



**Arbitration CAS 2015/A/4327 FC Dinamo Minsk v. Christian Udubuesi Obodo, award of 13 May 2016**

Panel: Mr José Juan Pintó (Spain), Sole Arbitrator

*Football*

*Termination of an employment contract without just cause by the club*

*Principle “venire contra factum proprium” and legitimate expectations*

*Warning of termination*

*Right to health of the player*

*Illness or injury*

1. **If a player has been absent from a club in order to undergo medical treatment and rehabilitation without the club’s consent but the latter has never requested the player to return to it, or warned him that with his absence he was in breach of the contract; if it has limited its correspondence to request information about the evolution of the player’s rehabilitation; if it has never applied the system of fines applied in case of improper fulfilment of the contractual obligations envisaged in the employment contract; then according to the rule *nemo potest venire contra factum proprium*, the club has created legitimate expectations to the player that led him to believe that the club had tacitly authorized him to follow the rehabilitation program. Therefore, the club is bound by its own acts and cannot pretend that such absence is to be considered as a breach of the employment contract.**
2. **For a party to be allowed to validly terminate an employment contract, it must have warned the other party, in order for the latter to have had the chance, if it deemed that the complaint to be legitimate, to comply with its obligations.**
3. **If a player has followed all the medical instructions of the club, but after a few months still has not resolved his physical problems in spite of the treatment followed on the club’s indication, it is lawful for him to seek an alternative and independent medical opinion in order to protect and guarantee his fundamental right to health.**
4. **If a player cannot provide his club with his working capacity due to illness or injury, this does not constitute a breach of contract or a just cause for early termination of contract.**

## **I. PARTIES**

1. FC Dinamo Minsk (the “Club” or “Appellant”) is a Belarusian football club with its seat in Minsk, Republic of Belarus. It is affiliated to the Belarus Football Federation (“BFF”), which in turn is a member of the Fédération Internationale de Football Association (“FIFA”).
2. Christian Udubuesi Obodo (the “Player” or “Respondent”) is a Nigerian football player born in Warri on 11 May 1984.

## **II. FACTUAL BACKGROUND**

3. A summary of the most relevant facts and the background giving rise to the present dispute will be developed based on the parties’ written submissions, the evidence filed with these submissions, and the statements made by the parties and the evidence taken at the hearing held in the present case. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. The Sole Arbitrator refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning. The Sole Arbitrator, however, has considered all the factual allegations, legal arguments, and evidence submitted by the parties in the present proceedings.
4. On 11 February 2013, the Player entered into an employment contract with the Club (the “Contract”) valid as from the date of its signature until 31 July 2014. In its most relevant part the Contract reads as follows:

“[...]

### **2. RESPONSIBILITIES EMPLOYEE**

[...]

*2.3. The EMPLOYEE in [sic] obliged to, by instructions of the EMPLOYER, the head coach and (or) coaches of the team, go to recreation and training centres and take part in all football games, performances, competitions, trainings, assemblies, gatherings, probation periods, meetings, conferences, debriefing of the team games and other sports, training and rehabilitation events conducted by the EMPLOYER;*

*2.4. To obey orders (instructions) of the EMPLOYER, the vice director of the Club, the head coach and coaches of the Club unquestioningly, to follow the decision of the governing bodies of the Club.*

*2.5. Not to interfere with the matters of choice of the team football players, coaches and administrators of the Club;*

*2.6. To attend all medical examinations (tests) and rehabilitative events organized by the Club to strengthen and improve his physical condition (medical examinations, sports and massotherapy, physiotherapeutic procedures, pool, sauna etc.);*

2.7. *To follow all the instructions and directives of the EMPLOYER, the head coach and coaches of the team undeviatingly, concerning a tactic plan of a football match and a general plan of trips, meetings, etc.;*

[...]

2.15. *To maintain the high level of his athletic performance, to increase his sportsmanship and achieve high sports results;*

[...]

2.20. *To plan together with coaches and to accomplish training and competitive tasks, individual training plans, as well as during the decentralized training;*

[...]

2.23. *Not to break the rules of morality, both in his private life and in society, to behave so that not to prejudice the EMPLOYER'S interest nor harm a football game, as well as to live such a way of life, which would correspond to the certain regime and the requirements determined by the EMPLOYER;*

[...]

2.28. *In case of sickness or an accident, the EMPLOYEE is obliged to inform the EMPLOYER (bring to the EMPLOYER'S notice) immediately. Besides, he is obliged to submit, within 48 hours, a health certificate (conclusion) confirming his impossibility to play football and put himself at the disposal of the medical council or doctors of the Club (team) for examination;*

[...]

