Contract (clause 1.4) at least one of the Parties does not consider it necessary to extend its period, this Contract is terminated pursuant to paragraph 2 of Article 36 of the Ukrainian Labor Code”³.

52. These paragraphs show the desire of the Parties not to automatically extend their employment relationship after the expiry of the term provided for by the Employment Agreement. Rather

³ Unofficial translation provided by the Club. Zavarov also provided a translation, which does not significantly differ.

than amending the terms of the original Employment Agreement, the Parties chose to sign a supplementary agreement in the form of the Extension Agreement: *“Apparently, the parties did not intend to deprive themselves, by Supplementary Agreement No. 5, of the freedom to independently determine whether the Contract should be extended, before the end of the period specified in paragraph 1.4 of the Contract, and they made a condition that Supplementary Agreement No. 5 will enter into effect at a certain date in the future, before which they could resort to the right provided for in paragraph 6.2 of the Contract”*.

53. Including an effective term should thus be considered as a condition which must be satisfied for the Extension Agreement to become effective. Since the underlying Employment Agreement was ended prior to this condition being met, the Extension Agreement never became effective.
54. Second, Dr. Kuznetsova compares the Extension Agreement to the earlier Additional Agreements to determine the *customary practice of relations between the parties*, and concludes that only in one instance out of five, the Parties included an effective date. *“This reveals a difference between the intention of the parties, in the first four cases, to simply modify a certain condition of the Contract at the time of signing of the respective additional agreement, and the intention of the parties in case of Agreement No. 5 (as reflected in the paragraph that differs) to have it enter into effect at a later date in time”*.
55. The Respondent also refers to public statements by Zavarov which demonstrate that he did not consider himself bound by the Extension Agreement before the effective date because he expressed his intentions not to work with the Club in the future should Rabinovich become president.
56. During the oral hearing, both Mr. Golovko and Ms. Kukuruza testified that the Club (in the person of Rabinovich) had intentionally opted for a separate agreement rather than amending the Employment Agreement. On the one hand the Club, by signing a renewed agreement, wanted to give Zavarov an incentive to improve his behavior. On the other hand, Rabinovich feared further “disruptions” and therefore made the contract conditional upon Zavarov’s behavior, meaning that Zavarov should refrain from alcohol consumption and “star behavior”. This was not written down for ethical reasons – every employment agreement is filed with the Ukrainian Premier League.
57. Based on these arguments, the Extension Agreement had no legal implications at the moment of Zavarov’s dismissal.

d) Further damages

58. With respect to material damages, the Club claims that Zavarov has not suffered any damage to his reputation. In fact, Zavarov has publicly said to have denied three offers already. What is more important, in April 2010 Zavarov was appointed as advisor to Ukraine’s Vice-Prime Minister, Mr. Boris Kolesnikov, who is in charge of organizing the UEFA EURO 2012 tournament.

59. Moreover, the disputed statements of the Club can hardly be considered to have affected Zavarov's reputation, as rumors and stories about his alleged alcohol (ab)use circulate – and always have circulated – widely in Ukrainian media.
60. Regarding moral damages, the Club claims that all statements fall under the freedom of expression as they were value judgments on a public figure and therefore protected by Article 10 of the European Convention of Human Rights.
61. The Club finally considers that the damages as calculated by Zavarov are completely disproportionate.

Merits

62. As discussed above, the FFU Appellate Committee decided that the dismissal of Zavarov was unlawful and awarded Zavarov compensation of his salary under the Employment Agreement. The Panel follows the FFU Appellate Committee's decision on these points for the reasons set forth below.
 63. The other issues on which the Panel must decide are whether the term of the Employment Agreement was extended by the Extension Agreement until June 30, 2013, and whether Zavarov is entitled to damages resulting from defamatory statements by the Respondent.
- A. The dismissal of Zavarov was unlawful*
64. The FFU Appellate Committee ruled Zavarov's dismissal unlawful on formal grounds. It found that Zavarov did not have to comply with the orders of the Club's management to return to Kiev since these orders were not duly authorized.
 65. The Panel agrees, and finds that the dismissal was unlawful also on different grounds. Article 40(4) does not apply when a person has a good reason to be absent from work. Additionally, as explained by the Club's legal expert, Article 40(4) applies only if one can establish a person's fault or guilt in being absent.
 66. The Club's legal expert believed that in Zavarov's case the lack of a good reason "*is evidenced by the fact that the employee arbitrarily changed the purpose and duration of the official trip, as follows from his explanations, i.e., he breached the work discipline by not following a direct and clear business trip order which explicitly set the purpose and duration of the trip*".
 67. The Panel does not agree with this interpretation, and finds that Zavarov cannot be held responsible for the Club's sudden decision that caused his absence, which the Panel finds was a transparent element of a preconceived scheme to remove Zavarov from his position. Common sense dictates that Zavarov should be able to spend the few days between the two training camps in Turkey. It was patently unreasonable that the Club (i) called him back to Kiev

