Arbitration CAS 2014/A/3640 V. v. Football Club X., award of 28 January 2015

Panel: Mr Lars Hilliger (Denmark), Sole Arbitrator

Football
Breach of a contract of employment between a coach and a club
Admissibility of new request and evidence
Compensation for breach providing for a derogation from the general principle of mitigation of loss
Burden of proof regarding the derogation from the general principle of mitigation of loss

1. **According to Article R56 of the CAS Code, a party that failed to file any answer within the prescribed deadline, will not be able to file any new requests, arguments or evidence not already submitted before the first instance. Only requests, arguments or evidence in connection with the issues covered by the appellant's appeal will be taken into consideration.**

2. **The amount of compensation, if applicable, can be agreed at the full outstanding salary amount under the contract for the remaining period of the contract, from which it follows, for instance, that no reduction should be made for any other salary earned with a third party during the period of the contract. The parties, according to Swiss law, may validly agree on a derogation from the general principle of mitigation of loss, which for instance allows the parties to agree validly that no reduction will be made for any other salary earned.**

3. **The party alleging that no reduction should be made in the amount of compensation, must discharge the burden of proof for the existence and content of such agreement in order to establish that the financial compensation shall be fixed at the full outstanding salary amount under the contract for the remaining period of the contract without any deduction.**

1. THE PARTIES

1.1 Mr V. (hereinafter referred to as the "Appellant") is a professional football coach of Russian nationality.

1.2 Football Club X. (hereinafter referred to as the "Respondent") is a professional Kazakhstan football club affiliated with the Football Federation of Kazakstan (hereinafter referred to as the

"FFK"), which in turn is affiliated with the Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

2. FACTUAL BACKGROUND

2.1 The elements set out below provide a summary of the main relevant facts as established by the Sole Arbitrator on the basis of the decision rendered by the Bureau of the Players' Status Committee (hereinafter referred to as the "Bureau") on 19 March 2014 (hereinafter referred to as the "Decision"), the written and oral submissions and summaries of the Parties and the exhibits filed. Additional facts may be set out, where relevant, in the legal considerations of the present Award.

2.2 On 13 January 2013, the Appellant and the Respondent concluded a two-year employment contract (hereinafter referred to as the "Contract") valid from 13 January 2012 until 13 January 2014.

2.3 According to the Contract, the Appellant was employed as the Senior Coach of the Respondent.

2.4 The Contract was not the first agreement entered into between the Parties as the Parties had already worked together before. During the Appellant's previous employment with the Respondent, the Respondent won the following awards, among others: Championship of Kazakhstan in 2007, 2008 and 2009, Kazakhstan Cup in 2008 and Kazakhstan Super Cup in 2008 and 2011.

2.5 The Contract stated inter alia as follows:

"2. RIGHTS AND OBLIGATIONS OF PARTIES

2.1. The Employee shall be entitled as follows:

…

2.1.1 to modify, amend and terminate this Employment Contract on the terms and conditions stipulated by the Labour Code of the republic of Kazakhstan and the present Employment Contract.

…

2.2. The Employee shall be obliged as follows:

…

to execute and comply with the Statutes, Regulations and Decisions of the Fédération Internationale de Football Association (FIFA), the Union of European Football Associations (UEFA) and the Football Federation of Kazakhstan.

…

2.3 The Employer shall be entitled as follows:

2.3.1. to modify, amend and terminate this Employment Contract on the terms and conditions stipulated by the Labour Code of the republic of Kazakhstan and the present Employment Contract.

…

2.4 The Employer shall be obliged as follows:

…

2.4.19. to execute and comply with the Statutes, Regulations and Decisions of FIFA, UEFA and the FFK.

3. REMUNERATION

3.1 The Employer shall fix the Employee's monthly salary in the amount of two million six hundred twenty-one thousand four hundred (2,621,400) tenge. The salary shall be paid no later than the first decade of each month following the worked out one, according to the procedure established by the effective legislation of the Republic of Kazakhstan.

9. LABOUR DISPUTES RESOLUTION

9.1 The Parties shall resolve all the disputes arising during the execution of this Employment Contract through negotiations.

9.2 The Parties agree that any disputes arising out of this Employment Contract or in connection with it shall be subject to consideration by the court and/or conciliation commission.

9.3 Unless a dispute between the Parties is resolved through negotiations, it will be subject to consideration in accordance with the Labour Code of the Republic of Kazakhstan.

10. TERM OF CONTRACT

10.1 This Contract shall enter into force upon its signing by the Parties and shall be valid until January 13 2014…".

2.6 Annex No. 1 to the Contract stated inter alia as follows:

"The procedure, terms of payment and amount of bonuses and other material incentives to the Employee:

4. In the event of termination of this Employment Contract by the Employer before the expiration of its term in the absence of the Employee's breach of the Contract or the law of the Republic of Kazakhstan, the Employer shall pay to the Employee the compensation in the amount determined by the total income of the Employee under this Employment Contract for the period from the date of termination of the Employment Contract till its expiration".

