Arbitration CAS 2012/A/2851 FC Metallurg v. Tkachenko Sergey Viktorovich, award of 25 March 2013

Panel: Mr Romano Subiotto QC (United Kingdom), President; Mr Rui Botica Santos (Portugal); Mr Markus Manninen (Finland)

Football
Contract of employment
Classification of unpaid payments as bonuses or salary
Club's entitlement to refuse the payment of bonuses

1. **Payments are to be qualified as bonuses if it is clear from the agreement between the parties that such agreement is supplementary to the contract and if such agreement explicitly states that it elaborates only upon certain aspects of it, namely sanctions and bonuses.**

2. **A club may only be entitled to refuse the payment of bonuses to a player for failing to meet the criteria stipulated in the agreement if it provides evidence that the player has failed to meet the criteria for the payments under such agreement.**

I. THE PARTIES

1. The Appellant, FC Metallurg, (the "Club" or "Appellant"), is a Ukrainian Premier League football club based in Donetsk, Ukraine.

2. The Respondent, Tkachenko Sergey Viktorovich (the "Player" or "Respondent"), is a Ukrainian football player. He spent a significant portion of his career playing in the Ukrainian Premier Division.

II. FACTUAL BACKGROUND

3. On June 1, 2008, the Club signed an employment contract (the "Contract") with the Player for three seasons (June 1, 2008 to June 30, 2011). The Club and the Player also signed an "Agreement on Disciplinary Sanctions and Bonuses" (the "Agreement"), which imposes further obligations on the Player as well as on the Club.

4. During the 2008/2009 season, the Player regularly played for the Club's first team. However, in the 2009/2010 season, the Player's appearances in football matches for FC Metallurg decreased, and he played in one match for the reserve team. In the 2010/2011 season, the

Player often played for the reserve team, and featured briefly in only one first team match. For some of the months in 2010 and 2011 that the Player played in the reserve team, it is apparent that he was paid less than he had received on prior occasions.

5. The Player notified the Club on October 20, 2010 that he had not received his full salary for the months March, April, May, and June 2010. The Club explained that his salary had been reduced by 50% in light of the Club Sport Council's decision of February 26, 2010, by which the Player had been transferred to the second team. The Club did however state that as of July 2010, payments to the Player would return to normal.

6. The Player confirms that he was transferred back to the first team in June 2010, but just a few months later in September 2010, the Player was once again transferred to the reserve team. The amounts received by the Player for September 2010 through March 2011 inclusive, are not disputed despite the Player's transfer back to the reserve team. However, for the months April, May, and June 2011, it is apparent that the Player again received 50% less than usual.

7. On July 18, 2011, the Player, requested from the Club the sums owed to the Player, namely US$ 17,500 for each of the months March through June 2010, US$ 20,000 for each of the months April and May 2011, and US$ 40,000 for the month June 2011.

8. Since the Club did not honour the request, the Player brought the dispute to the attention of the Disciplinary Committee of the Association of Professional Football Clubs of Ukraine (the "PL DC") on August 17, 2011. The Player requested that the PL DC oblige the Club to pay the above-mentioned sums as it was obligated to do under the Contract. Additionally, the Player requested an order for compensation in accordance with Article 117 of the Labor Code of Ukraine ("LCU"), on account of the delayed payment of the sums owed.

9. The PL DC's decision, rendered on October 27, 2011, unanimously rejected the Player's claim in its entirety. It considered the disputed sums as bonuses, and held their reduction to be justified on account of reduced *"sports proficiency"* as evidenced by the Player's transfer to the reserves.

10. On November 1, 2011, the Player filed a statement of appeal with the Football Federation of Ukraine Control and Disciplinary Committee ("FFU CDC"). On December 15, 2011, the FFU CDC overruled the PL DC's decision. By its decision, the FFU CDC obliged the Club to pay the Player the disputed sums totalling UAH 1,200,000 (the equivalent of US$ 150,000), which the FFU CDC considered as unpaid salary. The FFU CDC also ordered the Club to pay compensation for the delayed payment of said owed sums in accordance with Articles 116 and 117 of the LCU, without specifying the exact amount.

11. The Club appealed to the FFU Appeals Committee ("FFU AC"). On June 8, 2012, the FFU AC upheld the FFU CDC's decision in favour of the Player, although it did consider the disputed sums as bonuses rather than unpaid salary.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On July 4, 2012, the Appellant filed, pursuant to Articles R47 and R48 of the CAS Code of Sports-related Arbitration (the "Code") and in accordance with Article 52 of the FFU Disciplinary Rules, a Statement of Appeal before the Appeals Arbitration Division of the CAS. The Appellant asked the CAS:

> *"1. To accept the present statement of appeal for consideration by the Sole Arbitrator.*
>
> *2. To cancel the decision of Appeal Committee of Football Federation of Ukraine dated 08 of June 2012.*
>
> *3. To pass the new decision where to reject all the requests of the Respondent in full".*

13. On July 11, 2012, the Appellant confirmed that it had made a second payment which in sum with an earlier payment, constituted full payment of the Court Office fee in accordance with Article R64.1 of the Code.

