Arbitration CAS 2013/A/3261 FC Aris Limassol v. Jiří Mašek, award of 27 August 2014

Panel: Prof. Petros Mavroidis (Greece), President; Mr Michele Bernasconi (Switzerland); Mr Goetz Eilers (Germany)

Football
Termination of a contract of employment without just cause by the club
Validity of a contract of employment under Article 18 par. 4 RSTP
Mandatory character of Article 18 par. 4 RSTP
Unsuccessful medical test and right of the employer to rescind from the contract
Termination of the employment agreement based on a just cause
Serious breach leading to the immediate termination of a contract of employment
Refusal to train and burden of proof for the establishment of "just cause"
Calculation of the compensation for the unjustified termination of a valid contract

1. **Pursuant to article 18 par. 4 of the FIFA Regulations on the Status and Transfer of Players (RSTP), the validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit. The player's prospective club is therefore required to undertake all necessary research and to take all appropriate steps before concluding a contract. Once a contract has been signed, all parties involved can rely in good faith on it being respected and enforced. If the club does not use this diligence when signing a player, it cannot claim afterwards that the failure to fulfil a contract was based on (existing or presumed) injuries or the fact that the player has not received a work permit.**

2. **Article 18 par. 4 RSTP deals with "contracts", hence, with agreements, which, by definition, have a lawful object, and are entered into voluntarily by two or more parties. Article 18 par. 4 RSTP is a mandatory rule, regulating the content of any labour contract, regardless of the circumstances under which it was entered into. In accordance with the FIFA rules, any clause of an employment contract that derogates from article 18 par. 4 RSTP is not enforceable.**

3. **The unsuccessful medical test can legitimate the employer to rescind from the contract if the player's medical status is so essential to the employment relationship that it cannot be expected from the employer to execute the contract and is clear that if it had known about it before signing the employment agreement it would have never signed it. Such rescission would be subject to the establishment by the new club of all factual elements required by the applicable law. This is not the case if the employer was fully aware of the medical condition of the player, who did not act in bad faith and did not hide any relevant medical information to his future employer.**

4. **Fixed-term contracts cannot come to an end before the expiration of the agreed period**

unless there is a just cause for termination of the employment relationship or if the employer becomes insolvent. The unilateral and early termination of the contract with just cause is an exceptional measure and must be restrictively admitted. In the presence of a just cause, the employer or the employee may at any time terminate with immediate effect the contract. According to Swiss case law, whether there is "just cause" for termination of a contract depends on the overall circumstances of the case. The FIFA Commentary to the RSTP is on the same line of reasoning.

5. **The event that leads to the immediate termination must so significantly shatter the trust between the parties that a reasonable person could not be expected to continue to work with the other party who is responsible for the just cause. Only a serious breach of his obligations under the employment agreement by the employee can justify the immediate termination of the contract. In this respect, if the club was fully aware of the player's medical condition when it signed the employment agreement, the fact that the player did not recover as fast as anticipated (or as hoped) cannot constitute a breach – and even less a serious breach – of the contract on the part of the player. In other words, there was no fundamental change of circumstances in the employment relationship justifying an exception to the general rule of *pacta sunt servanda*.**

6. **If an employee, without a valid reason, does not appear at the work place, or if he leaves it without notice, the employer has a just cause to terminate with immediate effect the contract. There is an unjustified non-appearance at or leaving of the working place when the employee is absent for several days and the employer can reasonably assume that it is not in the employee's intention to return and that his decision is final. This is particularly true if the employee is summoned to return to work or to justify his non-appearance (for instance by means of a medical certificate) and does not comply or is unable to provide a just cause. If the employee's attitude is equivocal, the employer must issue a formal notice, inviting him to carry out his work. The burden of proof lies upon the employer to show just cause.**

7. **Regarding the compensation for the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"). Hence, it will aim at determining an amount, which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur.**

I. PARTIES

1. FC Aris Limassol (the "Appellant" or the "Club") is a football club with its registered office in Limassol, Cyprus. It is a member of the Cyprus Football Association, itself affiliated to the Fédération Internationale de Football Association ("FIFA") since 1948.

