Arbitration CAS 2014/A/3509 Anorthosis Famagusta Football Club v. Wojciech Kowalewski, award of 25 September 2014

Panel: Mr Jacopo Tognon (Italy), Sole Arbitrator

Football
Termination of a contract of employment without just cause
Starting point of the time limit to appeal according to Article R49 CAS Code
Principles for the calculation of compensation under Article 17 RSTP
Duties and discretion of the judging body under Article 17 RSTP
Validity of a termination clause of unilateral nature
Obligations of an employee under Swiss law

1. **Article R49 of the Code provides as follows: in the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The day of the receipt of the decision must be when the club had knowledge of the grounds of the DRC decision if FIFA falsely notified the decision to the former legal representative of the club in lieu of the club itself.**

2. **According to FIFA and CAS jurisprudence, there are two basic principles for the calculation of compensation under Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP): first, if there is no agreement between the parties with respect to the amount of the compensation or calculation of the compensation, the calculation then should be made giving due consideration to the various criteria contained in Art. 17. Second, the objective calculation shall be made by the Tribunal based on the principle of the so called "positive interest", meaning it shall aim at determining an amount which shall put the respective party in the position that same party would have been in if the contract had been performed properly. Moreover, other criteria could be considered in order to arrive at a just and fair determination of the compensation due, such as the so called "specificity of sport".**

3. **Article 17 RSTP creates a system whereby the judging body has on one side the duty to duly consider all the circumstances of the case and all the objective criteria available, and on the other side a considerable scope of discretion, so that any party should be well advised to respect an existing contract as the financial consequences of a breach or a termination without just cause would be, in their size and amount, rather unpredictable. What is more, the judging body shall aim at a legally correct and at the same time appropriate solution based on the specific sporting circumstances and the sporting issues inherent to the case at hand.**

4. A clause providing the ability to terminate the contract without paying any compensation and tying this faculty to the mere passage of time (three months) and physical injury appears unfair and burdensome to the player. Applying a rule of this kind is not acceptable because it has a unilateral nature and is signed for the exclusive benefit of the club.

5. Under Swiss law (and namely under Article 321 of the Swiss Code of Obligations), an employer is entitled to supervise and monitor the health of their employees, regardless of whether such an obligation was in fact also contained in the contract between the employer and its employee. It is essential that the instructions of the employer are limited to specific fields of work and that they are clear and understandable. In other words, it may well exist an obligation for the player to be present at training when summoned by the club, which still retains the right to make appropriate visits and suggest appropriate medical treatments in case of injury. The player also has an obligation to inform and provide the appropriate communication to the club as a corollary of a general duty of care and loyalty.

I. PARTIES

1. Anorthosis Famagusta FC (the "Club" or Appellant") is a professional football club affiliated with the Cypriot Football Federation, which in turn is an affiliate of the Fédération Internationale de Football Association ("FIFA").

2. Mr. Wojciech Kowalewski (the "Player" or "Respondent) is a football player of Polish nationality who formerly played for the Appellant.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings, and evidence may be set out, where relevant, in connection with the legal discussion that follows. While 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 16 January 2011, the parties entered into a Contract of Employment wherein the Player agreed to play for the Club for the 2010/2011 and 2011/2012 season (i.e. from 16 January 2011 until 31 May 2012 or after the last game of the 2011/2012 Championship, whichever is later) (the "Contract"). Because the sporting season in Cyprus runs from July to May, the

Player was actually joining the Club in the middle of the 2010/2011 season (*i.e.* the second half of the 2010/2011 season) and therefore, his contract with the Club was effectively for one and a half seasons.

5. Under the terms of the Contract, the Player was to receive the amount of EUR 43,750 for the 2010/2011 season (the period up to 30 May 2011) in five instalments and EUR 87,500 for the 2011/2012 season in ten instalments.

6. The Contract further provided, *inter alia*, as follows:

9) The player shall promptly submit so far as is reasonable at the expense of the Club to such medical examination as the Club shall deem necessary and shall undergo such treatments as may be prescribed by the Club's medical advisors. All injuries and/or sickness shall be reported by the player to the Club immediately and the Club will record these in an injury register. Dental treatment shall not be covered by the Club.

