Arbitration CAS 2013/A/3073 FC Kryvbas v. Ervin Bulku, award of 21 October 2013

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football
Contract of employment
Unauthorised leave
Interpretation of the provision of the contract relating to disciplinary sanctions

1. **Absent any documentary evidence produced by either party to support their respective submissions that a player was or was not given permission to leave, it appears on balance unlikely that a club would allow a player to leave two days before a scheduled final match and before further training scheduled too. As such, it can be determined that the player is absent without permission.**

2. **If the drafting of a provision is unclear and leaves itself open to interpretation, priority must be given to a logic and reasonable interpretation of the clause. Therefore, if in the annex to an employment contract the majority of the 16 examples of behaviour that can result in a fine would incur fines of a few hundred US dollars and only 3 behaviours would incur a fine of "100% of salary", the logic and reasonable interpretation of a sanction for unauthorised leave incurring one of these fines of "100% of salary" cannot be 100% of the salary for one month knowing that the player earns a monthly salary of USD 30'000. It can only be meaning 100% of the salary for the days of unauthorised absence.**

1. THE PARTIES

1. FC Kryvbas (hereinafter referred to as the "Club" or as the "Appellant") is a football club with its registered office in Kryvyi, Ukraine. At the commencement of this procedure, it was a member of the Football Federation of Ukraine (hereinafter referred to as the "FFU") and, played in the Ukrainian Premier League.

2. Mr. Ervin Bulku (hereinafter referred to as the "Player" or the "Respondent") is an Albanian professional football player.

2. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and evidence adduced in the present proceedings. Additional facts and allegations

may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 1 July 2009, the Player and the Club entered into an employment contract for the duration of 1 July 2009 to 30 June 2010 (hereinafter referred to as the "Contract").

5. On 14 July 2009, the Contract was registered in the Union of Professional Football Clubs of Ukraine Premier League. Further, on the same date, the Player's annex to the Contract was also registered (hereinafter referred to as the "Annex") which dealt with the financial obligations of the Club and the potential financial sanctions that may be imposed on the Player.

6. The Club scheduled a training camp between 11 and 25 January 2010, in Belek, Turkey.

7. On 11 January 2010, the head of the Club's team, the assistant of the chief coach and the sports physician all sent separate memorandums to the general director of the Club stating that the Player had failed to appear at training at the appointed time on that date and with the latter stating that the Player was absent from his physical examination.

8. On 12 January 2010, the head of the Club's team, the assistant of the chief coach and the sports physician all again sent memorandums to the general director stating that the Player had again failed to report to training and for his physical examination.

9. On the 11 and 12 of January 2010, the head of the Club's team, the administrator of the team and the coach of the team all signed a statement in relation to the Player's absence from training.

10. On 13 January 2010, the Club issued an order to reprimand the Player for failing to attend training on 11 January 2010 (hereinafter referred to as the "First Order"). Further, both two personnel department inspectors of the Club and the head of the team signed a statement stating that the Player had been provided with the First Order but had refused to sign the same.

11. After the training camp, on 25 January 2010, the main coach of the Club sent a memorandum to the general director of the Club stating the Player's performance during the training camp in Turkey for the period of 14 to 25 January had been unsatisfactory. The main coach requested the general director to convene a meeting with the Club's coaching staff, so the general director could discuss the possibility of relegating the Player to the Club's "backup team".

12. On 26 January 2010, the Club's coaches met with the general director. It was decided that the Player should be moved to the backup team from 1 February to 30 April 2010.

13. On 26 January 2010, the Club issued an order to move the Player to the backup team from 1 February to 30 April 2010 with a reduction of salary *"to 20 000 USD in UAH equivalent"* (hereinafter referred to as the "Second Order").

14. On 27 January 2010, the Club's accountant, personnel department inspector and general accountant all signed a statement stating that the Player had refused to sign the Second Order.

15. On 22 April 2010, the Albanian Football Association (hereinafter referred to as the "AFA") wrote to the Club requesting that a number of Albanian players, including the Player, be released on 18 May 2010 to the AFA until 2 June 2010 to enable them to participate in two friendly international matches. The Player and the other Albanian players at the Club asked if they could leave in advance of that date, but as the squad was still training and had a final game on 9 May 2010, the Club verbally refused their request.