2. Mr Jiří Mašek ("the Player") is a professional football player. He was born on 5 October 1978 and is of Czech nationality.

II. FACTUAL BACKGROUND

II.1 Background facts

3. The elements set out below are a summary of relevant facts emerging from the Parties' written pleadings. The summary comprises all claims and arguments in support, but not every contention put forward by the Parties. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its award only to the submissions and evidence it considers necessary to explain its reasoning pertaining to the assessment of the jurisdiction of the CAS.

II.2 The contracts signed between the Parties

4. On 2 June 2010, the Player underwent surgery on the left Achilles tendon.

5. On 22 June 2010, the Player signed an employment contract (the "Employment Agreement") with the Appellant. The main characteristics of the Employment Agreement can be summarised as follows:

   - It is a fix-term agreement for two years, effective from 22 June 2010 until 30 may 2012.
   - The Appellant committed itself to pay to the Player a yearly gross salary of EUR 20,000 for the 2010-2011 season, and of EUR 25,000 for the 2011-2012 season.
   - Its article 3 states the following: *"The Employee hereby acknowledges, agrees and understands that he will pass all the medical examinations and tests as per the request of the Employer and in case the report of any of the said examinations and/or tests provide that the Employee cannot offer his serviæs then the Employer shall have the right to cancel the said Agreement without any consequences and the Employee shall be obliged to refund immediately to the Employer any amounts already received. However the above football player has done surgery intervention into the Ache lion tendon of his left leg and due to the fact that he has not recuperated yet, the above parties agreed that if the football player will not be ready until 20/08/2010, after an examination of the above football club doctor, then the employer has the right to terminate this agreement and the football player will not be able to claim any damages".*

6. The same day, the Parties also signed a *"Supplementary Agreement"*, whereby the Appellant agreed to pay the following additional amounts to the Player:

   - For the season 2010-2011, EUR 30,000, payable in the amount of EUR 2,000 upon the signing of the *"Supplementary Agreement"* and, then, in monthly instalments of EUR 2,800.
   - For the season 2011-2012, EUR 35,000, payable in monthly instalments of EUR 3,500, the first time on 31 August 2011.

II.3. The Appellant's termination of the Employment Agreement with the Player

7. On 17 August 2010, the Player underwent a medical examination conducted by the Appellant's doctor. The Parties' positions differ significantly in regard to the doctor's findings:

   - On the one hand, the Appellant claims that the medical doctor came to the conclusion that the Player had not fully recovered from his surgery, and was therefore unable to play. In support of its position, the Appellant filed an undated *"Medical Statement"*, signed by the medical doctor, Dr Philippos Simillides. According to this document, on 17 August 2010, Dr Simillides told the Player that *"he needs more than 3 months in order to be able to participate in training. So he was not able to begin with the rest of the team in the preparation period.* (…) *the player was not ready and was not totally cured in respect the Achilles operation of his left leg"*.
   - On the other hand, the Player contends that *"the doctor confirmed to [him] that he is in good health condition"*. His assertion is corroborated by a medical certificate, established on 27 August 2010 by Dr M. Sinkule, from the Na Františku Hospital, in Prague. According to this document, the Player was *"fit to resume full sport activities"*.

8. On 19 August 2010, the Appellant notified in writing the Player of the fact that it was putting an end to their contractual relationship with immediate effect. The Club explained its decision in the following terms:

   > *"The Administrative Council of our Club decided to inform you in writing, due to the fact that you have not recuperated yet and/or you are not ready to participate with the team, regarding your injury onto Ache lion tendon of your left leg, after a medical examination by the doctor of the team, decided that under the paragraph 3 of your employment agreement, dated 22/06/2010 we proceed to terminate our agreement and we wish you good luck during your career.*
   >
   > *However you have to know that the Club considered your absence from the preparation of the team to the Austria and also your absenteeism from the training of the B team when the A team was to Austria for preparation"*.