2.7 On 26 September 2012, and following an important defeat of the Respondent's team, the Appellant stated at a press conference that he would *"apply to the management for resignation".*

However, the Parties agreed not to terminate the Contract, and the Appellant continued his work with the Respondent.

2.8 On 28 October 2012, and following an unsuccessful completion of the Championship of Kazakhstan, the Appellant forwarded a written statement to the General Director of the Respondent, according to which the Appellant informed the Respondent that he would like to terminate the Contract.

2.9 Following this statement, however, the Appellant continued his work with the Respondent during the remaining matches of the national Cup tournament, which the team of the Respondent ended up winning.

2.10 On 15 December 2012, the Appellant was presented with an order of termination (the "Termination Order") issued by the Respondent, effective as from 14 December 2012.

The Termination Order stated, inter alia, as follows:

"1. Terminate the labor contract no 121 from 13 January 2013 with V. – the head coach of FC X. from 15 December 2012 according to art. 57.1 of Labor Code of republic Kazakhstan because of the employee will.

2. Accounting should make full payment.

Reason for termination: V.'s statement".

2.11 On 18 December 2012, the Appellant informed the Respondent that *"I consider the actions of the club, as actions to unilateral termination of my contract without just cause and strongly disagree with it. I hereby draw to your attention that the club did not pay me wage for November and December 2012. (…) Therefore, I ask the Club within 14 days of receipt of this letter to pay my outstanding salary and compensation for termination of the contract in the amount specified in art. 4 of Appendix 1 to the contract".*

2.12 On 28 January 2013, the Appellant lodged a claim with FIFA against the Respondent, arguing that the Respondent had terminated the Contract unilaterally and without just cause. The Appellant requested from the Respondent the following amounts: USD 226,200 as compensation for breach of contract and representing his remuneration for the period from December 2012 until December 2013 (13 x USD 17,400), USD 137,402 as "bonuses" for match results, USD 3,925 for five flight tickets from X. to Moscow (5 x USD 785) as well as USD 6,066.58 as costs for a two-room apartment for the period from December 2012 until December 2013 (13 x USD 466.66). Furthermore, the Appellant claimed that these amounts should be with the addition of interest of 5% p.a. accrued since 14 December 2012 until the effective date of payment.

2.13 On 21 February 2013, the Respondent presented its response to the Appellant's claim, stating, inter alia, that the Appellant *"wrote application of his dismissal from his position by own desire in connection with unsuccessful participation of team from the 28.10.2012"*. The Respondent was of the opinion that it had not breached the Contract since such Contract had been terminated by the Appellant himself, and therefore the latter should not be entitled to receive any compensation based on Article 4 of Annex No. 1.

2.14 On 26 March 2013, the Appellant presented his comments to the Respondent's response, insisting that it had been demonstrated that the Respondent has terminated the Contract unilaterally and without just cause. The Appellant had *"changed his mind"*, which *"is evidenced by the fact that after writing a statement coach spent seven games, including several outside of the period stated in his resignation"* and that the Respondent *"with its tacit actions agreed that the coach will continue to work with the club"*. The Appellant further argued that on account on the above *"the termination of the Claimant's contract by the Club, which was made by the club 78 days and 7 official matches after the coach wrote the resignation letter, cannot be anything else other than the termination of the employment contract by the club without just cause"*.

2.15 On 26 April 2013, the Respondent reacted to the Appellant's last submission reiterating its previous statement. Furthermore, the Respondent explained that only two matches had been played after the said letter of resignation from the Appellant. The Respondent further explained that *"during the paid vacation time the management of FC X. club had no right to issue the order of dismiss of V."*. In view of the above, the Respondent reiterated that the Contract *"was broken by the Employee initiative and not by the Employer"*.

2.16 Asked about his labour situation between December 2012 and December 2013, the Appellant informed FIFA on 12 February 2014 that he had signed a contract with the Russian club FC Fakel on 6 June 2013, valid from the date of its signature until 10 June 2014, and according to which he *"will have a monthly salary of 290,000 (...) rubles*.

2.17 The Bureau, after having confirmed its competence, first of all recalled that no termination agreement was ever concluded between the Parties, but that the Respondent seemed to have handed over a termination order to the Appellant in order to prematurely put an end to their contractual relationship. Based on that, the Bureau deemed that the first question to be addressed was whether the Contract had been terminated by the Respondent and whether such termination had occurred with or without just cause. The Bureau underlined that according to the procedural rules, any party claiming a right on the basis of an alleged fact carries the burden of proof.

