Arbitration CAS 2011/A/2663 FC Obolon v. Oleg Volodymyrovych Ostapenko, award of 26 June 2012

Panel: Mr Stuart McInnes (United Kingdom), Sole Arbitrator

Football
Contract of employment between a club and a player
Illegal termination of a contract of employment
Compensation for damages

1. **The termination of a player's employment agreement based on grounds not stipulated by the rules of the national football federation concerned or by the applicable national law is illegal.**

2. **A player is entitled to receive compensation for breach of contract by the club in breach in addition to any outstanding payments under the contract.**

FC Obolon ("the Appellant") is a Ukrainian professional football club based in Kiev, Ukraine.

Oleg Volodymyrovych Ostapenko ("the Respondent") is a professional Football player and former goalkeeper with the Appellant.

The elements set out below are a summary of the main relevant facts, as established by the Sole Arbitrator on the basis of the written submissions of the parties, the exhibits filed and the decision rendered by the Football Federation of Ukraine Appeal Board, ("FFU AB"), on 22 November 2011, on the appeal of the club against the decision of the Football Federation of Ukraine Control and Discipline Committee ("FFU CDC") dated 9 June 2011. Additional facts may be set out, where relevant, in the legal considerations of the present award.

On 21 December 2010, the Respondent was suspended by the Discipline Committee of the Union of Professional Football Clubs of Ukraine, "Premier League" ("DC UPL"), from participation in all competitions for a period of six months for spitting at a senior assistant referee and/or swearing or using coarse language towards him, during a match of the 14th tour of the competition between the Appellant and SC Tavriya Simferol on 22 October 2010.

On 29 December 2010 the FFU CDC reviewed the decision of the DC UPL and increased the period of suspension until the end of the 2010/2011 football season.

On 31 January 2011, the Appellant terminated its Employment Agreement, dated 1 July 2010, with the Respondent.

On 8 February 2011, the Respondent filed an appeal against termination of the Employment Agreement with the DC UPL seeking, from the Appellant, *inter alia,* payment of arrears of wages and damages for unlawful termination of the Employment Agreement and amendment of the record in his work book specifying P7. of Art.36 of the Labour Code of Ukraine as the reason for the termination.

The decision of the DC UPL was published on 12 May 2011. The DC UPL did not award payment of the arrears of wages or damages, but ordered amendment of the record in the Respondent's work book to specify, P.8 of Art 36 of the Labour Code of Ukraine, as the reason for the termination of the Employment Agreement. All monetary claims of the Appellant against the Respondent, (specifically in respect of his salary paid for the period of his being suspended from participation on competitions between 22 October 2010 and 31 January 2010), were rejected.

The Respondent appealed to the FFU CDC, which published it decision on 9 June 2011, revoking the decision of the DC UPL and ordered *inter alia* that the Appellant pay the Respondent compensation in the sum of UAH 1,090,000.00 for groundless termination of the Employment Agreement and amendment of the Respondent's work book to specify P.1 of Art 36 of the Labour Code of the Ukraine as the reason for the termination of the Employment Agreement. The FFU CDC rejected all the Appellant's monetary claims against the Respondent.

On 3 October the Appellant appealed the decision of the FFU CDC to the FFU AB.

The decision of the FFU AB was published on 22 November 2011, which held as follows:

> *"1. To change the decision of the CDC of the FFU partially – in part changing formulationof firing Ostapenko O. (p2.1 of the resolution part): to bind the FC "Obolon" to change the record on firing Ostapenko O. in his work book, stating as a reason for that art.39 of the CLoL of Ukraine*
>
> *2. To leave the decision of the CDC of the FFU from 09.06.2011 in the other part without changes.*
>
> *3. To explain to the FC "Obolon" that this club is not deprived of the right to initiate a dispute regarding reimbursement of losses related to expenditures for a new goalkeeper in a separate case with proper reasoning and evidence base.*
>
> *4. To deliver the decision of the FFU AB to the interested parties in proper order".*

The Sole Arbitrator clarifies that the following short summaries of the parties' positions are only roughly illustrative and do not purport to detail all the submissions made by the parties. However, the Sole Arbitrator has thoroughly considered in his deliberation all of the evidence and arguments submitted by the parties, even if there is no specific or detailed reference to that evidence and those arguments in this award.