9. On 20 August 2010, the Player's attorney wrote to the Appellant and drew its attention to the fact that the termination of the Employment Agreement was unjustified. In this regard, he submitted that, on 17 August 2010, the Club's doctor found that the Player was in *"good health condition, ready to play football. Moreover, in last days [the Player] actively participated in the training proœss of the [Club]"*. He further contended that article 3 of the Employment Agreement was in breach of the applicable FIFA Regulations according to which clubs cannot submit the validity of a labour contract to the positive results of a medical examination. Finally, he claimed that the Player complied with the Club's instruction pertaining to his training. Under these circumstances, the Player's attorney invited the Appellant to reconsider its position as regards the termination of the Employment Agreement.

10. Eventually, the Player looked for another employer and signed an employment agreement with the Czech football club FK Viktoria Žižkov, valid from 1 September 2010 until 31 August 2011. He played in an official match with his new team for the first time on 12 September 2010. According to documentation on file, the Player's monthly wages amounted to CZK 35,000 (corresponding approximately to EUR 1,300 at the current exchange rate).

11. On 1 July 2011, the Player signed a contract with the German club, FC Lokomotive Leipzig and received a monthly remuneration of EUR 250.

II.4 Proceedings before the FIFA Dispute Resolution Chamber

12. On 18 July 2011, the Player initiated proceedings with the FIFA Dispute Resolution Chamber (the "DRC") to order the Appellant to pay in his favour an amount of EUR 108,000 as compensation for the unilateral termination of the Employment Agreement without just cause. The details of the claimed amount are the following:

Employment Agreement:		
Yearly salary for the 2010-2011 season		EUR 20,000
"Supplementary Agreement" for the 2010-2011 season		EUR 30,000
Amount received upon the signature of the *"Supplementary agreement"*	./.	EUR 2,000
Employment Agreement:		
Yearly salary for the 2011-2012 season		EUR 25,000
"Supplementary Agreement" for the 2011-2012 season		EUR 35,000
Total		**EUR 108,000**

13. In a decision dated 16 November 2012, the DRC dismissed the Club's argument, according to which, on the basis of article 3 of the Employment Agreement, it was entitled to terminate the contract, since the Player did not overcome his injury within the agreed deadline. The DRC found that this provision was invalid because it was in breach of article 18 par. 4 of the applicable FIFA Regulations on the Status and Transfer of Players. Pursuant to this provision, clubs cannot submit the validity of an employment contract to the positive results of a medical examination.

14. Based on the foregoing, the DRC held that the Appellant unilaterally terminated its Employment Agreement with the Player without just cause. It decided that the Appellant had to pay to the Player the amount of EUR 70,000 as compensation. This amount corresponded to the salaries that the Appellant failed to pay to the Player, reduced namely by the remuneration he received under his new employment contracts. In this regard, the DRC *"noted that the [Player] had entered into an employment agreement with the Czech football club FK Viktoria Zizkov valid from 1 September 2010 until 31 August 2011, where he was entitled to receive, inter alia, a monthly remuneration of CZK 35,000. The [DRC] also noted that the player signed an employment contract with the German club, FC Lokomotive Leipzig, on 1 July 2011, establishing a monthly remuneration of EUR 250 and compensation for travel expenses at a rate of EUR 0,30/km. Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the Respondent must pay the amount of EUR 70,000 to the Claimant as compensation for breach of contract".*

15. As a result, on 16 November 2012, the DRC decided the following:

> *"1. The claim of the Claimant, Jiri Masek, is partially accepted.*
>
> *2. The Respondent, Club Aris Limassol F.C., has to pay to the Claimant the amount of EUR 70,000 within 30 days as from the date of notification of this decision.*
>
> *3. In the event that the aforementioned amount is not paid within the stated time limit, interest at the rate of 5% p.a. will apply as of the expiry of the stipulated time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for its consideration and 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 Dispute Resolution Chamber of every payment received".*

16. On 2 July 2013, the Parties were notified of the decision issued by the DRC (the "Appealed Decision").

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

III. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 19 July 2013, the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), in accordance with Article R48 of the Code of Sports-related Arbitration (the "Code").

19. On 24 July 2013, the CAS Court Office acknowledged receipt of the Appellant's Statement of Appeal, of its payment of the CAS Court Office fee and took note of its nomination of Mr Chris Georghiades as arbitrator.