2.18 Based on the information available, the Bureau formed the view that, although the Appellant had notified the Respondent of his resignation at the end of September 2012, the documentary evidence contained in the file clearly demonstrated that the said statement and written notification had been revoked. As a result, the Bureau concluded that the Respondent had therefore no just cause to terminate the Contract unilaterally on the basis of the statement from the Appellant. Since the Respondent had not provided any evidence that could have justified its decision to terminate the Contract, the Bureau concluded that the unilateral termination of the contractual relationship between the Parties by the Respondent had been without just cause and that the Respondent should consequently compensate the Appellant accordingly.

2.19 With regard to the compensation to be paid to the Appellant, the Bureau underlined that although the Appellant had requested compensation in US dollars, the monthly salary stipulated in the Contract was in fact agreed in the currency of Kazakhstan, and any compensation to be

paid should therefore be calculated in the currency agreed upon between the Parties, *i.e.* Kazakhstani Tenge (KZT).

2.20 According to the Contract, the Appellant was, *inter alia,* entitled to receive from the Respondent a monthly salary of KZT 2,621,400 payable *"no later than the first decade of each month"* (i.e. within the first ten days of each month). On that basis the Bureau noted that the monthly salary corresponding to the month of December 2012 was already due on the day of termination of the Contract and therefore has to be considered as outstanding remuneration. Since the Respondent had not denied its failure to pay the salary which was due on 10 December 2012 at the latest, the Bureau concluded that the Appellant is entitled to receive the said amount as outstanding salary.

2.21 With regard to the Appellant's claim for compensation, and in accordance with the general principle of *pacta sunt servanda*, the Bureau decided that the Respondent must fulfil the obligation it entered into voluntarily with the Appellant by means of the Contract. The Bureau focused its attention on the content of the Contract, in particular Article 4 of Annex No. 1, and came to the conclusion that the wording of the said article clearly meant that in case of a premature termination of the Contract, the Respondent would become liable to pay to the Appellant a certain amount *"determined by the total income of the Employee under this Employment Contract"*. Taking into consideration that the Appellant had requested compensation for the period from January 2013 until December 2013, the Bureau found that he should therefore be entitled to receive from the Respondent the remaining amount due in accordance with the Contract, *i.e.* the sum of KZT 31,456,800, corresponding to his salary for the said period (*i.e.* 12 months of KZT 2,621,400). However, the Bureau emphasised that the Appellant was also under the obligation to mitigate the loss he suffered. In this connection it was noted that the value of the Appellant's contract with FC Fakel on 6 June 2013 was approximately KZT 9,440,000 for the period from June to December 2013. This amount should be deducted from the amount of compensation established above, which means that the Respondent should pay to the Appellant the amount of KZT 22,016,800 as compensation for breach of contract. All other requests from the Appellant, except for the request for interest, were rejected due to lack to sufficient evidence.

2.22 On 19 March 2014, the Bureau of the Players' Status Committee rendered the Decision and decided, in particular, that:

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

2. The Respondent, FC X., has to pay to the Claimant, V., the amount of KZT 2,621,400 as outstanding salary as well as the amount of KZT 22,016,800 as compensation for breach of contract, within 30 days as from the date of notification of this decision.

3. Within the same time limit, the Respondent, FC X., has to pay to the Claimant, V., default interest at a rate of 5% per year on the following partial amounts, as follows:

- on KZT 2,621,400 from 14 December 2012 until the effective date of payment;

- on KZT 22,016,800 from 28 January 2013 until the effective date of payment.

4. Any further claims lodged by the Claimant, V., are rejected.

…

7. The final costs of the proceeding in the amount of CHF 12,000 are to be paid to FIFA by both Parties, within 30 days as from the date of notification of the present decision, as follows:

7.1 The amount of CHF 6,000 has to be paid by the Claimant, V.

…

7.2 The amount of CF 6,000 has to be paid by the Respondent, FC X., to FIFA.

…".

3. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

3.1 On 20 June 2014, the Respondent filed a Statement of Appeal against the Appellant and FIFA with respect to the Decision, which procedure was later initiated under the reference CAS 2014/A/3641 FC X. v. V. & FIFA.

3.2 On 24 June 2014, the Appellant filed a Statement of Appeal in this present procedure (CAS 2014/A/3640 V. v. FC X.) against the Respondent with respect to the Decision.

3.3 On 1 July 2014 and upon agreement of all parties, the present procedure was consolidated with the procedure *CAS 2014/A/3641 FC X. v. V. & FIFA.*

3.4 On 3 July 2014, the Appellant filed his appeal brief in the present procedure, and on 9 July 2014, the Respondent filed its appeal brief regarding the CAS 2014/A/3641 procedure. The Respondent never filed an answer in the present procedure within the time limit set forth in the Code of Sports-related Arbitration (the "CAS Code").