17) If the player shall be guilty of serious misconduct or the disciplinary Rules of the Club of the terms and conditions of this Agreement, the Club may, on giving notice to the player by recorded delivery letter, stating the full reasons for the action taken, terminate this Agreement. Such action shall be subject to the player's right of appeal as follows:

17.1 to the Dispute Resolution Chamber established to the Cyprus Football Association;

17.2 to any tribunal or labour Court in Cyprus;

17.3 to FIFA and its competent departments;

17.4 to the court of arbitration in Lausanne.

35) During the player's illness Anorthosis shall pay to him full salary. If the period of the player's illness lasts longer than three months or it is by an adequate medical examination confirmed that despite the efforts of the Club the disability is not curable, Anorthosis may terminate this contract without any obligation to pay compensation for damages to the player.

36) It is expressly agreed that this contract is only valid and will be enforced on the condition that the player will pass all medical tests and that the player is eligible to play and free to be transferred with receipt of his ITC before the end Transfer window A of the football season 2010-2011. In the case that after passing the medical tests the player suffers an injury which has not been disclosed to the Club by the player and is diagnosed as pre-existing injury or [] [the Club has] the right to terminate the present contract without any obligation to pay compensation or damages to the player.

7. Shortly after the Player began his training with the Club, the Player began experiencing problems with his back, which hindered his ability to participate in any sport-related activities with the Club. Indeed, it is noted that after signing his contract, the Player was only fielded in one match.

8. On 12 April 2011, the Player was examined by a team doctor who ultimately sent the Player for a MRI examination. The MRI demonstrated that the Player suffered from a posterior

displacement with irritation on the descending nerve root. As a result of this injury, the Player sought advice from an independent doctor in his home country of Poland.

9. On 28 April 2011, the Player, with the consent of the Club, underwent back surgery in Poland.

10. For the next 5 weeks following his surgery, the Player took part in post-surgery treatment and rehabilitation while remaining in Poland.

11. On 3 June 2011, at the request of the Club, the Player returned to Cyprus and was examined by neurologist Dr. Michalis Protopapas. In his medical report, Dr. Protopapas stated that the Player *"is at a position to follow individual training program of rehabilitation and training until he could fully be incorporated with the rest of the team of Anorthosis"*.

12. Following his medical examination, the Player returned to Poland. Upon arrival, the Player began experiencing additional back pain, which the Player attributed to the *"long and uncomfortable air journey from Poland to Cyprus* … [which] s*eriously deteriorated Player's health"*. As a result, the Player incurred a second surgery in Poland under the care of Dr. Jan Krzysztof Podgorski on 14 June 2011. The Club, however, did not agree to the second surgery, also because it was not informed of the necessity for the player to undergo such an operation.

13. Two days after the second surgery, on 16 June 2011, Dr. Podgorski sent two emails (the first one at 13.04 and the second one at 14.05, the content of the latter being similar to the former) to Dr. Protopapas explaining the surgery, and noting *inter alia* that *"The patient feels pretty good, he walks normally with a slight, typical pain loco operations. I continue antibiotic and antidolorotic therapy. I think the patient will go home on Saturday morning and will continue the rehabilitation"*.

14. Following receipt of that report, on 16 June 2011, the Club, on the assumption that the Player was in a position to return to limited activity with the Club, requested the Player's participation at its 2-week long, pre-season training camp in Austria on 20 June 2011 in order to continue his recovery, remain under the supervision of the team's medical personal, and incorporate himself back with the team in view of the upcoming season.

15. Two days later, on 18 June 2011, Dr. Podgorski sent an email to the Club informing them that in his medical opinion, it was too early to expect the Player to join the team in Austria. In his email, Dr. Podgorski states that the Player *"should stay in Poland … and can join your kind invitation in few weeks. It should be much safer and better solution for him"*.

16. The next day, on 19 June 2011, the Club responded to Dr. Podgorski reiterating its request that the Player join the team in Austria and *"undergo his recovery procedure under the control and supervision of our club's medical team"*. Despite the Club's request, the Player did not join the Club in Austria or meet with its medical team.