20. On 30 July 2013, FIFA confirmed to the CAS Court Office that it renounced its right to request to intervene in the present arbitration proceedings.

21. On 1 August 2013, the Appellant lodged its Appeal Brief, in accordance with Article R51 of the Code.

22. On 5 August 2013, the Player confirmed to the CAS Court Office that it nominated Mr Goetz Eilers as arbitrator.

23. On 28 August 2013, the CAS Court Office acknowledged receipt of the Player's Answer filed on 26 August 2013 in accordance with Article R55 of the Code. It also informed the Parties that Mr Chris Georghiades had declined his nomination as arbitrator in the present procedure. The Appellant nominated Mr Michele A. R. Bernasconi to replace Mr Georghiades, as arbitrator.

24. By letters dated 4 September 2013, the Parties confirmed to the CAS Court Office that they agreed to waive a hearing.

25. On 5 December 2013, the CAS Court Office informed the Parties that the Panel to hear the case had been constituted as follows: Prof. Petros C. Mavroidis, President of the Panel, Mr Michele A. R. Bernasconi and Mr Goetz Eilers, arbitrators.

26. On 30 January 2014, the Appellant informed the CAS Court Office that, contrary to its statement of 4 September 2013, it applied for a hearing to be held.

27. On 6 February 2014 and on behalf of the Panel, the Appellant was granted a 15-day deadline to explain the reasons why it changed its mind and was calling for a hearing to be held. In response and on 20 February 2014, the Appellant explained that it deemed useful for the Panel to hear the witness statements of Dr Philippos Simillides as well as of the persons who *"were present at the meeting with the player where it was agreed by both parties that in case the player is not ready from his injury then the contract of employment would be mutually terminated"*.

28. On 22 January and on 20 February 2014, the Player and the Appellant respectively sent to the CAS Court Office a duly signed copy of the Order of Procedure. According to article 9 of this document *"By signature of the present Order, the parties confirm their agreement that the Panel may decide this matter based on the parties' written submissions. The parties confirm that their right to be heard has been respected. Pursuant to Article R57 of the Code, the Panel considers itself to be sufficiently well informed to decide this matter without the need to hold a hearing"*.

29. On 25 March 2014, the parties were informed that the Panel, in accordance with Article R57 par. 4 of the Code, deemed itself sufficiently well informed to issue an award based on the parties written submissions without holding a hearing.

IV. SUBMISSIONS OF THE PARTIES

(i) The Appeal

30. The Appellant submitted the following requests for relief:

> *"For all the above reasons, the Appellant kindly requests that the decision of the Dispute Resolution Chamber is overruled"*.

31. The Appellant's submissions, in essence, may be summarized as follows:

- The Appellant was entitled to terminate the employment relationship with the Player as the requirements of article 3 of the labour agreement were met. This provision is valid and is not in breach of article 18 par. 4 of the applicable FIFA Regulations on the Status and Transfer of Players.

- In view of the specific circumstances of the case, of the fact that the Player underwent surgery shortly before the signature of the Employment Agreement, the Parties made an

informed choice about the terms of the said article 3, which was mutually agreed upon by both, the Appellant as well as the Player. There is *"a common intention by the parties to include the clause 3 in the contract of employment. This provided firstly by the fact that when the [Player] signed the contract with the Appellant, he knew the seriousness of his injury as well as the risk of having a relapse. On the other hand, the Appellant would not intent to create an employment relationship with the [Player], knowing that the [Player] had not overcome his injury"*.

- The DRC was wrong when it held that article 3 gives rise to an *"unacceptable unbalance employment relationship"* as it creates a unilateral option allowing the Appellant to terminate the Employment Agreement. It was the common intention of the Parties to provide only one of them with the right to choose to continue or not the employment relationship and such a clause is therefore not objectionable. Rendering article 3 unenforceable would be an unacceptable interference with the principle of party autonomy.

- The Player *"took advantage of the Appellant's confidence, aiming to provide an erroneous situation in order to claim unreasonable compensation, presenting that he was the injured party"*.