### **3. RIGHTS OF EMPLOYEE**

*The EMPLOYEE has the right to:*

3.1. *work as the most worthy method of an individual's self-assertion, as well as to healthy and safe working conditions;*

[...]

### **4. RESPONSIBILITIES OF EMPLOYER**

4.1. *The EMPLOYER undertakes to pay the EMPLOYEE monthly wages in time, as well as to make other payments according to this contract and other normative legal acts of the EMPLOYER, to provide necessary working conditions according to the present contract;*

[...]

4.4. *To provide restorative, therapeutic, medical and relaxation procedures aimed at achieving the optimum competition form of the EMPLOYEE;*

[...]

4.9. To organize scientific-methodical and medical maintenance of the EMPLOYEE'S training, including;

- Services of a complex scientific group of experts, a coach-doctor, a coach masseur;
- complex and current examinations, medical supervision and consultations;
- treatment in case of need at specialized medical institutions;
- providing with medicines, vitamins, regenerative and other medical and biologic means in the established manner;

4.10. The EMPLOYER also bears other responsibilities according to this contract, the labour legislation of the Republic of Belarus, as well as the corresponding documents of FIFA, UEFA, ABFF.

[...]

4.13. The EMPLOYER is obliged to pay at own expense costs for flight tickets on the route Minsk – Lagos – Minsk for the SPORTSMAN two-times during the calendar year.

## **5. RIGHTS OF EMPLOYER**

5.1. To reduce/deprive the EMPLOYEE of bonuses of all kinds irrespective of the fact whether the EMPLOYEE was brought to disciplinary responsibility or not, for:

- absence at his place of work without any reasonable excuse;
- delayed fulfilment or failure to fulfil his labour responsibilities without valid excuse;
- use of state-owned property in nonservice purposes;

[...]

## **7. DURATION OF CONTRACT**

7.1. The present contract, in view of the character of the EMPLOYEE'S activity in the club (team), is concluded according to clause 2 of article 17 of the Labour Code of the Republic of Belarus for the fixed term, namely:

**From <<11>> February 2013 until 31 July 2014;**

[...]

7.3. During all the period of validity of the contract, the EMPLOYEE has no right to resignation, except for the following cases:

- *Disease or disability preventing him from the fulfilment of his work;*
- *Violation of the EMPLOYER of the labour legislation of the Republic of Belarus, the present contract, as well as due to other reasons provided for by the current labour legislation of the Republic of Belarus;*

[...]

## **9. CANCELLATION OF CONTRACT**

*9.1. The Contract may be cancelled or terminated early on the grounds provided for by the current legislation of the Republic of Belarus (articles 35, 37, 38, 42 of the Labour Code of the Republic of Belarus), as well as on other grounds provided for by the rules of FIFA, UEFA, Association of BFF, and the present contract, including:*

- *Non-fulfilment by the EMPLOYEE of the clauses provided for in the second article of the present contract;*

[...]

*9.3. When the Contract is cancelled or early terminated, the EMPLOYER pays the EMPLOYEE all the money due to him, on the day of dismissal or not later than the next day after the EMPLOYEE submits a requirement for payment, besides the EMPLOYEE'S work-record book is issued on the day of his dismissal.*

[...]

## **11. FINAL PROVISIONS**

*11.1. In case any dispute arises between the parties under this contract, or in connection with their football activity, it shall be settled by direct negotiations. If the dispute between the parties is not settled, it shall be settled at the committee of the status of football players (first instance) of the Association of BFF, or at the football Arbitration of BFF (second instance), or at the corresponding body of FIFA if the dispute is international, at that decisions of these bodies are final and without appeal;*

[...]

*11.4. As for the rest, which is not stipulated by the present contract, the parties are guided by the corresponding regulations of FIFA, UEFA, Association of BFF, as well as by the EMPLOYER'S documents;*

[...]”.

5. Also on this same date, the Club and the Player signed an additional agreement named “*Supplementary Agreement*”, by means of which both parties established the economic terms and conditions of the working relationship, as well as the disciplinary regime applicable to the Contract. In this “*Supplementary Agreement*” the parties agreed, *inter alia*, the following:

“[...]

1.2. *Salary of SPORTSMAN is 20 000 EUR (twenty thousand euro) net per month.*

[...]

1.6. *CLUB shall compensate for SPORTSMAN expenses for apartment rent in the amount of 700 USD (seven hundred U.S. dollars).*

1.7. *CLUB is obligated to provide to the SPORTSMAN personal car for his use during the term of the employment contract.*

[...]

### **Annex 1**

***for the supplementary agreement to the personal contract No. \_\_ -F from 11.02.2013***

[...]