17. Allegedly, on 20 June 2011, the Player sent an email to the Club informing them that he would not attend the Club's training in Austria upon the recommendation of Dr. Podgorski and stressing that his *"present state of health does not allow for being so long and exhausting journey, the more air and can adversely affect the results of my treatment at the health consequences"*.

18. On 29 June 2011, Dr. Protopapas, on behalf of the Club, sent an email to Dr. Podgorski requesting a complete medical report on the Player.

19. Two days later, on 1 July 2011, Dr. Podgorski replied to Dr. Protopapas with a brief email status report on the Player. In his email, Dr. Podgorski indicated that the Player was doing *"much better"*, and that he believed that he could *"start his special sport – training – improving step/ by step from the half of this month"*.

20. The Player never returned to the Club or subjected himself to medical examination by the Club's doctors.

21. On 25 July 2011, the Club terminated the Contract with the Player.

B. Proceedings before FIFA

22. On 10 October 2011, the Player filed a claim before FIFA seeking EUR 185,211 (later modified to EUR 97,622) as damages for the Club's unjust breach of contract and his outstanding medical bills. Following an exchange of submissions, the FIFA DRC rendered its decision on 31 October 2013 ordering the Club to pay the Player EUR 5,872 in medical expenses and EUR 87,500 as compensation for breach of contract. A reasoned decision followed on 29 January 2014 (the "FIFA Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 20 February 2014, the Appellant filed its statement of appeal at the Court of Arbitration for Sport (the "CAS") against the Respondent with respect to the FIFA DRC decision communicated on 29 January 2014, in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). The Appellant chose to proceed in English, and by letter dated 28 February 2014, nominated Mr. Michael Gerlinger (Germany) as arbitrator.

24. By letter dated 4 March 2014, the CAS Court Office acknowledged receipt of the Appellant's statement of appeal, and invited the parties to comment on whether it was appropriate to consolidate or join the current appeal with the currently pending (but suspended) case CAS 2012/O/2975 (Mr. Manfred Nan presiding), which involves the same parties and the dispute related to an image rights contract between the parties. The Respondent agreed to consolidate the case and refer this case to Mr. Nan as a Sole Arbitrator; the Appellant objected and requested a three-member Panel.

25. On 7 March 2014, the Appellant filed its appeal brief in accordance with Article R51 of the Code.

26. By letter dated 17 March 2014, FIFA stated to CAS that since the Appellant had not designated it (FIFA) as a respondent to the present procedure, any question relating to the competence of the relevant deciding body of FIFA was not to be taken into consideration by the CAS. In addition, FIFA argued that the appeal had not been lodged in time, since the

challenged decision was notified to the Appellant's previous lawyer on 29 January 2014, whereas its statement of Appeal was introduced only on 20 February 2014.

27. On 18 March 2014, the Respondent filed an objection to the Appellant's appeal on the basis that the filing of the statement of appeal was untimely in accordance with Article R49 of the Code.

28. On 24 March 2014, the Appellant filed its comments in response to the Respondent's objection to the timelines of the appeal.

29. On 28 March 2014, the CAS Court Office informed the parties that the President of the Appeals Arbitration Division decided to submit this appeal to a Sole Arbitrator in accordance with Article R54 of the Code, without consolidation. Moreover, the parties were informed that the admissibility of the appeal would be addressed by the Sole Arbitrator, once appointed, in accordance with Article R49 of the Code.

30. On 2 April 2014, the Respondent filed his answer in accordance with Article R55 of the Code.

31. On 3 April 2014, the CAS Court Office acknowledged receipt of the Respondent's answer and invited the parties to state their preference as to whether a hearing was necessary in this appeal.

32. On 8 April 2014, the Appellant informed the CAS Court Office that a hearing was necessary; on 10 April 2014 the Respondent stated the contrary.

33. On 8 May 2014, the CAS Court Office informed the parties that the President of the Appeals Arbitration Division appointed Mr. Jacopo Tognon, attorney-at-law in Padova, Italy, as Sole Arbitrator.