- The fact that the Player was unable to play also constitutes a just cause to terminate the Employment Agreement under the terms of article 337 par. 2 of the Swiss Code of Obligations. As a matter of fact and in view of the Player's health condition, the Appellant could not be expected, in good faith, to continue the employment relationship with the Player. *"The parties were not expected to continue their contractual relationship since the [Player] had not overcome his injury before a specific deadline which it was known to the parties before"*.

- The Player never attended *"the training of the B team during the A team was abroad as he was instructed by the Appellant. In light of this fact, Appellant believes that it constitutes a good reason for terminate the contractual relationship between them since the [Player] had acted contrary to his obligation and to the instructions of his employer and his coach"*.

(ii) The Answer

32. The Player filed an answer, with the following requests for relief:

> *"The Respondent would like to ask the [CAS] to adopt the following award:*
>
> *The Appeal filed by the Appellant against the [Appealed Decision] is rejected.*
>
> *The [Appealed Decision] is confirmed.*
>
> *The Appellant shall bear all the arbitration costs"*.

33. The Player's submissions may, in essence, be summarized as follows:

- The Appellant did not have a just cause to terminate its employment relationship with the Player.

- According to the applicable FIFA Regulations, the *"validity of the employment contract between the football club and the player may not be made subject to a successful medical examination"*. The fact that the Parties to the contract agreed otherwise is irrelevant and cannot be opposed to the Player.

- According to the well-established jurisprudence of the DRC and of the CAS, the injury of a player does not constitute a just cause to terminate an employment contract.

- The Player *"also contests the Appellant's opinion on his health condition. The [Player] actively participated in the training process of the Appellant's football team at that time. The Respondent absolved the medical examination by the Appellant's club doctor on 17 August 2010. The result was that the doctor confirmed to the [Player] that he is in good health condition. The [Player] was in perfect health condition, ready to actively play the professional football and to participate in professional football matches"*. In this regard, the Player underlines that he played his first professional match on 12 September 2010 with the team of his new employer, FK Viktoria Žižkov.

V. APPLICABLE LAW

34. Article R58 of the Code of Sports-related Arbitration (the "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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

35. Pursuant to article 66 par. 2 of the FIFA Statutes, *"[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*.

36. Regarding the issue at stake, the Parties have not agreed on the application of any specific national law. As a result, subject to the primacy of applicable FIFA's regulations, Swiss Law shall apply to the extent warranted.

37. It can be observed that, in their respective submissions, the Parties adopted the same approach, that is, they agreed on the application of the relevant FIFA regulations, and accessorily, Swiss law.

38. As their dispute was submitted to the DRC after 1 October 2010, it is the FIFA Regulations for Status and Transfer of Players (2010 edition) ("RSTP") that apply (cf. Art. 26 RSTP).

VI. ADMISSIBILITY

39. The appeal is admissible as the Appellant submitted it within the deadline provided by article R49 of the Code as well as by article 67 par. 1 of the FIFA Statutes. It complies with all the other requirements set forth by article R48 of the Code.

VII. JURISDICTION

40. The jurisdiction of CAS, which is not disputed, derives from articles 66 et seq. of the FIFA Statutes and article R47 of the Code. It is further confirmed by the order of procedure duly signed by the Parties.

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

42. Under article R57 of the Code, the Panel has the full power to review the facts and the law.

VIII. MERITS

43. On 16 November 2012, the DRC ruled that the Appellant terminated the Employment Agreement without just cause and issued an award granting compensation.

44. The key issue in the present matter concerns the validity and the enforceability of the Employment Agreement. Hence, the Panel has to resolve whether:

- Whether the DRC erred in finding that the termination of the Employment Agreement was unlawful;

- In case it is found that the DRC erred in rejecting the complaint, what the consequences of the error are for the amount of compensation that the Respondent is entitled to.

A. Did the DRC err in finding that the termination of the Employment Agreement was unlawful?

45. The Appellant claims that the Employment Agreement was validly terminated on the basis of its article 3 and, additionally, because there was a just cause to do so.