16. On 1 May 2010, the Player apparently rejoined the first team of the Club for training.

17. On 5 May 2010, the Club issued an order, entitled "Order No 06", for the chief coach of the Club to announce after the final match on 9 May 2010. The announcement was the date of the next training camp commencing on 10 June 2010 at 2pm.

18. On 7 May 2010, the assistant of the chief coach and head of the team both sent a memorandum to the general director of the Club stating that the Player had *"willfully left the location of the team"* on that date and requested him to take appropriate measures. Further, the sports physician sent a memorandum to the general director stating that the Player was absent from his physical examination on that date.

19. On 8 May 2010, the sports physician again sent a memorandum to the general director stating that the Player was absent from his physical examination on that date. Further, the head of team and assistant of the chief coach both sent a further memorandum to the general director stating that the Player was absent on that date.

20. On 9 May 2010, the chief coach, coach and administrator of the team signed a statement providing that the Player was absent when the details of the June training camp was announced to the team.

21. On 9 May 2010, the sports physician again sent a memorandum to the general director stating that the Player was absent from physical examination on 9 May 2010. Further, the head of team and assistant to the chief coach sent a memorandum to the general director of the Club stating that the Player was absent from both, the final match with FC Zakarpattia, and from the team meeting after the game.

22. On 10 May 2010, the team's chief coach, coach, and administrator all signed a statement in relation to the Player's absence from 7 May 2010.

23. On 10 May 2010, the "team's coaches" met with the general director in relation to the Player's absence from 7 May to 9 May 2010. They discussed possible sanctions to impose on the Player. They decided that the Player should be deprived of his May 2010 salary payment pursuant to the Contract and the Annex.

24. On 11 May 2010, the Club issued an order entitled "Order No 55-k" (hereinafter referred to as the "Third Order") to set the Player's salary for May 2010 as the amount defined by legislation as the living wage for an able-bodied person in connection with the Player's unauthorised departure on 7 May 2010 and his failure to appear at the training between 7 and 9 May 2010.

25. On 10 June 2010, the sports physician sent a memorandum to the general director stating that the Player was absent from his physical examination. Further, the assistant of the chief coach and head of team both sent a memorandum to the general director stating that the Player did not appear at the training base at the scheduled time on that date.

26. On 11 June 2010, the sports physician sent a memorandum to the general director stating that the Player was absent from his physical examination. The head of the team and assistant of the chief coach sent separate memorandums to the general director stating that the Player was absent from the location of the team.

27. On 11 June 2010, the team's coaches met with the general director regarding the absence of the Player and others from the training camp without good reason and possible sanctions to impose upon them. They decided that the Player should be deprived of his June 2010 payment in accordance with the Contract and the Annex.

28. On 12 June 2010, the sports physician sent a memorandum to the general director stating that the Player was absent from his physical examination. Further, the head of team and assistant of the chief coach sent separate memorandums to the general director stating that the Player did not appear at the training base at the scheduled time on that date.

29. On 13 June 2010, the sports physician again sent a memorandum to the general director stating that the Player was absent from his physical examination. The head of team and assistant of the chief coach sent separate memorandums to the general director again stating that the Player did not appear at the training base at the scheduled time on that date.

30. On 14 June 2010, both the two personnel department inspectors and the head of the team signed a statement providing that the Player refused to give a written explanation regarding his failure to appear at the training camp on 10 June 2010.

31. On 14 June 2010, the Club issued an order entitled "Order no 74-k" setting the salary of the Player for June 2010 as the living wage for an able-bodied person in connection with the failure to appear at the training camp on 10 June 2010 (hereinafter referred to as the "Fourth Order").

32. On 17 June 2010, both the two personnel department inspectors and the Club's accountant signed a statement stating that the Player had been provided with the Third Order and the Fourth Order and had refused to sign the same. Further, stated that the Player did not provide any explanation for his absence.

33. On 13 July 2010, after the Contract had ran its course, the Player submitted a claim in front of the FIFA Dispute Resolution Chamber (hereinafter referred to as the "FIFA DRC") requesting the total amount of USD 90,000 in relation to outstanding salaries for February, March, April, May and June 2010.