On 16 December 2011, the Appellant filed an Appeal at the Court of Arbitration for Sport (the "CAS") against the decision of the FFU AB, dated 22 November 2011, seeking the following relief:

i. To suspend the implementation of the decision of the Football Federation of the Ukraine of 22 November 2011, pending determination of the Appellant's appeal by the CAS

ii. To obtain and disclose to the parties the file of the Appeal Board of the Football Federation of Ukraine.

iii. To appoint an Arbitrator to consider the appeal.

iv. To set aside the decision of the decision of the Football Federation of the Ukraine of 22 November 2011.

The Appellant seeks the revocation of the decision of the FFU AB, more specifically, to reject the Respondent's award of compensation in the sum of UAH 1, 090,000 (approximately € 103,242) and the Order to amend the Respondent's work book to specify Art 39 of the Labour Code of the Ukraine as the reason for the termination of the Employment Agreement dated 1 July 2010 and instead to substitute P.8 of Art 36 of the Labour Code of the Ukraine as the reason for the termination of the Employment Agreement. In addition, the Appellant sought indemnification from the Respondent in the sum of UAH 1,299,870 (approximately € 123,120) for expenses incurred by the Appellant occasioned by the Respondent's suspension, representing salary payments of UAH 207,016 made to the Respondent during his period of suspension and the additional salary costs made to alternative goalkeepers Makhovskyi and Reva in the respective sums of UAH 212,854 and UAH 880,000.

On 23 December 2011 the Appellant filed its Appeal Brief.

By letter dated 20 December 2011, the CAS Court Office sent the Respondents the Statement of Appeal and granted the Respondent 10 days to comment on the Appellant's request for a stay of the execution of the challenged decision.

The Respondent failed to submit any comment within the time limit granted.

On 2 February 2012, the Deputy President of the Appeals Arbitration Division of the CAS, published his Order on the Appellant's request for provisional and conservatory measures, finding that the Appellant had failed to establish that the immediate execution of the challenged decision would prejudice the Appellants rights in any manner and dismissed the application without further consideration and ordered that costs of the order be determined in the final award.

On 7 February 2012, The CAS Court Office informed the parties that Mr Stuart McInnes, Solicitor, of London, United Kingdom, had been appointed as Sole Arbitrator to determine the appeal.

On 1 March 2012, the Respondent filed its Statement of Defence seeking that the decision of the FFU AB is upheld.

On 17 April 2012 the Appellant filed a reply to the Respondent's Answer.

By letter dated 7 May the Respondents filed its answer to the Appellant's letter dated 17 April 2012.

LAW

CAS Jurisdiction

1. The Jurisdiction of the CAS, which has not been disputed, derives from Article R47 of the Code of Sports-related Arbitration ("the Code") together with Article 51 of the statutes of the Football Federation of Ukraine, according to which an appeal against a final decision of the Football Federation of Ukraine may be resolved by the CAS

2. Article Rule 47 of the Code and pertinent case law (cf. CAS 2004/A/748 at para 7) provides that:

   "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".

3. Article 51 of the Football Federation of Ukraine's Statutes provides that:

   "The Court of Arbitration for Sport (CAS) (the city of Lausanne, Switzerland) as the body having final authority, has exclusive competence to consider all disputes within the activity of FIFA and UEFA, and also appeals against the decisions of the FFU Appeal Board. The Court of Arbitration for Sport (CAS) rejects the appeal against the decision about suspending from participation in four matches or for a term of three months".

4. The Appellant has exhausted all national legal remedies with regard to the decisions challenged and the requirements of the Code are therefore met. In light of the foregoing, the Sole Arbitrator is satisfied that he is competent to hear this dispute.

Admissibility

5. Article R 49 of the Code provides that:

   "In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from receipt of the decision appealed against. After having consulted the parties, The Division President may refuse to entertain an appeal if it is manifestly late".