1. Termination of the Employment Agreement based on its article 3

46. The Appellant's main argument is that, in view of the specific circumstances of the case, the fact that the Player underwent surgery shortly before the signature of the Employment Agreement, the Parties - exercising their contractual autonomy - fully understood and accepted the implication of article 3 of the labour contract. As a result, the Player cannot claim the benefit of article 18 par. 4 RSTP.

47. Article 3 of the Employment Agreement states the following:

> *"The Employee hereby acknowledges, agrees and understands that he will pass all the medical examinations and tests as per the request of the Employer and in case the report of any of the said examinations and/or tests provide that the Employee cannot offer his services then the Employer shall have the right to cancel the said Agreement without any consequences and the Employee shall be obliged to refund immediately to the Employer any amounts already received. However the above football player has done surgery intervention into the Achelion tendon of his left leg and due to the fact that he has not recuperated yet, the above parties agreed that if the football player will not be ready until 20/08/2010, after an examination of the above football club doctor, then the employer has the right to terminate this agreement and the football player will not be able to claim any damages".*

48. Pursuant to article 18 par. 4 RSTP *"The validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit"*. This provision is substantially identical to article 30 of the RSTP, edition 2001 and to article 18 par. 4 RSTP, edition 2005.

49. In this respect, the FIFA commentary on the RSTP (edition 2005) reads as follows (commentary ad. article 18 par. 4, page 55):

> *"1 The validity of an employment contract between a player and a club shall not be made subject to the positive results of a medical examination or to the acquisition of a work permit from the local authorities. Any such conditions that are included in a contract are not recognised and the contract is still valid without this clause. In other words, this means that the new club's failure to respect the contract represents an unconditional breach of contract without just cause.*
>
> *2 The player's prospective club is therefore required to undertake all necessary research and to take all appropriate steps before concluding a contract. Once a contract has been signed, all parties involved can rely in good faith on it being respected and enforced.*
>
> *3 Violations of this provision are linked to negligence by the new club that has not exercised the usual care expected from it in business life. In fact, both the medical examination and the request for a work permit have to be initiated by the new club. The player has to put himself at the club's full disposal and supply the prospective club with all necessary information and documents in order to facilitate these tasks. If the club does not use this diligence when signing a player, it cannot claim afterwards that the failure to fulfil a contract was based on (existing or presumed) injuries or the fact that the player has not received a work permit".*

50. Article 18 par. 4 RSTP deals with "contracts", hence, with agreements, which, by definition, have a lawful object, and are entered into voluntarily by two or more parties. In other words, the Panel sees no distinction between the Employment Agreement signed between the Parties on 22 June 2010 and any other 'contract' referred to under article 18 par. 4 RSTP. The Appellant's approach based on party autonomy – in the sense of freedom of contract – is irrelevant as article 18 par. 4 RSTP is a mandatory rule, regulating the content of any labour contract, regardless of the circumstances under which it was entered into. In accordance with the FIFA rules, any clause of an employment contract that derogates from article 18 par. 4 RSTP is not enforceable: *"Any such conditions that are included in a contract are not recognised and the contract is still valid without this clause"* (FIFA Commentary, Art. 18, sec. 5, N. 1); see also CAS 2003/O/540

& 541, par. V.2.1; CAS 2004/A/666, N 93 *et seqq.* and KLEINER J., *Der Spielervertrag im Berufsfussball*, Zurich, 2013 at p. 481 *et seqq.*).

51. The Panel refers to a CAS precedent whereby it has been accepted *"that, for a contract to be repudiated the employee's attitude during the negotiations must have been in bad faith, meaning that he deliberately hid an important information on his health status to his future employer. One should expect from a football club to be cautious on the health status of a potential employee, hence the onus is quite high in this context. The doctrine supports this view (…). In a nutshell, those authors consider that, under certain circumstances, the unsuccessful medical test can legitimate the employer to rescind from the contract if the Player's medical status of the football player as it comes out from the results of the test is so essential to the employment relationship that it cannot be expected from the employer to execute the contract and that it is clear that if it had known about it before signing the employment agreement it would have never signed it. Such rescission would of course be subject to the establishment by the new club of all factual elements required by the applicable law"*. (CAS 2008/A/1589, award of 20 February 2009, par. 29).