34. On 21 May 2014, the CAS Court Office, on behalf of the Sole Arbitrator, informed the parties that a hearing would be held in this appeal in accordance with Article R57 of the Code.

35. On 4 June 2014, the FIFA provided the CAS Court Office with a copy of its complete case file. Such file was forwarded to the parties on the same day.

36. On 18 and 19 June 2014, the Respondent and Appellant, respectively, signed and returned the Order of Procedure for this appeal.

37. A hearing was held in this appeal on 4 July 2014. The Sole Arbitrator was assisted by Mr. Brent J. Nowicki, CAS Legal Counsel, and joined by Mr. Theodore Giannikos (counsel for the Appellant; in person) as well as Mr. Pawel Granecki and Mr. Jakub Fornalik (counsels for the Respondent; by telephone conference).

38. At that hearing Mr. Andreas Themistocleous, Managing Director of the club, was heard as the legal representative of Anorthosis Famagusta. On the contrary, the Respondent, even though he was available, decided to not participate at the hearing.

39. At the conclusion of the hearing, both parties confirmed that they had no objection to the appointment of the Sole Arbitrator to resolve this appeal and that their right to be heard had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

A. Appellant's Submissions and Requests for Relief

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

- As an initial point, the FIFA DRC did not have jurisdiction to render a decision in first instance. The provisions of art. 17 of the Contract list, in ascending order, the right of the Player to file an appeal to the competent bodies only in case that the Contract was terminated due to the Player's misconduct. As such, the FIFA DRC had no jurisdiction based on the facts of this case. Instead, the proper provision to be applied is art. 37, which provides that any dispute between the parties should be submitted exclusively to the CAS. Nevertheless, since the CAS is permitted to review cases *de novo*, the merits of this appeal should be reviewed in their entirety.

- Art. 35 of the Contract provides that *"[d]uring the Player's illness Anothosis shall pay to him full salary. If the period of the Player's illness lasts longer than three months or it is by an adequate medical examination confirmed that the efforts of the Club the disability is not curable, Anorthosis might terminate the contract without any obligation to pay compensation or damages to the Player"*. Based on the fundamental principle of *"pacta sunt servanda"* the terms and binding nature of the Contract must be fulfilled and upheld.

- The Player never intended to perform his contractual obligations towards the Club as he signed a contract for two seasons and within less than two months (and after only playing in one match), he complained of back pain, left to Poland for surgery and rested for two months. Once he returned to the Club, the Club's doctor found him ready for rehab and training. Nevertheless, the Player returned to Poland following which he had another surgery and thereafter disappeared for another two months thereby losing the entire pre-season training period.

- His behavior was evident of a systematic violation of his obligation under art. 4 of the Contract to *"use his best endeavors to attend at any reasonable place for the purpose of training in accordance with instruction given by any duly authorized official of the Club"*. The evidence is clear that the Player did everything possible to evade his obligation to be at the training camp and to be supervised/observed by the Club for a period of four (4) months.

41. In its prayers for relief, the Appellant requests as follows:

1. *Revoke fully and in its entirety the Decision of FIFA's DRC dated October 31st, 2013.*

2. *Accept all and every manifestation, argument, document and proof that the Appellant made and present as valid and true.*

3. *Order that the termination of the Agreement dated January 16th, 2011 with the Respondent was valid and that the Appellant has no obligation to pay any compensation or damages to the Respondent.*

4. *To condemn the Respondent to bear all the administrative costs and arbitrators fees if this case.*

5. *To condemn the Claimant to compensate the legal costs of the Respondent of as a sum of CHF 50.000.*

B. Respondent's Submissions and Requests for Relief

42. The Respondent's submissions, in essence, may be summarized as follows:

- As an initial matter, the Appellant's appeal was untimely filed. The FIFA DRC decision was sent to and received by the Appellant's prior counsel on 29 January 2014. The Appellant had a duty to inform FIFA whether its prior counsel, Mr. George Christofides, was still acting as the Club's legal representative. At the very least, such information should have been provided to FIFA in response to its letter to the Club dated 15 November 2013. Therefore, the Club's filing of its statement of appeal with the CAS on 20 February 2014 – 22 days after the Club's prior counsel received the FIFA DRC decision – is untimely.