34. On 27 August 2012, the FIFA DRC considered the matter and on 8 January 2013 issued a full reasoned decision (hereinafter referred to as the "Appealed Decision") in which it determined that:

"1. The claim of the Claimant, Ervin Bulku, is partially accepted.

2. The Respondent, FC Kryvbas Kryvyi Rih, has to pay the amount of USD 64,355 to the Claimant within 30 days as from the date of notification of this decision.

3. If the aforementioned sum is not paid within the above mentioned deadline, interest at the rate of 5% pa will apply as of expiry of the stipulated time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for its consideration and for a formal decision.

4. Any further request filed by the Claimant is rejected.

5. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance is to be made and to notify the DRC Judge of every payment received".

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

35. On 29 January 2013, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as "the CAS"). It challenged the Appealed Decision, submitting the following request for relief:

"1. To cancel the decision of the FIFA DRC of 27.08.2012.

2. To refuse all demands of Mr Bulku as ungrounded and illegal.

3. To award all costs of the procedure before CAS to the Respondent".

36. On 7 February 2013, the Appellant filed its Appeal Brief with the CAS, with the following amended prayers for relief:

"1. To partially cancel the FIFA DRC decision of 27.08.2012 in part, relevant to the awarding to the Player USD 64 355.

2. To consider all Mr Bulku's demands, put forward before FIFA DRC as ill-grounded and illegal, and to reject them all.

3. To award all costs of the procedure before CAS to the Respondent.

4. To request full case file no VHO 10-02657 from FIFA DRC".

37. On 5 March 2013, the Respondent filed his Answer, with the following request for relief:

"We therefore ask the Court of Arbitration for Sport to decide, that FC Kryvbas is obliged to pay to Mr Ervin Bulku the total amount, which has been retained".

38. The Appellant had requested that this matter be joined with another matter that involved an Albanian player (Mr. Bylykbashi). The CAS reference number is 2012/A/2996. This player was

also represented by the same counsel as the Respondent, and the same Sole Arbitrator had been appointed by the CAS. Whilst not formerly joining the two respondents to the same procedure, the CAS Court Office endeavoured to consolidate the organisation of the two matters; including looking for one mutual hearing date and issuing consolidated directions.

39. Despite the Appellant's initial request for a full hearing in this matter, on 25 April 2013, the Appellant requested that the Sole Arbitrator convene a hearing at which neither the Club's officials nor its advisers would be present, and that only the witnesses would be present.

40. On 3 May 2013, the CAS Court Office issued directions seeking the parties' final position on whether a hearing was requested, and if so, suggested 23 or 24 May 2013 as potential hearing dates; then to submit detailed witness statements for any witness they sought to rely upon; and then after the exchange of all witness statements, for the opposing party to state whether it wished to challenge such evidence.

41. On 14 May 2013, the Respondent filed witness statements from two former teammates of the Player: I. and A. Furthermore, he announced that he and Mr Bylykbashi would attend the hearing on 23 or 24 May 2013.

42. Later on 14 May 2013, the Appellant filed witness statements from K., Z., O., D. (all employees of the Club), V., S. and R. (all players at the Club). And also requested the matter be dealt with by written submissions.

43. On 15 May 2013, the CAS Court Office received FIFA's case file and forwarded the same to the parties and to the Sole Arbitrator.

44. On 16 May 2013, the Respondent's attorneys indicated that they too were unable to attend the potential hearing dates, but the Respondent could attend.

45. On 22 May 2013, the Sole Arbitrator suggested that the parties accept each other's witness evidence to the CAS file, including any witness evidence filed in the CAS 2012/A/2996 procedure; be given the opportunity to make final written submissions on the witness evidence of the other party; and the Sole Arbitrator then produce a final award on the basis of such submissions and evidence; without the need for a hearing.

46. On 27 May 2013, the Appellant agreed with the Sole Arbitrator's suggestion. However, the Respondent by its attorneys' letter also dated 27 May 2013, on the one hand agreed with the Sole Arbitrator's suggestions, but on the other hand suggested *"personal hearings of the* [Respondent's] *independent witnesses"*.

47. On 28 May 2013, the CAS Court Office sought clarification from the Respondent, who agreed with some of the Sole Arbitrator's suggestions of 22 May 2013. On 4 June 2013, the Appellant confirmed its agreement with these suggestions.

48. On 11 June 2013, both parties were granted with the opportunity to submit questions to their counter-party's witnesses within a week.