52. In the present case, the Appellant was fully aware of the medical condition of the Player, who did not try to conceal his surgery on the left Achilles tendon. The fact that the Player had been operated has actually been incorporated into article 3 of the Employment Agreement. The Panel does therefore not consider that the Player's attitude, in the particular circumstance, justifies an early and unilateral termination of the Employment Agreement, since the Player did not act in bad faith and did not hide any relevant medical information to his future employer. It shall be noted that Art. 18.4 RSTP is not one-sided: its rationale is to protect football players from 'abusive' invocations of injury subsequent to the signing of an employment contract. Clubs nevertheless, are not left unprotected either. They can always subject a transfer to medical exams before signing an employment contract with a new player. What they cannot do is to sign an employment contract, and then subject the contract's validity to a medical examination. The reason for the FIFA rule is that football players having signed a contract will, in good faith, believe that they have entered into a new professional relationship with the club. They will thus, agree to cancel their existing contract with the 'old' club and forego the opportunity to continue negotiating with other potential employers. In the present case, the Player's choice to look for a new club was restricted, and he could only find a club in the Czech Republic in September 2011, that is, at a time where most European clubs have 'completed' their roster for the upcoming footballing season.

53. Based on the foregoing, considering that pursuant to article 1 par. 3 lit. a) RSTP, article 18 is binding at national level and must be included in the regulations of the national federations, the Panel finds that article 3 of the Employment Agreement is in violation of the applicable rule and cannot be enforced. As a result, the Appellant was not entitled to terminate the labour contract on the grounds that the requirements of its article 3 were met.

2. Termination of the Employment Agreement based on a just cause

54. The Appellant contends that in view of the Player's health conditions, it could not be expected, in good faith, to continue the employment relationship with him. Furthermore, it submitted that the Player failed to attend *"the training of the B team during the A team was abroad as he was instructed by the Appellant. In light of this fact, Appellant believes that it constitutes a good reason for terminate the*

contractual relationship between them since the [Player] had acted contrary to his obligation and to the instructions of his employer and his coach".

55. The Player contests the Appellant's version of the facts. He claims that he was fit to play and had always complied with the instructions given to him by the Appellant's representatives.

56. Fixed-term contracts cannot come to an end before the expiration of the agreed period unless there is a just cause for termination of the employment relationship or if the employer becomes insolvent (ATF 110 II 167; WYLER R., Droit du travail, 2ème edition, p. 436). The unilateral and early termination of the contract with just cause is an exceptional measure and must be restrictively admitted (decision of the Swiss Federal Court of 10 March 2005, 4C.413/2004, at 2.1).

57. In the presence of a just cause, the employer or the employee may at any time terminate with immediate effect the contract (Art. 14 RSTP; see also article 337 par. 1 of the Swiss code of obligations, "CO"). According to Swiss case law, whether there is "just cause" for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446). The FIFA Commentary to the RSTP is on the same line of reasoning: "The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case" (FIFA Commentary, Art. 14 N 2) A just cause exists whenever the terminating party can in good faith not be expected to continue the employment relationship (article 337 par. 2 CO). In other words, the event that leads to the immediate termination must so significantly shatter the trust between the parties that a reasonable person could not be expected to continue to work with the other party who is responsible for the just cause (ATF 130 III 28; ATF 116 II 145; ATF 116 II 142; ATF 112 II 41). Only a serious breach of his obligations under the employment agreement by the employee can justify the immediate termination of the contract (ATF 130 III 28 at 4.1 p. 31; decision of the Swiss Federal Court of 2 November 2011, 4A_215/2011, at 3.3).

58. The Appellant was fully aware of the Player's medical condition when it signed the Employment Agreement. Under these circumstances, the fact that the Player did not recover as fast as anticipated (or as hoped) cannot constitute a breach – and even less a serious breach – of the contract on the part of the Player. The Appellant's trust was not *"so significantly shattered"*, that it had a valid reason to terminate the Employment Agreement with immediate effect. In other words, there was no fundamental change of circumstances in the employment relationship justifying an exception to the general rule of *pacta sunt servanda*. Hence, the Appellant was not entitled to put an end to its employment relationship with the Player based solely on the medical conditions of the Player.