6. The challenged decision was notified to the Appellant on 6 December 2011. The appeal was filed at CAS on 16 December 2011. It follows that the appeal was filed in due time and is admissible

Applicable law

7. According to Article R 58 of the Code, the Panel shall decide the dispute:

"according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such choice, according to the laws 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

8. Neither party has expressly submitted what law should be applicable to the merits of the case. The applicable provisions of Swiss Federal Code on Private International Law ("PILA") concerning International Arbitration are set forth under Articles 176 to 194 of such law. In particular , concerning the applicable law, Article 187 PILA provides that :

"1. The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected.

2. The parties may authorize the arbitral tribunal to rule according to equity".

9. The Sole Arbitrator notes the applicability of the Football Federation of Ukraine Disciplinary Rules is confirmed by Paragraph 7 of Article 48 of the Football federation of Ukraine Charter which provides that jurisdiction and procedural actions of the Football Justice Authorities shall be specified by the Football Federation of Ukraine Disciplinary Rules.

10. As both parties are from Ukraine and the Federation whose decision is appealed against has its seat in Ukraine, the Sole Arbitrator also finds that, pursuant to Article 58 of the Code, Ukraine law is applicable on a subsidiary basis.

Scope of review

11. The scope of the Panel's review which is in any event limited to the scope of the decision appealed (cf. CAS2005/A/808 at para 6) is defined in Article R57 of the Code which provides that:

"The Panel shall have the full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witness or experts, as well as the oral arguments. He may also request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Articles R44.2 and R44.3 shall apply.

After consulting with the parties, The Panel may, if it deems itself to be sufficiently well informed, decide on not hold a hearing . At the hearing , the proceedings take place in camera, unless the parties agree otherwise.

If any of the parties is duly summoned yet fails to appear, The Panel may nevertheless proceed with the hearing".

12. As the Sole Arbitrator has the full power to review the facts and the law, this case is heard de novo. Indeed, it is the duty of a CAS panel in an appeals arbitration procedure to make its

independent determination of whether the Appellant's and Respondent's allegations are correct on the merits rather than to limit itself to assessing the correctness of the previous procedure and decision (cf. CAS 2009/A/1880-1881, para. 146).

Determination of the appeal without a hearing

13. By letters dated 12 March 2012 and 29 March 2012, addressed to the Court office of the CAS, the Respondent and the Appellant respectively requested that the Appeal be determined by the Sole Arbitrator on the basis of the written arguments provided by the parties, without a hearing being held.

14. By letter dated 23 April 2012, the parties were advised that pursuant to Article R57 of the CAS Code, the Sole Arbitrator deemed himself sufficiently informed to decide the Appeal based on the parties' written submissions without the need to hold a hearing.

Procedural issues

15. According to Article R56 of the Code, after the exchange of written submissions the parties are not authorised to produce further evidence unless they mutually agreed to it or the Panel exceptionally authorised it. On 20 March 2012 pursuant to Article R44.3 the Sole Arbitrator directed that the parties provide full copies of the following documents translated into English , if any reliance was to be placed upon them by either party:

    1. Ukrainian FFU Rules on the Status and Transfer of Football Players;
    2. Ukrainian FFU Charter;
    3. Ukrainian FFU Disciplinary Rules;
    4. Labour Code of the Ukraine;
    5. The Appellant's "Collective Agreement" for various years relevant or material to the duration of the Contract of Employment e.g. 2009/10 and 2010/11;
    6. Resolution of the Plenary Session of the Supreme Court of the Ukraine dated 6 November 1992;
    7. Minutes of the PFL Bureau dated December 3 2002;
    8. Any financial record of payment of salaries to the Respondent by the Appellant or to alternate players employed by the Respondent during his suspension;
    9. Employment regulations and mutual Obligations of the parties regulated by the *"Charter, other regulatory documents of the club….the Rules of the Ukrainian football competitions among professional teams and by current Ukrainian legislation"* as referred to in Para 2.1 of the Employment contract dated July 8 2010;
    10. The "Football Players Certificate" and Work Book Minutes of the Session of the PFL dated 3/12/02;

11. A copy of the Respondent's new contract with Niva FC;

12 A copy of the full file of the Appeal Board of the Football Federation of Ukraine.

16. The parties did not raise procedural issues or objections to the Sole Arbitrator's request and the documents were provided by the Appellant under cover of its letter of 17 April 2011.