49. On 18 June 2013, the Respondent submitted a copy of his statement that formed part of the FIFA file and requested the Appellant's witnesses comment on the same. The Appellant did not submit any questions for the Respondent's witnesses.

50. By a letter dated 26 June 2013, the CAS Court Office duly requested the Appellant to request its witnesses to comment upon the Respondent's statement.

51. On 9 July 2013, the CAS Court office made a final request because no further communication was received from the Appellant.

52. The CAS Court Office attempted to communicate with the Appellant via fax and by DHL courier, however, the courier reported that the Appellant had been subject to an insolvency procedure and no one would accept the letters or respond any further.

53. On 4 October 2013, the CAS Court Office informed the parties that due to the lack of any further correspondences from the Appellant, the Sole Arbitrator would issue his decision based on the CAS file.

4. THE CONSTITUTION OF THE PANEL AND THE HEARING

54. By letter dated 26 March 2013, the CAS informed the parties that the Panel to hear the appeal had been constituted as follows: Mr. Mark Hovell, Sole Arbitrator. The parties did not raise any objection as to the constitution and composition of the Panel.

55. Article R57 of the Code for Sports-related Arbitration (hereinafter the "CAS Code") provides that the Sole Arbitrator may, after consulting the parties, decide not to hold a hearing if he deems himself sufficiently well informed. The Sole Arbitrator noted that neither of the parties eventually requested a hearing. The Sole Arbitrator determined that, having given the parties the opportunity to file detailed witness evidence, the opportunity to add to their written submissions by the further round of submissions and the fact that the Appellant was now apparently insolvent and no longer taking an active part in the procedure, he was sufficiently well informed to decide the case without holding a hearing.

5 THE PARTIES' SUBMISSIONS

A. Appellant's Submissions

56. The Appellant's submissions, in essence, may be summarised as follows:

57. The Player originally signed a contract with the Club in 2007 and as the Player became an important, integral part of the team, the Club signed the Player on the Contract. Regrettably, the Player perceived this as preferential status and the Player decided that regular training was not important and started to approach the training process without due diligence. The Appellant submitted that the Player had become prone to the "star complex".

58. In January 2010, the Player ignored his direct obligation to be present at a training session in Turkey which was scheduled from 11 until 25 January 2010. The Player arrived at the training camp 2 days late without permission for such delay and without any valid reasons. Under the Ukrainian Labour Code (hereinafter referred to as the "ULC"), any absence from work without good reason for longer than 3 hours constitutes absenteeism, and is sufficient grounds for unilateral termination of a contract by an employer. Further, in accordance with the Annex to the Contract, such a violation constituted a ground for the depravation of 100% of the Player's salary. However, the Club did not implement these harsh measures at that stage, and instead reprimanded the Player with the First Order.

59. The Player's negative attitude towards his obligations continued which had an adverse effect on the team and deteriorated the level of discipline required by the new coach.

60. During the training camp in Turkey, from 14 to 25 January 2010, the coaches noticed that the Player began to sabotage the training process by ignoring their instructions. The Player's attitude became detrimental for the functioning of the team and training process. Therefore, a meeting was held in relation to the Player's conduct and it was decided to transfer the Player to the backup team from 1 February until 30 April 2010. The Player was given the Second Order, but he refused to sign the acknowledgement. Whilst in the backup team the Player performed his duties and received a salary equivalent to 20,000 USD in Ukrainian Gryvnia. The Player did not object to this transfer or reduction in pay.

61. When the AFF requested the release of the Player for international duty, the Player asked the Club to release him early together with other Albanian Players. The Club unambiguously refused the Player's request. The Player left the training base at his own discretion and did not show up for training from the 7 May 2010 onwards. Therefore, pursuant to the Third Order, a financial disciplinary sanction was applied in accordance with the Contract in the form of the depravation of the Player's salary for May 2010.

62. In June 2010, the training commenced and the Player was 4 days late. Therefore, pursuant to the Fourth Order, a further financial disciplinary sanction was applied in accordance with the Contract in the form of the depravation of the Player's salary for June 2010.

63. The FIFA DRC failed to apply the binding provisions of the Contract to the merits of the case and misinterpreted the essence of the sanction. The Appealed Decision was also manifestly ill grounded.