14. On July 13, 2012, the Appellant requested an extension of 10 to 15 days to submit its evidence on account of the necessary translations from Ukrainian and Russian to English. This was opposed by the Respondent in a letter dated July 18, 2012, as the Appellant had already had 40 days, despite the normal time constraint specified in the Code being 31 days.

15. On July 18, 2012, the FFU declined the invitation to be party to the arbitration extended to it as per Article R54 and R41.3 of the Code.

16. Also on July 18, 2012, the Respondent requested a panel of three arbitrators pursuant to Article R50 of the Code. This was agreed to by the CAS in a letter dated July 19, 2012.

17. By letter of July 23, 2012, the Respondent claimed that the Club had received the appealed decision on June 8, 2012, and therefore, by filing the appeal on July 4, 2012, the 21 days within which an appeal must be lodged according to R49 of the Code had expired. On August 21, 2012, the CAS rejected the Respondent's claim and declared that the appeal was admissible.

18. By letter of July 24, 2012, the Respondent nominated Mr. Markus Manninen as arbitrator, and by letter of September 6, 2012, the Appellant appointed Mr. Rui Botica Santos as arbitrator.

19. On August 29, 2012, the Respondent submitted its Answer.

20. On September 20, 2012, the CAS acknowledged receipt of the advanced costs from the Appellant, and notified the Parties that pursuant to Article R54 of the Code, the Arbitration Panel would be constituted as follows: Mr. Romano Subiotto QC (President), Mr. Rui Botica Santos (arbitrator appointed by the Appellant) and Mr. Markus Manninen (arbitrator appointed by the Respondent).

21. An oral hearing took place in Lausanne on November 28, 2012. Both Parties were represented at the hearing and counsel for both Parties submitted oral arguments. At the end of the hearing, both Parties confirmed that their rights to a fair hearing had been satisfied.

IV. JURISDICTION AND APPLICABLE LAW

A. Jurisdiction

22. The CAS has jurisdiction on the basis of Article 52 of the FFU Disciplinary Rules, which provides that decisions passed by the FFU AC can be appealed to CAS.

23. The Respondent explicitly accepted jurisdiction of the CAS both in its Response and by signing the Order of Procedure on October 25, 2012.

B. Applicable Law

24. Article R58 of the Code provides as follows:

> *"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".*

25. Article 5.3 of the Contract explicitly provides that any disputes will be resolved in accordance with Ukrainian Law. Accordingly, the present appeal is subject to the FFU Disciplinary Rules and Ukrainian law. There is no dispute as to the applicability of the FFU Disciplinary Rules and Ukrainian law.

V. THE MERITS

26. It is undisputed that the Club withheld payments from the Player for certain months in 2010 and 2011. The Player and the Club disagree as to whether the payments that the Player received for the months March through June 2010 and April through June 2011, satisfied the amount that the Player was owed under the terms of the Contract and the Agreement. The Club argues that the disputed payments were bonuses, which it could withhold at its own discretion. The Respondent argues that the payments were not bonuses but part of his salary. Alternatively, the Respondent claims that the Club had no grounds to withhold the payments irrespective of their qualification as bonus or salary.

27. Article 4.1 of the Contract specifies that the Player's salary would be paid at least twice a month, but the exact amount that the Player would receive as salary was not specified. Rather, Article 4.1 of the Contract refers to the Club's *"position and salary"* schedule, also referred to as *"the manning table of the football team"* (the "Manning Table"). It became clear during the Oral Hearing that the Club uses the Manning Table to register players' salaries, and that the Club can change the salaries on the Manning Table at its own discretion.

28. In addition to the reference in the Contract to the salary as specified by the Manning Table, Articles 2.1-2.3 of the Agreement impose an obligation on the Club to make monthly

payments to the Player. For example, Article 2.3 provides that *"From July 1st, 2010 to June 30th, 2011, for the faithful performance of duties, high sports achievements, professional sports skills, individual contribution to winning sports results of [the Club], the Club shall make payments to the Player in the amount of 40,000 (forty thousand U.S. dollars) per month"* (Articles 2.1 and 2.2 provide for the payments in different periods.)

29. It is against this background that the Panel must determine whether (1) the payments withheld by the Club should be considered salary or bonus, (2) the Club was entitled to withhold these payments, and (3) the Player is entitled to compensation for delayed payment as provided by Articles 116 and 117 LCU.