Merits

17. The main issues to be decided upon by the Sole Arbitrator are:

a. Was the Respondent's Labour Agreement validly terminated?

b. Under what Article of the Labour Code of Ukraine should the termination be recorded in the Respondent's workbook?

c. Is the Respondent eligible to receive compensation for termination of his Labour Agreement and if so in what sum?

d. Can the Appellant claim compensation from the Respondent for financial losses following termination of the Respondent's Labour agreement?

A. Was the Respondent's Labour Agreement validly terminated?

18. It is common ground between the parties that the Respondent's Labour Agreement dated 1 July 2010 was terminated on 31 January 2011.

19. The Appellant contends that the decision of the FFU AB in finding the termination illegal is erroneous in that it does not comply with Labour Code of Ukraine or the Regulations of the Football Federation of Ukraine and FIFA and maintains that the suspension of the Respondent for a period of 8 months until the end of the 2010/2011 season is a valid and good reason for termination of an employment agreement as the Respondent could not fulfill his contractual obligations as a footballer.

20. In support of its contention the Appellant cites the following regulations:

- Article 4 of the Labour Code of Ukraine which provides as follows:

  "The labour legislation shall consist of the labour Code of Ukraine and other legislative acts adopted under it".

- Article 36 Paragraph 7 of the Labour Code of Ukraine which provides as follows:

  Grounds for termination of employment contract are…. *"entry into legal force of a court verdict that sentences the employee (unless suspended sentence and reprieve) to imprisonment, corrective work is not the place of work or other penalty, which precludes the continuation of this work".*

- Article 9 Paragraph 1 of the Football Federation of Ukraine Rules on the Status and Transfer of Football Players which provides as follows:

"the Agreement the club has concluded with a professional football player included to the team and with his name included to the application form, may be terminated in some cases according to the Ukrainain labour legislation, requirements of the FIFA, UEFA,FFU and appropriate association".

- Article 10 Paragraph 2 Football Federation of Ukraine Rules on the Status and Transfer of Football Players which provides as follows:

  "An agreement may be terminated by one of the parties without any consequences (compensation or penalty)if there is a valid reason for it".

- Under Article 14 of the FIFA Rules on Status and Transfer of Football Players which provides as follows :

  "An agreement may be terminated by each party without any consequences (paying compensation and imposing disciplinary penalties) if there is a valid reason".

21. The Appellant also contended that the Respondent's conduct justified the termination and cited Paragraph 3.1 of Chapter 3 of the Labour Agreement dated 1 July 2010 which inter alia obligates the Respondent to: *"to prevent violation of morality rules in the course of work and while having rest".*

22. The Respondent contends that from the date of the offence and up to the date when initial suspension of six months was increased on 29 December 2010, until the end of the 2010/2011 football season, (a period of some 100 Days) he continued to train and work with the Appellant and was precluded from appealing against the increased suspension as he was not notified by the Appellant of the increase in suspension until after the expiration of the time limit for appeal.

23. After careful review of the rules and legislation the Sole Arbitrator deems that the FFU AB was right to consider that the termination of the Respondent's Labour Agreement was illegal pursuant to Article 36 Paragraph 7 of the Labour Code of Ukraine as that provision relates to the coming into force of a court sentence *"that sentences the employee (unless suspended sentence and reprieve) to imprisonment, corrective work is not the place of work or other penalty, which precludes the continuation of this work"*. The suspension imposed by FFU CDC, was an administrative sanction and not a criminal sanction of the Criminal Courts of Ukraine and did not impose imprisonment upon or preclude the Respondent from working for the Appellant, for which he continued to work and which continued to pay the Respondent from 22 October 2010 until 31 January 2011.