64. In accordance with the clause 6.2 of the Annex, which is subject to Ukrainian National Labour legislation, provided a sanction of 100% depravation of the monthly salary for a breach such as "not showing up for the training camp gathering without warning and good reason". In accordance with the Annex absenteeism was regarded as one of the most serious contractual breaches that can be committed by the Player. By signing the Contract and the Annex to it, the Player was a party to the Contract and submitted himself by his own will to the above sanctions. In the Appealed Decision, the Judge misapplied the Annex by withholding the salary for the days in which the Player was absent.

65. The parties to the Contract had the uniform understanding that the Annex should be interpreted as such, and that the Annex clearly provided for a fine of 100% of the monthly salary for such contractual breach as absenteeism. It was the parties' mutual understanding that such provision was fair, reasonable and binding. Thus, the parties had a one and the same understanding of the relevant clause of the Annex to the Contract; willingly bound themselves with it, and never contested it. Therefore, the approach in the Appealed Decision based on "rethinking" of what this clause or the Annex should have meant, violates the principle of contractual freedom. In accordance with the Contract, the relevant clauses unambiguously defined the remuneration to be a monthly salary. Therefore the accurate interpretation of the very clear and relevant provisions of the Contract and the Annex to it, can not be interpreted as a daily payments.

66. Further, if a Player without good reason fails to train for a number of days within a month, then, due to his non-participation in the preparation for the matches, the Player will be unable to participate in the games due to the lack of training and preparation. The essence of contractual relationships with players in football makes training and medical discipline of players a paramount importance. Therefore, applying harsh sanctions for voluntary absences, without a good reason, from training is inherent in the nature of such relationships, and therefore justified. In accordance with the Annex, 100% salary depravation was provided for serious breaches, which deal with the training and medical discipline.

67. Further, it must be acknowledged that the Club could have terminated the Contract for the first breach, however the Club decided to reprimand the Player instead. In accordance with the ULC, it is clear that the Player was absent without a good reason for more than 3 hours, and therefore the Club could have terminated the Contract. As the Club could have unilaterally terminated the contract, the depravation of 100% of the Players salary cannot be considered unreasonable or disproportionate.

68. The Appealed Decision misinterpreted the facts in that the reduction in salary for the Player when he participated in the backup team was due to the Player's behaviour, i.e. his lack of devotion and to unfulfillment of his obligations, and not to his talent or lack of it. The Player's salary reduction was based on the breach of the Player's professional duties in accordance with the Contract and the Club, pursuant to Article 112 of ULC was further entitled to make such reduction.

69. The Player was not treated with any kind of unfairness and it must be noted that the concept of fair treatment must be bilateral. Also the reduction of the Player's contractual remuneration was not arbitrary.

70. Further, the Player complied with the Second Order in relation to his transfer to the backup team; thus de facto expressing his consent with its contents.

71. The Appellant submitted statements provided by the following witnesses: O. (to confirm the dates the Player left in January and May 2010); D. (to confirm the dates the Player was present and absent during the training camps in January, May and June 2010 and that the Player could communicate without the need for an interpreter); a joint statement by the players V., S. and R. (also to confirm the dates the Player was present and absent during January, May and June

2010 and his conduct during training); K. (to confirm that all the Orders were properly prepared in accordance with Ukrainian law); and Z. (to confirm the dates the Player was present and absent during January, May and June 2010 and the Club's decisions regarding the Orders).

B. Respondent's Submissions

72. In summary, the Respondent submitted the following in response:

73. The Player never "broke" the Contract with the Club and the correct decision of FIFA should have been to commit the Club to pay the total sum of USD 90,000. The Club wanted to get rid of him once their new coach was appointed.

74. The Player never missed a single practice session, training camp or physical examination without the Club's permission. The Player does not deny that he was absent on the dates as stated by the Club but states that all the absences were with the consent of the Club. Whilst the Player could not speak Ukrainian and the Club could not speak Albanian, they communicated in broken English.

75. With regards to the January 2010 training camp, the Albanian players had all been allowed a short holiday before joining the other players. He arrived at the training camp on the agreed upon date.

76. The new coach didn't want him, so the Appellant dropped him to the reserve team. The Player still behaved like a professional, and fulfilled his part of the Contract.