when the second training was due to start only a few days after the end of the previous one, and (ii) at such short notice, whose adverse consequences are compounded by the lack of regular and frequent connections between Turkey and the Ukraine.

68. The Panel would point *inter alia* to the following additional circumstances that have led it to this conclusion:
69. The Club meticulously documented Zavarov's absence of work by signing an absurd number of acts and orders between January 26 and January 28, 2010. The Club argued that this was done to comply with Ukrainian legal requirements, but acknowledged that it had not documented any of the other alleged contractual breaches of Zavarov (*e.g.*, poor performance due to drinking);
70. The Club explicitly required Zavarov to be present for a number of different events when it was certain he could not attend as he was still in Turkey. Rabinovich, who never interfered with the training schedule of the team, personally initiated the training session that was to take place during Zavarov's absence.
71. The sole topics on the agenda of the management meetings that the Club organized during Zavarov's absence and on which he was required to be present related to his absence from work;
72. The Club publicly announced Zavarov's dismissal as well as the appointment of a new head coach on January 28, 2010, only three days after the team returned from Turkey, and five days before taking an official decision on Zavarov's dismissal.
73. As a result, the Panel finds that Zavarov had a valid reason to be absent from work and bore no fault or guilt for his absence. With respect to the reinstatement requirement, the Panel finds that under the circumstances described above, it would be unreasonable to require that Zavarov should have requested reinstatement.
74. The Club has also attempted to justify the dismissal of Zavarov by claiming that his performance as head coach was hampered by an alleged drinking problem. The Panel believes that this argument, however, is only another pretext for dismissing Zavarov without incurring any costs.
75. First, the Club agreed to a three-year extension to the Employment Agreement in November 2009, and dismissed Zavarov two months later. A person does not become an alcoholic over two months. If Zavarov's drinking were a cause for dismissal, then surely it must have been a ground for not extending the Employment Agreement by three years only two months before.
76. Second, the Club has neither provided any convincing evidence that Zavarov really has a drinking problem nor that such drinking problem had escalated in the two months prior to his dismissal. The Club relies on anecdotes of Zavarov's former teammates regarding the days that he was a professional football player, a few public interviews in which Zavarov used alcohol-

related proverbs, and a number of testimonies of Club employees indicating that Zavarov would sometimes appear to be hung over. The Panel does not see how this does even remotely prove that Zavarov would be an alcoholic, and indeed could see no personal characteristic even remotely connected to alcoholism when Zavarov appeared at the oral hearing.

77. For these reasons, the Panel agrees with the FFU Appellate Committee that the dismissal of Zavarov was unlawful.

B. Compensation under the Employment Agreement

78. The FFU Appellate Committee ordered the Club to pay Zavarov the remainder of his salary until the end of his Employment Agreement on the basis of Article 9 of the FFU Regulations.

79. The Club explicitly recognized that “provisions of those football bylaws are to be applied to the contested relationships” and agrees with Zavarov that “the property damages related to (allegedly) unlawful dismissal of a Head coaches as it was demonstrated above ... are regulated by the art. 9 par.2 of the FFU Regulations ... and are reduced by such to a salary for the ‘remaining period under the contract’”. The Club argues that Zavarov is not entitled to damages under the Employment Agreement, however, since he failed to request reinstatement to his job.

80. The Panel does not agree with the Club. As explained above, it would be unreasonable to require that Zavarov should have officially requested reinstatement under the circumstances in which he was dismissed. It had become apparent from the many phone calls between the Parties as well as statements on the Club’s website that the Club did not want to continue with Zavarov as its head coach. Moreover, the Club had already appointed a new head coach, and it is common knowledge that a football club employs only one head coach at a time.

81. For these reasons, the Panel finds that on the basis of Article 9 of the FFU Regulations, Zavarov is entitled to the remainder of his salary under the Employment Agreement, amounting to UAH 219,024.

82. In line with Zavarov’s request to set interests at a rate the Panel deems appropriate, and given the amounts awarded under the current Award, it will award interest of 5% per annum due on the period from the date of this Award until the date of payment.