24. In its decision dated 22 November 2011, the FFU AB did not address the issue whether an increase in the period of suspension or whether the provisions of Paragraph 3.1 of Chapter 3 of the Labour Agreement dated 1 July 2010 are sufficient justification for termination of the Labour Agreement, however for the avoidance of doubt the Sole Arbitrator does not consider that either an increase in the period of suspension is or the provisions of Paragraph 3.1 of Chapter of the Labour agreement would in the circumstances of this case entitle the Appellant to terminate the Labour Agreement.

B. Under what Article of the Labour Code of Ukraine should the termination be recorded in the Respondent's workbook

25. Having concluded that the termination of the Respondent's Labour Agreement by the Appellant was not on grounds stipulated by the rules of the FFU or the law of Ukraine, the Sole Arbitrator is of the view that the decision of the FFU AB to consider the appropriate designation for the termination of the Labour Agreement in the Respondent's workbook to be that of Article 39 of the Labour Code of Ukraine is correct. That provision reads as follows:

Article 39 Labour Code of Ukraine - Termination of employment contract on the initiative of the employee

"Fixed-term employment contract (paragraphs 2 and 3 of Article 23) shall be subject to early termination of workers' claim in the event of illness or disability, which hinder the implementation of the contract, breach of the owner or authorized body of labour legislation , collective agreements or employment contracts and in cases provided part one of Article 38 of the Code"

C. Is the Respondent eligible to receive compensation for termination of his Labour Agreement and if so in what sum?

26. Article 9.2 of the Regulations of the FFU on the Status and Transfer of Players provides as follows:

"in the case of terminating a contract on the initiative of the club and on the grounds not stipulated by the law of Ukraine and the players contract, the club shall pay to the second party salary for the period valid till the expiry of the contract and the existent liabilities for the work at the club".

27. The Sole Arbitrator considers that the Respondent's Labour Agreement was terminated by the club on grounds not stipulated by the rules of the Football Federation of Ukraine or the law of Ukraine and that the player is entitled to receive compensation for breach of contract in addition to any outstanding payments under the contract.

28. In this regard, the Sole Arbitrator does not see any reason to depart from the analysis of the FFU AB made in the appealed decision which upholds the decision of the FFU CDC dated 9 June 2011 on appeal against the decision of the Premier league Union of professional Football Clubs of Ukraine dated 12 May 2011 and therefore fully reverts to the appealed decision in this respect.

29. The Sole Arbitrator is of the view that in the manner prescribed by Article 9.2 of the Regulations of the FFU on the Status and Transfer of Players the Appellant should pay compensation to the Respondent in the sum of UAH 1, 090, 000.00 for illegal termination of the Labour Agreement.

D. Can the Appellant claim compensation from the Respondent for financial losses following termination of the Respondent's Labour agreement?

30. Having decided that the Respondent's Labour Agreement was not terminated by the Appellant in accordance with the Rules of the FFU or the law of Ukraine, the Sole Arbitrator rejects any claim for compensation made by the Appellant in respect of the wages paid to the Respondent between the date of imposition of the suspension, 21 December 2011 and the date of termination of the Labour Agreement.

31. Likewise the Sole Arbitrator rejects the Appellants claim for losses under Paragraph 3 of the Resolution of the Plenary Session of the Supreme Court of Ukraine which provides as follows:

"In accordance with Art.130 of the Labour Code of Ukraine, damage shall be compensated for regardless of whether disciplinary, administrative or criminal responsibility has been imposed on an employee for actions (failure to act) having caused damage to an enterprise institution organisation".

32. The Sole Arbitrator is of the view that any damage occasioned to the Appellant was of its own making in terminating the Respondent's labour Contract and that as such any claim against the Respondent is without foundation.

Conclusion

33. Based on the above, The Sole Arbitrator finds that paragraphs 1 and 2 of the Appealed Decision are confirmed and that Paragraph 3 of the decision shall have no effect. Accordingly, all other prayers for relief are rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed by FC Obolon against the decision of the Football Federation of Ukraine Appeal Board dated 22 November 2011 is dismissed.

(…)

4. All further and other claims for relief are dismissed.