2. *Absence on the training sessions, camps, friendly matches or other events organized by the CLUB without a valid reason or without advance notice - 2500 EUR (two thousand five hundred euros), and 5000 EUR (five thousand euro) if repeatedly within month.*

[...]

4. *Absence on the official match of the CLUB without good reason or without advance notification – 5000 EUR (five thousand euro)*

5. *Disobeying orders (instructions) of the Top Management, head coach and team manager, as well as failure to comply with the decision of the CLUB governing bodies – 2500 EUR (two thousand five hundred euro)*

[...]

11. *Violation of the norms of morality and ethics in personal life and in society, if these acts resulted in damage to the interest of the CLUB and the football game – 3500 EUR (three thousand five hundred euro).*

[...].

6. Since the beginning of the training period with the Club, the Player suffered a sharp pain located between his belly and the pubic area.
7. On 18 March 2013, the Player underwent some medical tests in the “Minsk State Emergency Hospital” where he was diagnosed with an unspecified infection to be treated with antibiotics. Pursuant to the medical records corresponding to this exploration (i.e. Epicrisis No 7752), the Player had a “Blunt abdominal trauma. Bursing of the anterior abdominal wall. Subacute mesenteric adenitis”.

8. On 8 April 2013, given the fact that the Player maintained that his pain was getting worse, the Club authorised him to undergo medical examinations in the “*Hospital Quirón of Barcelona*” where he was treated by Dr. Cugat, who diagnosed him with a stress fracture of the pubic area, also known as athletic pubalgia or sport’s hernia. In this respect, Dr. Cugat advised the Player “*to follow conservative treatment*”(including “*Rehabilitation and Physiotherapy program*”) and that “*if satisfactory results were not achieved, surgical treatment would be necessary*”.
9. In particular, Dr. Cugat provided the Player with a specific 10 day “*Readaptation Program*”. Such program prescribed to “*Introduce the player to the group progressively: in the beginning, give space to the player for think/move, and progressively increase the intensity of the work*”.
10. The Player returned to Belarus and was reinstated with the team.
11. The Club did not pay the Player’s salary of May 2013.
12. On 1 June 2013, as the Player did not recover from his injury, he attempted to fly to Rome in order to undergo further medical examinations in the “*Clinic Villa Stuart of Rome*”. However, once in the airplane the Player was forced by the Club’s staff to get off the plane, apparently because he had not been authorized by the Club to leave Belarus.
13. On 4 June 2013, given that the Player was not yet recovered, a new medical examination was carried out in Minsk in the “*Municipal Clinic Emergency Hospital*” where the Player underwent a “*Nuclear Magnetic Resonance*” (“NMR”). The medical report issued by this medical center, *inter alia*, stated:

“*[...] Bone-destructive changes in the pelvis, femoral heads are not discovered, cortical bones are not damaged, subchondral change of the MR-signal is not determined.*

*MR-signal in the muscles structure is not changed.*

*Pathological changes in the visible pelvic organs are not discovered.*

*Conclusion: Structural changes are not revealed [...]*”.
14. On 17 June 2013, given that the Player’s pain did not disappear, the Club requested the medical advice of Dr. Cugat, requesting him to assess the results of the NMR.
15. On the same date, Dr. Cugat sent a letter to the Club suggesting that “*As discussed by telephone with Mr Oleg today Monday 17<sup>th</sup> June 2013, please find below a brief description of the proposed surgery [...]*” which would be performed at the “*Hospital Quirón*” of Barcelona and that a “*Recovery time is estimated at 2 months according to patient evaluation*”.
16. On 26 June 2013, as the Player was still injured, the Club suggested he undergo a new medical examination “*in order to clarify the diagnosis*”. The Player refused to undergo this medical examination, arguing that any further medical examination would have to be done in a FIFA Medical Centre of Excellence.

17. Around 27 June 2013, the Player took a flight to Italy in order to undergo structural exams of his pubic area in the SaniRad Hospital in Udine.
18. On 27 June 2013, the Player's counsel sent a letter to the Club informing it about the Player's prognosis in the following terms:

*"[...] with the present I formally communicate you, even according to art. 2.27 of the contract of employment, that Mr. Obodo, is still affected by the injury, already known by you, in his pubic area, as certified by the Dr. Gianni Paolo Degano, with the medical certification attached to the present.*

*According to the suggestion of the Doctor, tomorrow, Mr. Obodo will undergo with more specific medical tests, in order to verify the extent of the damage and perform therapies and rehabilitative care.*

*I also communicate you that, in the next days, Mr. Obodo will carry out the practices for the renewal of his Italian permit to work.*

*The player will remain at your complete disposal of your medical staff at the saniRad s.r.l, via J.F. Kennedy 3, 33019 Tricesimo (Udine).*