3.5 By letter of 11 August 2014, the CAS Finance Director invited the Parties to pay their respective share of the advance of costs by 1 September 2014, of which deadline the Parties were reminded by letter of 27 August 2014.

3.6 On 27 August 2014, the Respondent paid its share of costs in both cases.

3.7 By letter of 29 August 2014, the Appellant informed the CAS Court Office that he was unable to pay his share of the advance of costs in the CAS 2014/A/3641 procedure, and on the same day, the CAS Finance Director therefore invited the Respondent to pay the Appellant's share of the advance of costs by 12 September 2014.

3.8 On 3 September 2014, the Parties were informed by the CAS Court Office that Mr Lars Hilliger, Attorney-at-law, Copenhagen, Denmark, had been appointed as Sole Arbitrator in the consolidated procedures, which appointment was not challenged.

3.9 By letter of 24 September 2014, the CAS Court Office noted that it received no additional payment from the Respondent and therefore invited the latter, within five days of receipt, to provide it with proof of payment.

3.10 By letter of 25 September 2014, the Respondent admitted it failed to pay the Appellant's share of the advance of costs and requested the CAS Court Office to set forth a new time limit to pay the same.

3.11 On 26 September 2014, the CAS Court Office invited the Appellant and FIFA to file their respective positions towards this request. Both the Appellant and FIFA objected to the Respondent's request and asked the CAS Court Office to apply Article R64.2 of the CAS Code to consider the appeal in the CAS 2014/A/3641 procedure to have been withdrawn for the non-payment of the advance of costs within the given deadline and to terminate the present arbitral procedure.

3.12 By letter of 10 October 2014, the Respondent requested to be granted a second round of submission in order to respect the principle of equal treatment and fair dispute resolution.

3.13 On 15 October 2014, and duly invited to comment on the Respondent's request, the Appellant objected to the request since no exceptional circumstances existed which could allow such request to be granted.

3.14 Also on 15 October 2014, the Sole Arbitrator issued a Termination Order, according to which *"The procedure CAS 2014/A/3641 FC X. v. V. & FIFA is terminated and removed from the CAS roll"*.

3.15 On 17 October 2014, the CAS Court Office wrote the following to the Parties (excerpt):

"…

Furthermore, even though FC X. timely filed its appeal brief in the procedure CAS 2014/A/3641 FC X. v. V. & FIFA which has recently been terminated, the Sole Arbitrator is of the opinion that such appeal brief cannot be considered as its answer towards Mr V.'s appeal.

The Sole Arbitrator also reminds FC X. that, in accordance with article R55 para. 2 of the Code of the Sports-related Arbitration (the "Code"), "(i)f the Respondent fails to file its answer, the Sole Arbitrator may nevertheless proceed with the arbitration and render an award".

However, in order to respect both parties' right to be heard, the latters are advised that they may provide a summary of their respective positions of not more that fifteen pages by Friday, 24 October 2014".

3.16 By letter of the same date, the Appellant informed the CAS Court Office that *"As the Appellant had already submitted his Appeal Brief in due time and considering that the Respondent's position is missing, the Appellant has nothing to summarize yet in the absence of X.'s Answer"*. Furthermore, the Appellant requested the CAS *"to fix the time limit for filling the Appellants submission after receiving the position of FC X."*.

3.17 On 21 October 2014, the Parties were informed that the time limit set out in the letter of 17 October was maintained and that, in order to comply with the principle of the right to be heard,

the Parties will be given the opportunity to reply orally at the hearing and no further written submissions will be allowed besides the summary of their respective positions as set out in the above-mentioned letter.

3.18 The Respondent filed its summary (the "Summary") within the set deadline.

3.19 Finally, on 28 October 2014, both Parties signed and returned the Order of Procedure.

4. HEARING

4.1 A hearing was held on 31 October 2014 in Lausanne, Switzerland.

4.2 The Appellant was represented at the hearing by its counsel, Mr Mikhail Prokopets and Mrs Darina Nikitina.

4.3 The Respondent was represented by Mr Daniyar Kenbayev and Mr V. Suslenko, who were assisted by Mrs Olga Tissot, interpreter.

4.4 The Parties confirmed that they did not have any objections to the appointment of the Sole Arbitrator.

4.5 Mrs Bikahambetova Sharipa, General Director of the Respondent, and Mrs Babagiahina Bakyt, accountant of the Respondent, were heard as witnesses via Skype.