- The Sole Arbitrator should not consider whether FIFA was competent to hear the first-instance case before the DRC because the Appellant engaged itself in a dispute as to the substance of the case before FIFA without objecting to the DRC's competence under the parties' arbitration agreement. Indeed, in all the FIFA proceeding the Club never raised any objection under the provision of art. 37 of the Contract (which states that *"any dispute between the parties should be submitted exclusively to the Court of Arbitration of Sports)"*.

- As to the merits of the dispute, FIFA properly determined that art. 35 of the Contract could not be validly invoked by the Club to terminate the Contract with the Player. The clause is ambiguous, and violates one of the general principles according to which it falls within the Club's obligations to be responsible for its players in case of injury caused in relation to his professional activity and in fulfillment of his contractual obligations.

- The *"pacta sunt servanda"* principle invoked by the Appellant is irrelevant because a player's injury does not justify a just cause termination of a contract and the only reason such a clause is in the Contract is to take advantage of the Club's position of power and bypass FIFA standards. The Club just took advantage of the injury to terminate the Contract without giving rise to the duty of compensation.

- The Player performed all his duties under the Contract and remained in constant contact with the Club and its doctors. The Player's travel alone back to Poland after his first surgery only worsened his condition and caused a second surgery. He carefully listened

to his doctors who requested that he not travel long distances during recovery. He was not "on vacation" or relaxing at his home as suggested by the Club. The injury was serious and ultimately caused the end of his career.

43. In his prayers for relief, the Player requests as follows:

1. *Dismiss the Appeal of Anorthosis Famagusta F.C. pursuant to Art. R49 of the CAS Code before adjudicating to the substance of the case, as it was submitted after the deadline stipulated in art. 67 par. 1 of the FIFA Statutes.*

   Eventually if the Panel finds otherwise, reject The Appeal of Anorthosis Famagusta F.C. as unfounded in its entirety,

2. *Uphold the decision of FIFA DRC from 31st October 2013 in its entirety,*

3. *Order the Appellant to bear all the costs and fees including Respondent's costs or legal representation.*

V. ADMISSIBILITY

44. Article R49 of the Code provides as follows:

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

45. The reasoned FIFA Decision was notified to the Player (c/o Mr. Pawel Broniszewski) and the Club (c/o Mr. George Christofides, previous legal counsel) on 29 January 2014. Mr. Christofides then forwarded the FIFA Decision to the Club on 30 January 2014. The Club's appeal was filed with the CAS on 20 February 2014.

46. The Sole Arbitrator acknowledges that under a strict reading of Article R49 of the Code, the Club's statement of appeal would be considered late and this appeal would be dismissed in view of the fact that the Club's Counsel before FIFA had been notified on 29 January 2014.

47. However, the Sole Arbitrator notes that on 14 November 2013, the Club wrote to the FIFA Players' Status Committee specifically asking them to notify the Club with the legal grounds for the FIFA Decision. Then, four days later, on 18 November 2013, the Club again wrote to the FIFA Players' Status Committee informing them that Mr. Christofides would no longer be representing the Club.

48. Based upon these two letters, it is evident to the Sole Arbitrator that FIFA knew or should have known to send the FIFA Decision directly to the Club, not Mr. Christofides, as he was no longer representing the Club. The Club should not be penalized for FIFA's (perceived) administrative error and therefore, Article R49 of the Code must be interpreted as setting the Club's 21-day filing deadline from the date on which Club received the FIFA Decision from

Mr. Christofides (namely, 30 January 2014). In other words, it is correct to underline that the day of the receipt of the decision appealed against must have been the 30 January 2014 (*in lieu* of 29 of January 2014) because only from that date did the Club have knowledge of the grounds of the DRC decision.

49. In this regard, because the Club filed its statement of appeal on 20 February 2014 - 21 days after it actually received the FIFA Decision - the Sole Arbitrator determines that this appeal is timely and admissible.