77. The Player was allowed to leave for international duty on 7 May 2010. No one had informed him when the next training camp started. However, other reserve team members informed him that it was on 16 June 2010. So he returned on 15 June 2010. The Club presented him with the Fourth Order stating that he should have been present on 10 June 2010, but he refused to accept it, as he hadn't been informed as such.

78. The Player did not commit any misconduct and therefore his salary not be deducted. But even if the Player's salary should be reduced, then the Appealed Decision is correct in that the reduction should only be for the days that the Player did not attend training and not for the full month.

79. The Respondent submitted statements of I. and A. (to confirm that the Player fulfilled his contractual duties and that his absence in May and June was with permission).

6. JURISDICTION OF THE CAS

80. Article R47 of the CAS Code provides as follows:

"An appeal against a 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 if the parties have concluded a specific

arbitration agreement and if the Appellant had exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes of regulations of that body".

81. The jurisdiction of the CAS, which is not disputed between the parties, derives from Article 62 and 63 of the FIFA Statutes as well as Article R47 of the CAS Code.

82. Under Article R57 of the CAS Code, the Sole Arbitrator has the full power to review the facts and the law and may issue a new decision, de novo, superseding entirely or partially, the appealed decision.

7. APPLICABLE LAW

83. Article R58 of the CAS Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

84. Moreover, Article 62 paragraph 2 of the FIFA Statutes provides that the:

"Provisions of the CAS Code of the sport related arbitration shall apply to the proceedings. The CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

85. The "Federation" in the sense of Article R58 of the CAS Code is domiciled in Switzerland; a fact that also requires that Swiss law be applicable.

86. In the present matter, the parties did not agree on the application of any particular law in their recent submissions. The Sole Arbitrator noted that the Appellant referred to Ukrainian legislation (the ULC) and referred to Ukrainian case law. The Respondent was silent as to the applicable law.

87. The Sole Arbitrator ruled that as the decision being appealed to the CAS was the Appealed Decision, the Appeal is subject to the primary application of the FIFA Regulations, but that Swiss law should also apply subsidiarily. The Sole Arbitrator also noted that the original issue at hand is whether the conduct of the Player in the circumstances warranted the deduction of his salary which must also be viewed in accordance with the law applying to the Contract (clause 6.1 of the Contract provides that "parties are liable for non-fulfilment or inadequate fulfilment of their obligations under this Contract in accordance with applicable legislation or the Ukraine"), as such Ukrainian law should be applicable to that particular issue.

8. ADMISSIBILITY

88. The Appealed Decision, dated 27 August 2012, was notified to the parties on 8 January 2013 by fax. Therefore, pursuant to Article 63 paragraph 1 of the FIFA Statutes, the Appellant had 21 days from receipt of notification of the decision to appeal to the CAS.

89. The Appellant duly submitted its Statement of Appeal on 29 January 2013, which was within the stipulated deadline and therefore the appeal is admissible. The Appellant complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

90. The Sole Arbitrator notes that the prayer for relief from the Respondent was that no sums should have been deducted by the Club whatsoever. The Sole Arbitrator determines that this counterclaim contained within the Answer is inadmissible. As pursuant to Article R55 of the CAS Code, counterclaims are not possible in appeals procedures. If the Respondent wished to challenge the Appealed Decision, he should have done so by his own appeal against the Appealed Decision brought within the stipulated deadline.

9. MERITS OF THE APPEAL

91. In these present proceedings, the Sole Arbitrator had to determine the following:

a. Was the Club able to reduce the Player's salary when the Player was demoted to the Club's backup team, or not?

b. Was the Player absent from training from 7 to 9 May 2010 without the Club's consent and without a valid reason? If so, was the Club able to withhold his full monthly salary?

c. Was the Player absent from training from 10 to 13 June 2010 without consent and without a valid reason? If so, was the Club able to withhold his full monthly salary?

a. Salary reduction

92. The Sole Arbitrator notes that the Appellant has apparently become insolvent and, as such, the witness evidence produced by the parties cannot be further examined. Whilst the Appellant at one stage requested a hearing, as the procedure progressed, the Appellant withdrew that request, presumably to keep legal costs and expenses to a minimum. Unfortunately, that leaves the position where the Club says one thing and the Player denies it. Both sides have put forward evidence from officials and/or other players to support their positions. It is difficult, therefore to place much weight on any of the witness statements – to an extent, one side's witness evidence cancels out the other side's. That noted, the burden of proof is for the party making any assertions.