4.6 The Appellant and the Respondent had ample opportunity to present their cases, submit their arguments and answer the questions posed by the Sole Arbitrator. After the Appellant's and the Respondent's final submissions, the Sole Arbitrator closed the hearing and reserved his final award. The Sole Arbitrator listened carefully and took into account in his subsequent deliberations all the evidence and arguments presented by the Parties although they have not been expressly summarised in the present Award. Upon closure, the Appellant and the Respondent expressly stated that they did not have any objections in respect of their right to be heard and to be treated equally in these arbitration proceedings.

5. ADMISSIBILITY OF NEW REQUESTS, ARGUMENTS AND EVIDENCE

5.1 In the Summary filed by the Respondent, the Respondent presented its requests for relief and submitted arguments which had not been submitted previously, neither when the case was pending before FIFA nor during the preparation of the case for consideration by the CAS.

5.2 Article 56 of the CAS Code states, *inter alia*, as follows:

"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to

produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".

5.3 As already mentioned in para 3.12 – 3.15, the Respondent did in fact request to be granted the opportunity to submit a written submission in order to have the principle of equal treatment respected, to which request, however, the Appellant objected due to the lack of exceptional circumstances.

5.4 By letter of 17 October 2014, the Parties were informed that the appeal brief filed by the Respondent in the CAS 2014/A/3641 would not be considered as an answer in the present case. However, the Parties were allowed to provide a summary of their respective positions.

5.5 Against this background, and since the Respondent failed to file any answer in the present case within the prescribed deadline, any new requests, arguments or evidence not already submitted by the Respondent before FIFA will be disregarded by the Sole Arbitrator.

5.6 It is further emphasised that only requests, arguments or evidence in connection with the issues covered by the Appellant's appeal in the present case will be taken into consideration by the Sole Arbitrator.

6. CAS JURISDICTION AND ADMISSIBILITY OF THE APPEAL

6.1 Article R47 of the Code states as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if 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".

6.2 With respect to the Decision, the jurisdiction derives from article 67 of the FIFA Statutes. In addition, neither the Appellant nor the Respondent objected to the jurisdiction of the CAS, and both Parties confirmed the CAS jurisdiction when signing the Order of Procedure.

6.3 The Decision was notified to the Appellant on 4 June 2014, and the Appellant's Statement of Appeal was lodged on 24 June 2014, *i.e.* within the statutory time limit set forth by the FIFA Statutes, which is not disputed. Furthermore, the Statement of Appeal and the Appeal Brief complied with all the requirements of Articles R48 and R51 of the CAS Code.

6.4 It follows that the CAS has jurisdiction to decide on the appeal of the Decision and that the appeal of the Decision is admissible.

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

7. APPLICABLE LAW

7.1 Article 66 of the FIFA Statutes states as follows:

"The Provision 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".

7.2 Article R58 of the CAS Code states as follows:

"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".

7.3 In the Summary the Respondent submitted that the case should be decided according to the national law of Kazakhstan since, according to the Respondent, the Parties had agreed on that in the Contract.

7.4 The Sole Arbitrator notes that the argument that the case should be decided in accordance with the national law of Kazakhstan was never submitted before FIFA, which is why the Bureau decided the case in accordance the FIFA regulations.

7.5 For that reason alone, see para 5.4, the argument that the case should be decided in accordance with the national law of Kazakhstan should be disregarded by the Sole Arbitrator, and with reference to the provisions mentioned above, the law in this case will be the rules and regulations of FIFA and, additionally, Swiss law since FIFA, which issued the Decision, is domiciled in Switzerland.

8. THE PARTIES' REQUESTS FOR RELIEF AND POSITIONS

8.1 The following outline of the Parties' requests for relief and positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions and evidence filed by the Parties with the CAS, even if there is no specific reference to those submissions or evidence in the following summary.

8.2 The Appellant

8.2.1 In its Statement of Appeal of 4 June 2014 and in its Appeal Brief of 24 June, the Appellant requested the following from the CAS:

1. To set aside points 2, 3 and 5 of the Decision and to replace them with the following decision:

"2. The respondent, FC X., has to pay to the Claimant, V., the amount of KZT 2,261,400 as outstanding salary as well as the amount of KZT 31,456,800 as compensation for breach of contract, within 30 days as from the date of notification of this decision.

3. Within the same time limit, the Respondent, FC X. has to pay to the Claimant, V., default interest at rate of 5% per year on the following partial amounts, as follows:

- on KZT 2,261,400 from 14 December 2012 until the effective date of payment;

- on KZT 31,456,800 from 28 January 2013 until the effective date of payment.

5. If the aforementioned amounts of KZT 2,261,400 and KZT 31,566,800, plus interest as established above, are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision".

2. To order FC X. to bear all the costs incurred with the present procedure.

3. To order FC X. to pay to V. a contribution towards his legal and other costs, in an amount to be determined at the discretion of the Panel.