VI. JURISDICTION

50. Article R47 of the Code provides as follows:

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

51. With respect to the FIFA Decision, the jurisdiction of the CAS derives from art. 64 par. 5 of the FIFA Disciplinary Code and art. 67 of the FIFA Statutes. In addition, neither the Appellant nor the Respondent objected to the jurisdiction of the CAS, and the Parties confirmed the CAS jurisdiction when signing the Order of Procedure.

52. Moreover, the Sole Arbitrator highlights the following: a) since FIFA was not summoned as respondent in this appeal, it is not possible for the Sole Arbitrator to decide on FIFA jurisdiction without the presence of FIFA itself in this proceeding; b) the Appellant, in front of DRC, only argued about competence of a national arbitration forum to hear this dispute, thereby not invoking the different clause of art. 37 above mentioned; c) even considering the jurisdiction issues sporadically discussed by the parties at the hearing or in their submissions, nevertheless it seems (see par. 56 of the appeal brief) that the Club wanted the merits of the case to be examined by CAS de novo. Therefore, the Appellant also decided *per facta concludentia* to accept the jurisdiction of CAS.

53. In light of the foregoing, the Sole Arbitrator, therefore, confirms that CAS has jurisdiction to hear this appeal.

VII. APPLICABLE LAW

54. 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.

55. Paragraph 12 of the Contract provides as follows:

The player and the Club shall observe and be subject to the Rules, Regulations and Bye-Laws of the The Cyprus Football Association and such other organizations of which these bodies or the Club is a member and in the case of any conflict between this Agreement and such Rules, Regulations or Bye-Laws then such Rules, Regulations or Bye-Laws shall take precedence. The player shall also at all times observe the reasonable Rules of the Club.

56. Other than this provision, the Contract does not provide any express rule in respect of the laws applicable to any dispute between the Parties. The Sole Arbitrator, however, notes that both the Appellant and the Respondent explained in their submissions that various provisions of the FIFA Regulations apply.

57. Furthermore, Article 66 para. 2 of the FIFA Statutes provides that *"CAS shall apply the various regulations of FIFA and, additionally, Swiss law"*. The Sole Arbitrator thus holds that FIFA Regulations, as well as the Rules, Regulations, and By-Laws of The Cyprus Football Association (where necessary) and additionally Swiss law, are applicable.

VIII. MERITS

58. The present dispute is primarily governed by the FIFA Regulations, which provide that in cases of breach of contract, financial compensation, as well as sporting sanctions, may be applicable.

59. More specifically, Art. 17 of the FIFA Regulations of Transfer of Players ("RSTP") states that *"the following provisions apply if a contract is terminated without just cause: 1. In all cases, the party in breach shall pay compensation. Subject to the provisions of art. 20 and annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport and any other objective criteria. These criteria shall include, in particular the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period"*.

60. The purpose of Art. 17 has been discussed and clarified in many CAS awards. For example, in CAS 2008/A/1519-1520, the Panel stated: *"the purpose of art. 17 is basically nothing else than to reinforce contractual stability i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player…this deterrent effect shall be achieved through the impending risk…to have to pay compensation for damage caused by the breach or the unjustified termination"*.

61. In other words, *"both players and clubs are warned: if one does breach or terminate a contract without just cause, a financial compensation is due, and such compensation is to be calculated in accordance with all those elements of art. 17 of the FIFA regulations that are applicable in the matter at stake, including all the non-exclusive criteria listed in par. 1 of said article"* (CAS 2009/A/1856-1857, par. 186 *et seq*.).

62. As exemplified by the foregoing, two basic principles are well stated by the DRC of FIFA and CAS jurisprudence:

1. If there is no agreement between the parties with respect to the amount of the compensation or calculation of the compensation, the calculation then should be made giving due consideration to the various criteria contained in Art. 17;

2. The objective calculation shall be made by the Tribunal based on the principle of the so called "positive interest", meaning *"it shall aim at determining an amount which shall put the respective party in the position that same party would have been in if the contract had been performed properly"* (BERNASCONI M., The unilateral breach – some remarks after Matuzalem in: BERNASCONI/RIGOZZI (editors), "Sport Governance, Football Disputes, Doping and CAS arbitration", Colloquium, 2009, p. 249).