93. In this matter, the Appellant has asserted that it was within its contractual rights to reduce the salary of the Player for the months of February, March and April 2010 by a total of USD 30,000.

FIFA, in the Appealed Decision, and the Player both disagreed. The Appellant submitted that the Player's behaviour at the January 2010 training camp was sufficiently poor and unprofessional to warrant him being dropped to the reserve team and his salary reduced accordingly. The Player argued the true reasons were that the new coach didn't want to play him anymore as he was too expensive.

94. The starting point for the Sole Arbitrator is to analyze whether the Club had a contractual right to reduce the Player's salary as provided for in the contract or the Annex. He must do so before deciding whether there were sufficient grounds in this case and whether all proper procedures had been followed by the Club.

95. Under the terms of the Contract, the Player *"…accepts the Statutes and other normative acts of the Club…"* (article 2.3) and the Appellant submits that article 9.3.3 of the Club's statutes state that the *"General Director of the Company has the following powers:…payment of wages of the Company employees"*, which allows him to reduce the salary of a player at his discretion.

96. The Contract also clearly directs the parties to the Annex; this is where the salary is set out. The Club can reduce this salary by applying financial sanctions (article 4.2) in certain circumstances, but otherwise any variation of the Contract, including provisions relating to salary, require *"…mutual agreement of the Parties…"* (article 5.2), unless the Club wished to increase his salary (article 4.3).

97. In this case, it does not appear that any disciplinary procedures were followed by the Club. It instead relied upon an apparent discretionary power of the General Director to reduce employee's salary contained in the Club's Statutes. The terms of the Contract are clear; the Club has to pay the Player his monthly salary; even if it decides to drop him to the reserve team, and the salary can only be varied with the Player's consent.

98. The Appellant also referred to its statutory right, pursuant to Article 112 of the ULC to reduce the Respondent's salary. The Sole Arbitrator notes above the conflicting position of the parties' witnesses. The Appellant's witnesses stated the Player's behaviour resulted in this reduction. The Respondent stated he did nothing wrong. The Sole Arbitrator notes that this appears to be a secondary argument to justify the exercise of the General Director's discretionary power. The Order of 26 January 2013 issuing the reduction in salary does not refer to the ULC at all (whereas previous Orders, such as the one on 13 January 2013, which were pursuant to the ULC, expressly mention the ULC in the Order). The Sole Arbitrator notes there was no evidence advanced by the Appellant that it was exercising a statutory power to reduce the Player's salary. It therefore appears to the Sole Arbitrator that the reliance on the ULC was after the reduction was issued. The Sole Arbitrator determines that the sanction was actually issued pursuant to the rights the Appellant believed it had pursuant to the Club's Statutes, not pursuant to any rights the Appellant may or may not have been able to exercise pursuant to the ULC, a matter the Sole Arbitrator can leave as moot, in the case in hand.

99. The Appellant claimed the Player consented to the reduction, by not objecting at the time. However, the Player did complain in July 2010 when he raised his claim with FIFA. The Sole Arbitrator is satisfied that the Player has maintained a right to a claim and cannot be said to

have somehow waived his rights or that he has accepted the reduction. In the opinion of the Sole Arbitrator, "mutual agreement" requires more than one party apparently remaining silent for a few months.

100. The Sole Arbitrator agrees with the Appealed Decision, in that the Appellant had no right to reduce the Player's salary for the months of February, March and April 2010.

b. May's salary deduction

101. The Sole Arbitrator again notes the different stances of the parties. It is not disputed that the Player left on 7 May 2010 to join his national team. The Appellant says it expressly denied his request to leave at that time, instead said that he was required for the last match for the Club on 9 May 2010. The Player said he had permission, but did not say from whom.

102. By not appealing the Appealed Decision, the Respondent is not able to counterclaim and request his entire month's money, nor challenge the DRC Judge's finding that he was absent without permission.