8.2.2 In support of its requests for relief, the Appellant submitted as follows:

a) It has already been decided by the Bureau that the Respondent breached the Contract without just cause and that the latter must pay to the Appellant all outstanding amounts as well as compensation for breach of contract. The Respondent never appealed against these questions before the CAS.

b) The Bureau miscalculated the amount of compensation for breach of contract to be paid when failing to correctly consider the *"lex specialis"* liquidated damages clause stipulated in Article 4 of the Annex as well as the well-established CAS jurisprudence in similar matters.

c) The Bureau correctly decided that the Appellant, as a result of the premature termination of the Contract by the Respondent, had found himself unexpectedly without any employment and that the Appellant therefore should be entitled to receive from the Respondent the remaining amount due in accordance with the Contract, *i.e.* the sum of KZT 31,456,800, corresponding to the Appellant's salary for the period from January 2013 to December 2013 (*i.e.* KZT 2,631,400 x 12 months), as compensation for unilateral termination.

d) However, the Bureau then came to the legally erroneous conclusion that the Appellant was under the obligation to mitigate the loss suffered by the Appellant by the Respondent's termination of the Contract without just cause.

e) As a consequence, the Bureau decided that *"the amount of KZT 9,440,000 earned with FC Fakel should be deducted from the amount of compensation established above, i.e. KZT 31,456,800"*, and the amount of compensation to be paid by the Respondent to the Appellant as compensation should therefore be KZT 22,016,800 (*i.e.* KZT 31,456,800 – KZT 9,440,000).

f) When deciding that the amount of compensation should be reduced by deducting the amount earned by the Appellant with FC Fakel, the Bureau failed to correctly take into account the provision of Article 4 of the Annex, which states as follows:

"In the event of termination of this Employment Contract by the Employer before the expiration of its term in the absence of the Employee's breach of the Contract or the law of the Republic of Kazakhstan, the Employer shall pay to the Employee the compensation in the amount determined by the total income of the Employee under this Employment Contract for the period from the date of termination of the Employment Contract till its expiration".

g) The compensation agreed between the Parties in advance cannot be adjusted unless allowed by the Contract or the Annex, or unless the amount is excessive, which is not the case.

h) According to Swiss law, which is applicable to this matter *"the terms of a contract may be freely determined within the limits of the law"*, just as well as *"liquidated damages may be agreed upon in any amount by the parties"*.

i) In Article 4 of the Annex, the Parties clearly stipulated the consequences of an early termination of the Contract by the Respondent without just cause, i.e. payment of compensation by the Respondent in the amount determined by the total income of the Appellant under the Contract, calculated from the date of termination to the date of expiration. Based on that method of calculation, the compensation that is due to the Appellant equals KZT 31,456,800.

j) Neither the Contract nor the Annex stipulates any other additional criteria, such as a deduction of the salary earned with another employer,

k) In this respect, the CAS in its practice has already taken the decisive position that the compensation agreed between the parties in advance cannot be mitigated unless the parties have stipulated so or unless the agreed amount is excessive.

l) Furthermore, the general obligation to mitigate a loss according to Swiss law is not a mandatory rule, and the parties to a contract may therefore agree that no deduction has to be effected.

m) When deciding differently, the Bureau went against the principle of contractual freedom and against the CAS jurisprudence, and no deduction in the amount of compensation shall be applicable.

n) In any case, the Respondent failed to establish the concrete elements which would have justified the application of a possible deduction and for which the Respondent bears the burden of proof.

o) Finally, when deciding upon the amount of compensation, the deciding body is limited by the Parties' prayers for relief, as it cannot rule *extra* or *ultra petita*.

p) According to the *ultra petita* principle, the deciding body may not award a party anything more than or different from what that party has requested, nor less that what the opposing party has acknowledged.

q) In the procedure before FIFA, the Respondent never asked for a reduction of the amount of compensation on the ground that it was excessive, and the Bureau did not consider the amount of compensation as excessively high.

8.3 The Respondent

8.3.1 As already described in para 3.4 – 3.18, the Respondent never filed an answer in the present proceeding within the time limit. However, in its Summary the Respondent requested the following from the CAS:

1. to dismiss the appeal, and in any case
2. to decide that no compensation for breach of contract is payable by any of the Parties.