C. The Extension Agreement

83. The legal experts of both Parties agree that, under Ukrainian law, parties have the freedom to contract. It is therefore not contested that paragraph 4 of the Extension Agreement, which provides an effective date, is valid and legally binding.

84. The issue to be decided by the Panel is therefore whether this paragraph should be interpreted as being a term of the contract, merely indicating that the other terms become effective as of

June 30, 2010, or whether it is a condition, meaning that the Extension Agreement would have no legal effect until June 30, 2010.

85. First, the Panel has to decide which rule of interpretation is applicable. Both legal experts agree that there is no dispute regarding the wording of the challenged paragraph. However, they attach different conclusions to this finding. While the legal expert of Zavarov concludes that since the paragraph is clear, it should be interpreted on the basis of paragraph 3 of Article 213 of the UCC, the legal expert of the Club concludes that it should be interpreted on the basis of paragraph 4 of Article 213 of the UCC.
86. In view of these opposing expert statements, the Panel will consider both the literal meaning and the intent of the Parties. In any case, the Panel considers that the outcome is the same under each of the different interpretations.
 - a) Literal interpretation
87. If the Panel were to follow Zavarov's argument that the wording of the Extension Agreement is clear and therefore calls for a literal interpretation, it must consider the exact wording of the Extension Agreement.
88. The Extension Agreement reads that "*The Parties have agreed to extend the effective term of the Contract until June 30, 2013*" and that "*This Additional Agreement shall become effective on June 30, 2010*".
89. The meaning of the Extension Agreement is clear: it extends the term of the Employment Agreement. The Parties disagree on the meaning of the effective term. Zavarov claims that this clause merely means that the new contractual conditions will apply starting on June 30, 2010. The Club argues that this clause means that the Extension Agreement had no legal effect until June 30, 2010, and stated in its Response that if Zavarov had found another club he would be free to enter into such a contract with such other club after expiration of the term of the Employment Agreement.
90. The Panel notes that an agreement is legally binding, in general, as of the date on which it is signed. An effective term in an agreement generally stipulates at what point in time certain obligations under the agreement become enforceable. An effective term is not an uncertain event in the future upon which contractual obligations are conditional. By signing an agreement, parties are contractually bound from the moment of signature of the agreement to carry out their respective contractual obligations as of the effective date.
91. The Extension Agreement was signed on November 26, 2009, and legally binding as of that date. The Parties thereby extended the effective term of the Employment Agreement until June 30, 2013. Any other interpretation would render the Extension Agreement (or any other agreement that is signed prior to an effective date) without any legal value.

b) Interpretation as to the intent of the Parties

92. If the Panel were to follow the Club's argument that the wording of the Extension Agreement is clear but that the main issue is the intent of the Parties behind the wording, it must consider the intention of the parties when signing the Extension Agreement.
93. The Club has raised four arguments to support its claim that the Parties intended to sign a conditional agreement that would not enter into force (and would have no legal value) until the effective date stipulated therein:
 94. First, the Club argues that the Parties did not intend to deprive themselves of the freedom to independently determine whether the agreement should be extended before the end term of the Employment Agreement, which freedom is provided for by paragraph 6.2 of the Employment Agreement.
 95. The Panel considers that this argument fails to acknowledge that by signing the Extension Agreement, the Parties already exhausted such "freedom". Even if the Extension Agreement were to have become effective only on June 30, 2010, which is what the Club argues, it would still overlap with the Employment Agreement for one day. The Employment Agreement would thus in any case be extended before its expiry on the basis of paragraph 6.2 of the Employment Agreement. Contrary to what the Club claims, Zavarov would not be free to enter into a contract with another club after the expiration of the Employment Agreement.
 96. Second, the Club points to the difference between the Extension Agreement, which contains an effective date, and the Additional Agreements, which do not contain an effective date, and argues that this proves the Parties' intent to have the Extension Agreement enter into effect at a later date in time.
 97. However, as also argued by Zavarov, there is a fundamental difference between the Additional Agreements, which merely adjusted the salary of Zavarov, and the Extension Agreement, which also contained an extension of his Employment Contract for three years. The Panel does not consider the Additional Agreements to be a useful benchmark regarding the customary practice of relations between the parties in order to interpret the Extension Agreement.
 98. Third, the Club further refers to a public statement by Zavarov which allegedly demonstrate that he did not consider himself bound by the Extension Agreement before the effective date because he expressed his intentions not to work with the Club in the future should Rabinovich become president.
 99. The statement to which the Respondent refers was made by Zavarov in July 2009. The Panel does not see how this statement could reflect Zavarov's intent when he agreed on the effective date in the Extension Agreement, that is, four months later. Moreover, at the time Zavarov signed the Extension Agreement, Rabinovich was already the (informal) President of the Club.