63. Moreover, it is important to underline that other criteria could be considered in order to arrive at a just and fair determination of the compensation due, such as the so called "specificity of sport". Indeed, *"the authors of art. 17 of the FIFA Regulations, achieved a balanced system according to which the judging body has on one side the duty to duly consider all the circumstances of the case and all the objective criteria available, and on the other side a considerable scope of discretion, so that any party should be well advised to respect an existing contract as the financial consequences of a breach or a termination without just cause would be, in their size and amount, rather unpredictable…"* (CAS 2009/A/1856-1857, par. 186).

64. In addition, *"sport, similarly to other aspects of social life, has an own specific character and nature and plays its own important role in our society. Similarly as for the criterion of the "law of the country concerned", the judging body has to take into due consideration the specific nature and needs of sport when assessing the circumstances of the dispute at stake, so to arrive to a solution which takes into reasonable account not only the interests of players and clubs, but more broadly those of the whole football community…. In other words, the judging body shall aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interest at stake, the sporting circumstances and the sporting issues inherent to the single case"* (*see ibid*; CAS 2009/A/1880-1881, par.233-240).

65. In sum, a party who engages in conduct which is in bad faith or terminates the contract for their own selfish ends, the party in question can be condemned to pay more damages because of sports' specificity. And on the contrary, if a party has displayed exemplary behaviour throughout the duration of a contract, such positive behaviour may be taken into consideration so that the amount of damages payable is reduced.

66. In view of the above, the main issues to be resolved by the Sole Arbitrator are:

a) Who was in breach of the Contract?

b) Is the injured party entitled to any compensation and in which amount?

A. Who was in breach of the employment contract?

67. As discussed above, the first question to be addressed is whether the Club unilaterally terminated the Contract with or without just cause, bearing in mind that it is undisputed that the Club relied upon art. 35 of the Contract as a basis for termination stating: *"During the player's illness Anorthosis shall pay to him full salary. If the period of the player's illness lasts longer than three months or it is by an adequate medical examination confirmed that despite the efforts of the Club the disability is not curable, Anorthosis may terminate this contract without any obligation to pay compensation for damages to the player".*

68. This Sole Arbitrator believes that, based upon the language of art. 35 of the Contract, CAS jurisprudence, and the facts of this case, the Appellant's appeal is not founded.

69. Indeed, the Sole Arbitrator is of the opinion that a clause of this nature (art. 35) is not only contrary to established jurisprudence (some of which was produced by the Respondent in the first phase) but also to the well-known principles of law applicable to the case.

70. In this respect, a clause of such a content appears unfair and burdensome to the Player by providing the ability to terminate the Contract without paying any compensation and tying this faculty to the mere passage of time (three months) and physical injury. Applying a rule of this kind is not acceptable, as it has a unilateral nature and is signed for the exclusive benefit of the Club. So on this basis alone, the Sole Arbitrator is of the opinion that that the Club's introduction of a termination provision based a player's injury (as set forth above), coupled with the conditions set forth under art. 4 of the Contract (attendance at a reasonable place for training camp), supports the Sole Arbitrator's that art. 35 cannot form the basis of the Player's termination and therefore, the Club breached the Contract and supports the conclusions reached by this Sole Arbitrator in *an debeatur* point.

B. Is the injured party entitled to any compensation and in which amount?

71. Given the Sole Arbitrator's determination that the Club breached the Contract, the issue of damages must now be addressed, bearing in mind the principles of law established above.

72. It shall first be noted that under Swiss law (and namely under art. 321 of the Swiss Code of Obligations), an employer is entitled to supervise and monitor the health of their employees, regardless of whether such an obligation was in fact also contained in art. 4 of the Contract. It is essential that the instructions of the employer are limited to specific fields of work and that they are clear and understandable (see. award CAS 2009/A/1856-1857 par. 98-100). In other words, it may well exist an obligation by the player to be present at training when summoned by the club, which still retains the right to make appropriate visits and suggest appropriate medical treatments in case of injury.