8.3.2 In support of its request for relief, the Respondent submitted as follows:

a) Art 22 lit. c of the Regulations on the Status and Transfer of Players states as follows:

"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear: employment-related disputed between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists on national level";

b) As such an arbitration tribunal at the national level exists, and since the Parties agreed in the Contract that *"…any disputes arising out of this Employment Contract or in connection with it shall be subject to consideration by the court and/or conciliation commission"* and that such dispute then *"will be subject to consideration in accordance with the Labour Code of the Republic of Kazakhstan"*, the Bureau was not competent to decide on the matter.

c) Furthermore, and since the Parties to the Contract chose the law of Kazakhstan as the applicable law, the Bureau was wrong in applying the FIFA regulations, which in any case do not contain the procedure of contract termination, when deciding on the matter.

d) Furthermore, the Bureau was wrong when deciding that the Contract was terminated by the Respondent without just cause.

e) On 28 October 2012, the Appellant lodged his resignation statement to the General Director of the Respondent, which resignation was caused by the poor performance of the Appellant and the Respondent's team.

f) The Appellant never revoked his resignation, and in accordance with the applicable law of Kazakhstan, the Respondent therefore accepted the resignation and terminated the Contract in accordance with his application of dismissal.

g) As the Contract was terminated with just cause, the Appellant is not entitled to receive any compensation for breach of contract as no legal basis for such compensation exists.

9. DISCUSSION ON THE MERITS

9.1 The Sole Arbitrator notes initially that the Respondent, as already mentioned above, failed to file an answer in the present procedure within the time limit set forth in the CAS Code.

9.2 Moreover, and as mentioned earlier, the appeal filed by the Respondent in the now terminated procedure CAS 2014/A/3641 must be deemed to have been withdrawn, and its content is therefore not included as part of the file in the present case.

9.3 Against this background, and as already stated in paras 5.4 and 5.5, it is thus only any possible requests, arguments or evidence in connection with the issues covered by the Appellant's appeal in the present case that will be taken into consideration by the Sole Arbitrator.

9.4 This means that the Sole Arbitrator is for instance prevented from addressing the allegations made by the Respondent claiming that the Bureau is not competent to deal with the dispute and that the dispute should be decided in compliance with substantive Kazakhstan law.

9.5 Moreover, as the Appellant's appeal solely concerns the question of the size of the compensation which the Respondent, in accordance with the Decision, in addition to payment of the Appellant's outstanding salary for December 2012 in the amount of KZT 2,621,400, is obligated to pay to the latter as compensation for breach of contract without just cause, the very question of whether the Sole Arbitrator may specifically find that the Respondent actually terminated the Contract without just cause and, as such, became obligated to pay compensation for breach of contract does not fall within the scope of the case.

9.6 The Appellant requests that the Respondent, in addition to his outstanding salary for December 2012, be ordered to pay to the Appellant the full outstanding salary amount under the Contract during the remaining contract period as from January 2013 until and including December 2013 with addition of interest.

9.7 The Sole Arbitrator notes that in accordance with the Decision, the Appellant is entitled to receive *"the remaining amount due in accordance with the contract, i.e. sum of KZT 31,456,800, corresponding to his salary for the period from January 2013 to December 2013 (i.e. KZT 2,621,400 x 12 months…)"*, the size of which amount has not been disputed by the Respondent, neither before FIFA nor during these proceedings.

9.8 Moreover, it is noted that the Parties do not seem to dispute the fact that the Appellant, during the period from June 2013 until December 2013, received from his new club, FC Fakel, an amount corresponding to KZT 9,440,000, which is the amount the Bureau deducted from the final amount of compensation to be paid.

9.9 The Appellant submits in this connection that the deduction set out in the Decision in the amount of compensation to be paid by the Respondent was an error as the Parties had already agreed in advance how an amount of compensation, where appropriate, would be calculated in the event of the Respondent's early termination of the Contract without just cause, which agreement the Bureau has not respected in its Decision.

9.10 The Sole Arbitrator notes initially in this connection that, as stated by the Appellant, it appears inter alia from the Swiss Code of Obligations (article 19 para. 1 and article 160 para. 1) that *"the*

terms of a contract may be freely determined within the limits of the law" just as well as *"liquidated damages may be agreed upon in any amount by the parties"*.

9.11 Furthermore, according to art 337c of the Swiss Code of Obligations, it follows that:

"1. Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration.

2. Such damages are reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work".

9.12 With reference to article 361 of the Swiss Code of Obligations, however, the Sole Arbitrator agrees with the Appellant that the obligation to mitigate the loss in case of unilateral termination of an employment relationship without just cause is not a mandatory rule, and the Parties are therefore entitled to agree that no such deduction shall be applicable.

9.13 Given the fact that it is the Appellant who alleges that no reduction should be made in the amount of compensation because the Parties have agreed on this, the Sole Arbitrator finds that the Appellant must discharge the burden of proof for the existence and content of such agreement.

9.14 As a result, the Sole Arbitrator reaffirms the principle established by CAS jurisprudence that *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue, In other words, the party which asserts facts to support its rights has the burden of establishing them (..) The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (e.g. CAS 2003/A/506, para. 54; CAS 2009/A/1810 & 1811, para. 46 and CAS 2009/A/1975, para. 71ff).