100. Fourth, a number of witnesses called by the Respondent testified that the Extension Agreement had only been presented to Zavarov as an incentive to improve his behavior, and, as such, was conditional upon his behavior.
 101. However, the Club failed to provide any convincing evidence that the Extension Agreement was conditional upon the behavior of Zavarov. On the other hand, Zavarov provided a letter from the Ukrainian Premier League of July 19, 2010, in which it is confirmed that the Club registered the Extension Agreement with the Premier League: *"In response to your request of July 9, 2010, we hereby inform you that as of February 2, 2010 and July 1, 2010, the database of the Premier League, Union of Professional Football Clubs of Ukraine (Premier League UPFCU) contained the date of expiration of the contract between O.A. Zavarov and Arsenal Kyiv FC as June 30, 2013. This contract term was established on November 28, 2009, as a result of the club's application for registration of an additional agreement to the contract of November 26, 2009"*. The fact that the Club officially registered the Extension Agreement with the Premier League indicates that it considered it had at least some legal value.
 102. The Club's argument that the Extension Agreement was registered simply because every contract should be registered runs counter to its own statement that the Extension Agreement *"is a legal instrument of no legal force, which does not give rise to any obligations"* prior to June 30, 2010.
 103. Moreover, the Panel considers it unlikely that the Extension Agreement, and the promise of a substantial salary, was only an incentive for Zavarov to improve his behavior. The Club failed to provide any evidence that Zavarov's behavior was of such nature that an incentive to improve it was necessary. During the Oral Hearing, Ms. Natalia Kukuruza, one of the Club's in-house lawyers involved in the dismissal of Zavarov who was called as a witness by the Club, admitted that no incidents of Zavarov's alleged alcohol abuse were officially reported.
- c) Conclusion on Extension Agreement
104. It follows from both a literal and a more subjective interpretation of the Extension Agreement that both Parties intended to prolong Zavarov's term as head coach of the Club until June 30, 2013. The period for which Zavarov is entitled to salary should correspondingly be extended until June 30, 2013.
 105. The Extension Agreement provides for a salary in Ukrainian Hryvnia that is equivalent to US\$ 30,000. Zavarov claims that the total amount for the extended period should be calculated on the basis of the new salary as agreed on in the Extension Agreement, which was not contested by the Club.
 106. Given that the Parties explicitly agreed on a new salary for the period of the Extension Agreement, the Panel will use this salary as the basis for calculating the salary due under the Extension Agreement. Accordingly, Zavarov is entitled to a monthly salary of US\$ 30,000 for the period of July 2010 through June 2013, which amounts to a total amount of US\$ 1.08 million.

107. In line with Zavarov's request to set interests at a rate the Panel deems appropriate, and given the amounts awarded under the current Award, it will award interest of 5% per annum due on the period from the date of this Award until the date of payment.

D. *Further damages*

108. Zavarov argues that defamatory statements by the Club have caused both material and moral damages. The material damages consist of missed future earnings, while the moral damages relate to the psychological impact of the statements by the Club.

109. Regarding material damages as a result of missed future earnings, the Panel has taken note of the fact that Zavarov had not found employment as head coach of a football club up till the date of the Oral Hearing. However, it also became apparent during the arbitration procedure that Zavarov is still a highly esteemed figure in the international football community.

110. In fact, his close ties with certain well-placed persons near the top of the international football community lead Ukraine's Vice-Prime Minister, Mr. Boris Kolesnikov, to appoint Zavarov as his personal advisor for the UEFA EURO 2012 tournament, for which Ukraine is a co-host. Moreover, Zavarov is still supported by very influential persons in the international football community, which is evidenced by the witness testimonies of Mr. Blokhin and Mr. Belanov. When asked by the Panel, Mr. Belanov attested that Zavarov's name had been at least partially restored as a result of his new position. For these reasons alone Zavarov cannot be considered as "*an outcast from the football world*".

111. In any case, the Panel is convinced that Zavarov's name has been sufficiently cleared by the FFU Decision and, at the very latest, the current Award. Therefore, Zavarov's claim for material damages is dismissed.