A. The Classification Of The Unpaid Payments As Either Bonuses or Salary

30. The Appellant argues that the disputed sums should be classified as bonuses, which may be paid in addition to a salary under the Contract. In particular, the Appellant advances that the Contract and the Agreement are structured as such that on the basis of Article 4.1, the Player will receive a salary in accordance with the *"manning table"*; and on the basis of Article 4.2, the Player may receive *"different extra payments, bonuses and additional payments"*, as provided in the separately signed Agreement.

31. The Respondent argues that the disputed sums should be considered unpaid salary. First, the Respondent asserts that the Agreement should be considered an integral part of the Contract as a result of numerous articles of Ukrainian law. For example, Article 38(3) of the Law of Ukraine "On Physical Culture and Sports" would require a professional sports person's remuneration to be specified under contract. In support, the Respondent notes that the Agreement is equated to the duration of the Contract, and the Agreement concerns the activities of the Player under the Contract.

32. Second, the Respondent asserts that Article 4.1 of the Contract does not contain the Player's salary, because its reference to the Manning Table provides only the composition or structure of the salary and is of no legal force. Reference to it in the Contract does not therefore constitute an agreement on salary, particularly since the Club could unilaterally alter the sums specified in the Manning Table.

33. Third, in light of the above, the Respondent believes that Articles 2.1-2.3 of the Agreement establish the Player's salary as they reflect the Player's ordinary obligations which are specified in Article 3.1 of the Contract. The Respondent considers Article 3.1 to require that the Player *"in good faith, due time and in high professional level,* (…) *perform his professional duties"*.

34. The Panel agrees with the Appellant that the disputed payments should be qualified as bonuses. It is clear that the Agreement is supplementary to the contract, and explicitly states that it elaborates only upon certain aspects of it, namely sanctions and bonuses.

35. Moreover, whilst Article 4.1 of the Contract does not contain an exact salary amount, during the Oral Hearing the Parties confirmed that the Manning Table to which Article 4.1 refers does specify the salary owed under the contract. Similarly, Article 1.1 of the Agreement refers

"*to the other salary rate*" to which the Player may be transferred, which suggests that the Player was likely aware of two possible rates that he could receive under the Contract.

36. Further, both Parties interpret Article 3.1 of the Contract to require that the Player *"perform his labor duties (…) in good faith, due time and in high professional level"*. Articles 2.1-2.3 of the Agreement require *"the faithful performance of duties, high sports achievements, professional sports skills, [and] individual contribution to winning sports results of Football club 'Metallurg'"*. Based on the literal wording, Articles 2.1-2.3 seem to establish conditions which go beyond the Player's ordinary contractual duties under the Contract, specifically *"individual contribution to winning sports results"*.

37. For these reasons, the Panel finds that the disputed payments should be qualified as bonuses. It should therefore be determined whether the Club could legitimately withhold payment of these bonuses to the Player.

B. Arguments Relating To Whether The Unpaid Bonuses Should Have Been Paid To The Player

38. The Appellant argues that the Player is not owed the bonus payments, as bonuses are paid *"exceptionally under the competence of any employer"*, and are the *"changeable part of the salary"*. The Club would therefore have the *"right* [to pay bonuses] *but not the obligation"*. The payment of bonuses "*depends on the efforts of the employee*" and therefore is *"encouragement (…) for labor which is high than it is expected (…) high than the average one"*. For further clarification, the Appellant offers *"over-fulfilment of plan, participation in matches, goals etc"*. as instances of *"achievements of high results of labor activity"*.

39. The Appellant also argues that the Player's reduced participation in matches, notably during the 2010/2011 season where the Player *"played just (one)!!!!!!! minute of clear game time"*, is evidence that the Player did not achieve the *"high results and great labor investment"* deserving of a bonus.

40. The Respondent argues that withholding the sums from the Player is illegal. The Respondent considers the payment of bonuses to be conditioned upon satisfaction of the criteria contained in Articles 2.1-2.3 of the Agreement, and, absent evidence showing violations of the Articles 2.1-2.3 of the Agreement or the Contract, the Club lacked grounds for withholding these payments.

41. The Respondent also argues that *"professional sports skills"* and *"individual contribution to FC Metallurg's winning sports results"* as stipulated in Articles 2.1-2.3 of the Agreement are subjective criteria which cannot be the basis of unilateral changes to the terms of remuneration of a contract. It is therefore asserted that the Player's reduced participation in matches cannot justify the retention of these payments, as the Club's decision not to play the Player reflects a subjective assessment of the Player's performance.