9.15 The Appellant submits in this connection that it was specifically agreed at the time when the Parties entered into the Contract that the size of any financial compensation payable by the Respondent to the Appellant in the event of the Respondent's unilateral termination of the Contract without just cause should be fixed in accordance with the provision of Article 4 of the Annex, which reads as follows:

"In the event of termination of this Employment Contract by the Employer before the expiration of its term in the absence of the Employee's breach of the Contract or the law of the Republic of Kazakhstan, the Employer shall pay to the Employee the compensation in the amount determined by the total income of the Employee under this Employment Contract for the period from the date of termination of the Employment Contract till its expiration".

9.16 According to the Appellant, it was thus expressly decided in advance that the Appellant's claim for compensation would not be reduced in such cases, which means that the Appellant is entitled to receive the full outstanding salary amount under the Contract during the remaining

contract period as from January 2013 until and including December 2013 with addition of interest.

9.17 The Sole Arbitrator notes initially that the Respondent does not dispute the wording of the provision in question and that this provision has been validly agreed between the Parties.

9.18 Furthermore, the Sole Arbitrator notes that the Respondent, during the hearing itself, was not capable of providing a satisfactory interpretation of the relevant clause that was different from the Appellant's interpretation of the clause, according to which the clause set the guidelines for calculating the amount of compensation without any deduction, and none of the Parties expounded in any way on the background to the conclusion of the clause concerned.

9.19 Against the background of an interpretation of the wording of the clause, and considering the headline of Annex 1, which includes the phrase *"and other material incentives to the Employee"*, the Sole Arbitrator finds that the Appellant has satisfactorily discharged the burden of proof to establish that the provision describes the condition originally agreed between the Parties, which means that an amount of compensation, if applicable, was agreed at the full outstanding salary amount under the Contract for the remaining period of the Contract, from which it follows, for instance, that no reduction should be made for any other salary earned with a third party during the period of the Contract (emphasis added).

9.20 Moreover, as the Sole Arbitrator agrees with the Appellant that the Parties, according to Swiss law, may validly agree on a derogation from the general principle of mitigation of loss, which for instance allows the parties, as is regarded to be the case in the present dispute, to agree validly that no reduction will be made for any other salary earned, the Sole Arbitrator finds that the Bureau, when calculating the final amount of compensation, should not have made a deduction corresponding to the amount earned by the Appellant with FC Fakel.

9.21 Given these circumstances, and based on the view that the amount is incidentally not found to be excessive, the Sole Arbitrator thus finds that the Appellant, in accordance with the agreement between the Parties, is entitled to receive KZT 31,456,800 (corresponding to the Appellant's total salary for the period from January 2013 until December 2013 (*i.e.* KZT 2,621,400 x 12 months) without any deduction being made.

9.22 In accordance with the stipulations of the Decision, this amount carries interest at the rate of 5% p.a. as from 28 January 2013, *i.e.* the date when the claim was lodged.

9.23 Moreover, in accordance with the stipulations of the Decision, the Appellant is entitled to receive payment of his salary due and owing for December 2012, KZT 2,621,400 plus interest at 5% p.a. from 14 December 2012.

10. SUMMARY

10.1 Based on the foregoing and after taking into consideration all evidence produced and all arguments made, the Sole Arbitrator finds that the Appellant has satisfactorily discharged the burden of proof to establish that the Parties expressly agreed that the size of any financial compensation payable by the Respondent to the Appellant in the event of the Respondent's unilateral termination of the Contract without just cause should be fixed at the full outstanding salary amount under the Contract for the remaining period of the Contract without any deduction.

10.2 This amount is indisputably KZT 31,456,800, which the Appellant is therefore entitled to receive from the Respondent as compensation for breach of contract without just cause.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 24 June 2014 by Mr V. against the decision rendered by the Bureau of the Players' Status Committee on 19 March 2014 is upheld.

2. Paragraphs 2, 3 and 5 of the decision rendered by the Bureau of the Players' Status Committee on 19 March 2014 are set aside and replaced with the following:

"2. The Respondent, FC X., has to pay to the Claimant, V., the amount of KZT 2,261,400 as outstanding salary as well as the amount of KZT 31,456,800 as compensation for breach of contract, within 30 days as from the date of notification of this decision.

3. Within the same time limit, the Respondent, FC X. has to pay to the Claimant, V., default interest at the rate of 5% per year on the following partial amounts, as follows:

- On KZT 2,261,400 from 14 December 2012 until the effective date of payment;

- On KZT 31,456,800 from 28 January until the effective date of payment.

5. If the aforementioned amounts of KZT 2, 261,400 and KZT 31,456,800, plus interest as established above, are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision".

(…)

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