59. Under these circumstances, the remaining question is whether the Player's alleged refusal to train constitutes a "just cause".

60. If an employee, without a valid reason, does not appear at the work place, or if he leaves it without notice, the employer has a just cause to terminate with immediate effect the contract. There is an unjustified non-appearance at or leaving of the working place when the employee is absent for several days and the employer can reasonably assume that it is not in the employee's intention to return and that his decision is final. This is particularly true if the employee is

summoned to return to work or to justify his non-appearance (for instance by means of a medical certificate) and does not comply or is unable to provide a just cause (See the example in the FIFA Commentary at Art. 14 N 4 as well as ATF 108 II 301, at 3 b; decision of the Swiss Federal Court of 21 December 2006, 4C.339/2006, at 2.1; WYLER, op. cit., p. 499).

61. When the employee's intention has not been explicitly expressed, the judge must evaluate if, in the light of the circumstances, the employer could reasonably and in good faith believe that the worker's absence constitutes an abandonment of post. If the employee's attitude is equivocal, the employer must issue a formal notice, inviting him to carry out his work (see FIFA Commentary, Art. 14 N 4: "a reprimand or a fine"). The burden of proof lies upon the employer to show just cause (decision of the Swiss Federal Court of 12 November 2013, 4A.337/2013, at 3).

62. In the present case, the Appellant has not offered any evidence to substantiate the Player's alleged illicit absenteeism. In particular, the Appellant did not submit any document establishing that it gave a warning to the Player or a formal notice to fulfil his side of the contract, i.e. to attend the training sessions. The only document on file is the Appellant's termination letter of 19 August 2010, the content of which was contested the very next day by the Player, who confirmed that he was *"ready to continue in his contractual relation (…) and to participate on trainings and official matches of the club"*.

63. As a result, the Panel finds that the Appellant has not established that it terminated the Employment Agreement with just cause.

64. It has to be noted that according to Swiss law, except for certain cases which do not apply in this case, a termination without notice brings an employment contract to an end with immediate effect, even if the termination was in the absence of a valid reason (REHBINDER/PORTMANN, *Basler Kommentar*, OR I, 3rd ed., Basel, N. 5, ad art. 337 CO; CAS 2003/O/453, par. 46, page 9).

B. What are the consequences of the error for the amount of compensation that the Respondent is entitled to?

65. The termination of an employment agreement without just cause is a serious violation of the obligation to respect an existing contract and goes against the principle of contractual stability, which is crucial for the well-functioning of international football (see article 17 RSTP; CAS 2008/A/1519 & 1520, par. 80; CAS 2005/A/876, CAS 2007/A/1358, N 90; CAS 2007/A/1359, N 92; CAS 2008/A/1568, N 6.37).

66. Regarding the compensation for the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"). Hence, it will aim at determining an amount, which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur.

67. Following these principles, the DRC decided that the Appellant had to pay to the Player the amount of EUR 70,000 as compensation. This amount corresponded to the salaries that the

Appellant failed to pay to the Player, reduced by the remuneration the Player received under his new employment contracts.

68. The Appellant did not provide any reason justifying a reduction of the compensation awarded by the DRC.

69. Likewise, the Player did not put forward any evidence of further damage suffered by him in connection with the unilateral termination of the Employment Agreement by the Appellant. On the contrary, in his answer filed in the present procedure, the Player requested the Panel simply to confirm the Appealed Decision.

70. Under these circumstances, the Panel finds that the Appealed Decision must be upheld in its entirety, without any modification. Against this background, all other prayers and requests shall be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 19 July 2013 by FC Aris Limassol against the decision issued on 16 November 2012 by the FIFA Dispute Resolution Chamber is rejected.

2. The decision issued on 16 November 2012 by the FIFA Dispute Resolution Chamber is affirmed.

3. (…).

4. All other motions or prayers for relief are dismissed.