103. The Appellant submits that the absence was unauthorised and as such, it applied the disciplinary sanctions within the Contract to fine the Player. In that much, the Appellant agreed with the DRC Judge. The Annex lists a number of disciplinary violations, the first two of which are:

"1. Arrival for the training camp in delay more than 15 min. without warning and reason – USD 100

2. No showing up at all for the training camp gathering without warning and good reason – 100% of salary".

104. The Appellant submitted that as the Player did not show up for the training on 7 to 9 May 2010, then the Appellant was justified to fine the Player 100% of his entire May salary, which it duly did. The Sole Arbitrator noted that the DRC Judge, in the Appealed Decision, determined that the Player wasn't due to join his national team mates until 18 May 2010 and as such had left 11 days prior to the date the Club was bound to release him and allowed the Club to deduct 11 days' pay from his May 2010 monthly salary. The Sole Arbitrator notes that neither party has produced any independent evidence to support their respective submissions that the Player was or was not given permission to leave on 7 May 2010. On balance, the Sole Arbitrator finds it unlikely that the Appellant would allow the Player to leave on 7 May 2010, when there was a final match to be played on 9 May 2010, when the Player had rejoined the First Team and there was further training scheduled too. As such, the Sole Arbitrator agrees with the DRC Judge and determines the Player was absent without permission for 11 days in May 2010.

105. The issue at stake is whether "100% of salary" is to be interpreted as, at one extreme, all of his salary under the Contract, or perhaps all his monies for a month, or perhaps all his monies for the days he was absent, or perhaps it's a maximum, so up to 100%? The drafting is unclear and leaves itself open to interpretation.

106. The Appellant submitted that under ULC, it would have been justified in dismissing the Player, as he was more than 3 hours late, so a fine of 100% of the month's salary was more reasonable.

The Appellant also pointed out that most fines were in terms of a few hundred US dollars, but behaviour such as missing training or being drunk would be serious enough to warrant a fine of a full month's salary.

107. The Sole Arbitrator noted the majority of the 16 examples of behaviour that could result in a fine would incur fines of a few hundred US dollars and only 3 examples fell into the "100% of salary" bracket. If it was intended to be a full month's salary, then it would have been easy enough to have included that wording. Further, the Player was earning USD 30,000 a month – as such, the Appellant's interpretation would result in most fines being in the region of USD 300, a few other examples of bad behaviour receiving a fine in the region of USD 500, one further example receiving a fine of USD 1,000, but then the next three examples of behaviours resulting in a fine of USD 30,000. That seemed quite a "jump" to the Sole Arbitrator when the difference in the behaviours was perhaps worse, but not necessarily 30 times worse. Whilst the Appellant argued that not all players earned as much as the Respondent, so their "jump" might not be as marked, the Sole Arbitrator notes no other player contracts were submitted and further that he is dealing solely with the Respondent and his Contract and its Annex, where the increase between the sanction compared to increased behaviour seems quite marked.

108. The DRC Judge interpreted the "100% of salary" as meaning 100% of the days of unauthorised absence. The Sole Arbitrator notes the logic behind such interpretation and determines that is a perfectly reasonable interpretation of the clause and one that he chooses to follow.

c. June's salary deduction

109. Whilst from the facts set out by the Appellant, it appears the Player was absent when the details for the June 2010 training was given out, which was during a period of unauthorised absence in May 2010. The Player has not appealed the Appealed Decision and within that the DRC Judge determined that he was absent without permission in June 2010 too. Further, the Sole Arbitrator determines that if a Player is absent without leave and issues the dates of the next training, he bears the responsibility to contact the Club to find out when he should be back in training. Here, the Player relied upon other players to find out the date and ends up with the wrong date and must assume the responsibility for this.

110. With that finding, the same issue arises again – could the Appellant fine the Player 100% of his June wages or should it have been limited to 100% of the wages on those days in June 2010 he was absent without permission? For the reasons set out above, the Sole Arbitrator agrees with the DRC Judge's approach in the Appealed Decision.

Conclusion

111. The Sole Arbitrator concurs with the DRC Judge and the Appellant's appeal is dismissed and the Appealed Decision is upheld entirely.

112. All further prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by FC Kryvbas on 29 January 2013 against the decision of the FIFA Dispute Resolution Chamber dated 27 August 2012 is dismissed and the said decision of the FIFA Dispute Resolution Chamber is upheld.

2. (…).

3. (…).

4. All further prayers for relief are hereby dismissed.