112. Regarding moral damages, the legal experts of the Parties refer to Article 23, paragraph 1 of Article 237 and Article 280 of the UCC, which provide as follows⁴:

Article 23 Compensation for moral damages

1. *A person is entitled to the compensation for moral damages resulting from the infringement of his/ her rights.*

2. *The moral damages include the following:*

(1) The physical pain and suffering caused to an individual by an injury or other health impairment;

(2) the emotional distress suffered by an individual due to unlawful conduct with respect to him/ her or his/ her family members or close relatives;

(3) the emotional distress suffered by an individual due to the destruction or damage of his/ her property;

(4) the debasement of the honor and dignity of an individual or the business reputation of an individual or a legal entity.

⁴ The following are unofficial translations provided by the Parties.

3. The moral damage is compensated with money, other property or other means. The amount of monetary compensation for moral damages is determined by the court depending on the nature of the infringement, depth of physical and emotional sufferings, deterioration of the damaged person's abilities or deprivation of possibility to use such abilities, the degree of fault/guilt of the person who inflicted moral damage if the fault/guilt is the ground for compensation, and other circumstances of significant importance. The requirements of reasonableness and fairness shall be taken into account in determining the scope/amount of compensation.

4. The moral damage is compensated regardless of the compensation for property damage and is not related to its size/amount.

5. The moral damage is compensated in one installment, unless otherwise provided for by an agreement or the law.

Article 237(1) Compensation of moral damage by the owner or his empowered body

Moral damage shall be compensated to an employee by the owner or his empowered body when the violation of the worker's legal rights has led to moral suffering, loss of normal life connections, and require from him additional efforts to organize his life.

Article 280 Right of a natural person, whose personal non-pecuniary right has been violated, to damages

If a natural person has suffered a pecuniary and (or) moral loss due to the violation of his personal non-pecuniary right, such loss shall be compensated.

113. The Parties' legal experts summarized how moral damages should be awarded under Ukrainian law. The amount depends on the character and importance of suffering, the character of the moral damage and other circumstances, such as the state of health of the damaged party, the importance of the forced changes in his every-day and professional relationships, the degree of reduction of consideration, his professional reputation, as well as the time and effort necessary to restore the previous state. Courts should act reasonably, fairly and in a balanced way. In any case, the adjudicating bodies enjoy a great deal of discretion in determining the fair of compensation, taking into account the requirements of reasonableness and fairness.
114. The grounds for Zavarov's claim to moral damages are the defamatory statements by the Club regarding Zavarov's alleged drinking habits and personal problems. The Panel notes that the dispute between the Parties that started after their professional relationship ended is, unfortunately, not uncommon in the world of football (or even sport as a whole). As is true in most of these incidents, both Parties have a certain degree of guilt. It is unfortunate that the dispute has now escalated as to require intervention by the CAS, which does not aspire to act as a referee in such disputes by valuing insults and deciding on the level of guilt of each party.
115. Nevertheless, Zavarov claims that his public image has been severely damaged, and that he has suffered both psychologically and physically as a result of the Club's defamatory statements. To prove his moral damage, Zavarov mainly relies on the witness statements of Mr. Belanov and Mr. Blohkin and certain medical statements.
116. The Panel finds that the evidence provided by Zavarov is insufficient to prove the damages he claims to have suffered. Moreover, while the Panel does not underestimate the psychological

impact that certain insults may have on a person, it has not seen in the present case any insults of such nature that would warrant any moral compensation. The Panel also notes that Zavarov, through his former legal representative Mr. I.A. Skoropashkin, published a number of possibly defamatory statements concerning Rabinovich.

117. Considering these circumstances and taking account of the principles of reasonableness and fairness, the Panel therefore dismisses Zavarov's claim for moral damages.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr. Oleksandr Zavarov on October 18, 2010 is partially upheld.
2. The termination of the Employment Agreement by FC Arsenal Kiev was unlawful.
3. FC Arsenal Kiev is ordered to pay Mr. Oleksandr Zavarov, within one month of the date of this Award, the amount due under the Employment Agreement, being UAH 219,024, plus interest of 5% per annum due on the period from the date of this Award until the date of payment.
4. FC Arsenal Kiev is ordered to pay Mr. Oleksandr Zavarov, within one month of the date of this Award, the amount due under the Extension Agreement, being US\$ 1.08 million, plus interest of 5% per annum due on the period from the date of this Award until the date of payment.
5. (...).
6. (...).
7. All other requests are dismissed.