42. The Panel holds that the Appellant's arguments fail, and therefore that it had no grounds to reduce the payment of bonuses to the Player. While the criteria in Articles 2.1-2.3 of the Agreement may allow for broad interpretation, the Club has not provided any evidence that the Player failed to meet the criteria for the payments under the Agreement.

43. The Appellant asserts that the Player's reduced participation in matches suffices as evidence of a failure to achieve *"high results"* and a *"great labor investment"*, based upon which the Club claims to have withheld the bonus payments. However, neither the Contract nor the Agreement subjects bonuses to the Player's participation in matches. Article 3.1(5) of the Contract obligates the Player to *"participate in all games by the decision of the Club (…) including games of the main and reserve squad teams"*. The Player's (non-)participation is thus irrelevant certainly to *"great labor investment"*, if it reflects the Club's decision. Also, the Agreement does not specifically require *"high results" and "great labour investment"* when participating in matches – high results could be achieved in other areas of activity under his employment with the Club. Reduced participation in matches thus does not necessarily reflect a failure to achieve high results. This is supported by the Club's reference to *"[no] over-fulfilment of [the] plan, participation in matches, goals etc"*. – as is evident from Article 3.1 of the Contract, there are many elements to "the plan" in which the Player may heavily invest himself.

44. During the Oral Hearing, the Club further explained that the Player had been placed in the second team at the start of the 2010 and 2011 seasons at the recommendation of the coach. Again, however, the Club has not provided any evidence that would suggest that the coach's decision was based upon any of the grounds on which the Club could legitimately withhold bonus payments, *i.e.*, failure to meet the criteria of the Agreement. The Player, for example, believes that his removal from the first team in 2010 was not related to his individual performance or achievements, but the result of the Club's acquisition of two new players for his position, making him redundant.

45. To conclude, since the Club has not provided any evidence that the criteria on the basis of which the Player was entitled to the payments as stipulated in Articles 2.1-2.3 of the Agreement were not met, the Panel confirms the FFU AC's finding that the Club is obliged to pay the Player the disputed sums.

46. Finally, as to the total amount in dispute, the Panel notes that for the month of June 2011, the Player claims a full month's sum of US$ 40,000. However, the Player submitted an abstract of his bank account, which indicates that for the month of June 2011 the Player in fact received US$ 20,000. During the Oral Hearing, both Parties confirmed that the Club had paid 50% of the total sum for each month, and that the dispute only concerned the additional payment. The Panel holds that the Club therefore owes the Player the amount of US$ 130,000 (US$ 17,500 for each of March-June 2010, and US$ 20,000 for each of April-June 2011).

C. Arguments Relating To The Payment Of Compensation

47. According to Article 117 LCU, an employee may be entitled to compensation for the delayed payment of owed sums. The Appellant argues that, in accordance with Article 2 LCU, compensation on the basis of Article 117 LCU would only be payable for sums which are *"obligatory"*. The Panel notes, however, that Article 2 LCU only provides for the *"fundamental labor rights of employees",* and does not deal with compensation. Moreover, as noted by the Respondent, Article 117 LCU provides for compensation over outstanding amounts as specified in Article 116 LCU, which in turn refers to *"all amounts"* owed to an employee. On

this basis, the Panel finds that the Player is entitled to compensation for the delayed bonus payments.

48. Following a request for payment from the Respondent on July 18, 2011, the disputed sums became due on July 19, 2011. Given that the sums were not paid on July 19, 2011, compensation began to accrue from July 20, 2011, as from this date the payments were overdue and thus late. Article 117 LCU states that compensation shall be paid for the entire delay. However, based on the Resolution of the Plenum of the Supreme Court of Ukraine No. 13 dated December 24, 1999, compensation paid on the basis of Article 117 LCU should be paid up until the date of the court decision, excluding the duration during which proceedings are brought. The final date for the purposes of calculating compensation should therefore be August 17, 2011, the date on which the Player filed a letter of statement to the PL DC. Since then, the dispute has been subject to formal proceedings until the date of this Award.

49. The Panel calculates the Player's average earnings for the duration of the delay based upon the 2010/2011 season, during which the Player received US$ 40,000 per month, or approximately US$ 1,315.07 per day. The Panel calculates that the Player is owed compensation for 28 days. Total compensation payable to the Player is therefore US$ 36,821.96.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 4 July 2012 by FC Metallurg is partially upheld.

2. The decision of the Football Federation of Ukraine Appeals Committee dated 8 June 2012 is partially amended.

3. FC Metallurg is ordered to pay to Tkachenko Sergey Viktorovich the amount of US$ 130,000 for outstanding payments under his employment agreements and US$ 36,821.96 in compensation for the delayed payment.

4. (…)

5. (…)

6. All other and further requests for relief are dismissed.