73. Notwithstanding the above, it is also clear that the Player then has an obligation to inform and provide the appropriate communication to the Club as a corollary of a general duty of care and loyalty.

74. After a careful analysis of the facts and circumstances submitted by the parties, the Sole Arbitrator is not - only in this respect - in agreement with the DRC decision concerning the application of the basic principle of "positive interest". The behaviour of the Respondent in fact is not entirely blameless.

75. In this regard, the Sole Arbitrator notes the following: First, if it is true that the first surgical operation had been authorized by the club, the same could be said for the second surgery which took place on 13 June 2011. In other words, the Player should have, at the least, fully informed the Club of his impending second surgery by all accounts.

76. Moreover, the behaviour of the Player concerning his surgery seems questionable, since he blamed the Club for the aggravation of his health condition after having made a long journey from Poland to Cyprus and back, when he could have stayed in Cyprus after the 3 June 2011 and remain there to undergo treatment.

77. Even the post-operative behaviour seems incorrect. After the examination of the exhibits, it has not been demonstrated that the Player really put the Club in a position to fully understand the underlying physical problems. Certainly this is impossible to understand from the email exchange on 16 June 2011, and an objective reader would have expected more information to be disseminated from the Player's own doctor. Moreover, the player has not even demonstrated the impossibility of reaching the club in the training period in Austria on the 20 June 2011, a country much closer to Poland than Cyprus.

78. As for the medical certificate dated 30 June (the only certificate issued after the second unauthorized surgery), there is no proof that the Club had knowledge of it at the date of termination of the Contract (it was only produced in front of the DRC on 11 October 2011); while the email on the part of the player, supposed to have been sent on 20 June 2011, was only sent as a text message on 27 July 2011 by the player to his attorney, after the termination of the Contract.

79. In other words, this Sole Arbitrator agrees on the fact that the Player was not in touch with the Club for a long period of time, and did not really justify the grounds for his absence at the training camp in Austria.

80. On the other hand, the email sent from Dr. Podgorski to the Club on 1 July 2011 legitimized the good faith of the Club to assist in the Player's recovery in the shortest time possible. This makes the player's behaviour all the more incomprehensible.

81. Notwithstanding the Player's behaviour, the Sole Arbitrator reiterates that the Club breached the Contract (which utilised an unlawful clause and that in any case, *de iure condendo*, would have had no reason to terminate the contract for just cause) and in this respect, the specificity of sport under Art. 17 applies to reduce the amount of the Player's damages, taking into account all the circumstances (including that the injury forced the player to end his career.

82. Finally, the Sole Arbitrator cannot help but find similarities in the Player's attitude towards his (non) attendance at the hearing and his responses to the Club during the period of his injury.

Despite being announced as attending the hearing, the Player was not present, and when the Sole Arbitrator asked his counsel whether he was available and willing to participate, his appearance became almost evasive and the Player never participated - despite the Sole Arbitrator's request. The Sole Arbitrator is aware that the Player, as a party to these proceedings, has the right to decide whether he wishes to speak or not. However, his failure to make himself available prevented the Sole Arbitrator from obtaining clarifications on certain issues that could somehow mitigate or justify his behaviour.

83. On the basis of this reasoning, the Sole Arbitrator states that the damages can be reduced by 20%, or a deduction of EUR 17,500, resulting in a claim for damages in the amount of EUR 70,000. Such amount, in other respects, corresponds to two months' salary which also coincides almost entirely with the period (from 3 June 2011 to 25 July 2011) in which the player appears not to have fully complied with the obligations imposed on him.

84. All the other prayers for relief are dismissed and the decision of the FIFA Decision shall be confirmed in the remaining part.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal of Anorthosis Famagusta FC is partially upheld.

2. Anorthosis Famagusta FC shall pay Mr. Wojciech Kowalewski EUR 70.000, plus interest at a rate of 5% as from 1 March 2014.

(…)

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