*It will be my care to update you about the progress of rehabilitation [...]"*

19. On 27 and 28 June 2013, the Player underwent medical exams in the SaniRad Hospital in Udine, including an x-ray and RMN exams that were conducted by the medical team of Dr. Gianpaolo Degano. In this regard, Dr. Degano - who analysed the NMR - issued a report according to which he *"[...]confirm the clinical suspect of severe sufference [sic] to the pubic region with external periosteal of 8 mm. The connecting suffering of the big adductor is clear. I prescribe completion of exams with pelvis x-rays alternate monopodial leaning and RMN of pelvis [...]"*
20. On 28 June 2013, the Club sent a letter to the Player stating, *inter alia*, the following:

*"[...]"*

*The top management of FC Dinamo-Minsk has been informed by the coaching and administrative staff of the first team that you had not appeared at the team's location for a training session on 27 June 2013 and headed to an unknown direction.*

*We have to note that you also missed trainings in the period from 20 to 24 June 2013. On 25 June 2013 during a joint meeting in our office in Minsk with your representative, FIFA licensed agent Mr. Augusto Carpeggiani, you found it difficult to explain the reasons for the absence on the days specified above.*

*FC Dinamo-Minsk is much concerned about your conduct and actions, and we kindly and convincingly ask you to return to the location of the first team and continue the execution of your duties under the employment contract No. 09/13-F dated 11 February 2013.*

*This letter of FC Dinamo-Minsk should be considered as official reprimand for the football player who is bound by the contract with the professional club. In addition FC Dinamo-Minsk cordially requests to submit a written explanation **on or before 8 July 2013** regarding the reasons for your absence.*

*In case of your silence, which would be interpreted as lack of reasonable excuses for your absence, or continuation of your absence at club's training sessions, FC Dinamo-Minsk would have to fine you in accordance with the provisions of the supplementary agreement No. 1 to contract No.09/13-F dated 11 February 2013*

*In the case of abandonment of the appeal without attention, FC "Dinamo-Minsk" will be compelled to report to FIFA about this situation.*

*We remain at your disposal for the further information.*

*[...]*

21. The Club did not pay the Player's salary of June 2013.
22. On 1 July 2013, the Player's counsel sent a letter to the Club stating the following:

*"[...] I formally communicate you, in incompliance with the provision of the contract of employment and, in particular, to its art. No. 2.28, that the medical exams to which Mr. Obodo was subjected at the saniRad S.r.l. in Tricesimo - Udine (Italy), have underlined that he is still affected by the injury, already known by you, in his pubic area, as certified by the documentations attached to the present letter.*

*[...]*

*Therefore, in response to your communication of the last 28<sup>th</sup> June, the medical situation explained by the certifications of Professor Davide Fiore, Dr. Giuseppe Monetti and Dr. Gianpaolo Degano, should be considered as a full justification of the absence from work contested to Mr. Obodo, specifically in reason of the significant deterioration of the player's injury, certified, under your control in the date of 4<sup>th</sup> June.*

*According to the suggestions of the Doctors, in the next days, Mr. Obodo will sustain a medical follow-up specialistic [sic], in order to individuate the best therapies and rehabilitative care that will be carried out in a primary European centre for rehabilitation, whose name will communicate to you as soon as possible.*

*Furthermore, we have to underline that the conducts of Mr. Obodo had to be considered absolutely lawful, according to the Health and Safety safeguard established by the "European Framework Agreement regarding the minimum requirements for standard Player Contracts in the Professional Football Sector in the European Union, and in the rest of the UEFA Territory", that had to be considered as directly applicable to the contract of employment.*

*[...]*

*Despite the temporary impossibility to train, due to the injury, we communicate you that the player will remain at complete disposal your and of your medical staff, at the saniRad s.r.l, via J.F. Kennedy 3, 33019 Tricesimo (Udine).*

*It will be my care to update you about the progress of rehabilitation.*

*Sure to have clarified the position of Mr. Obodo, we kindly invite you desist from the announced disciplinary actions [...]*

23. On 2 July 2013, several sports websites published that the Player had been found by the Italian police in a car with two girls and a male friend who was arrested for being in the possession of marijuana.

24. On this same day, the Club sent a letter to the Player with the following content:

“[...]

*The medical staff of FC Dinamo-Minsk is completely disagreeing with the interpretation of medical results (MRI no. 2312/13), which have been performed on 4 June 2013 in Minsk, Belarus. Due to the medical report of the above mentioned MRI no structural changes were revealed in you pubic area. We should also note that Mr. Obodo went to the Italy without the permission of his current employer.*

*As stated in the letter of Mr. Miranda dated 1 July 2013 you should remain at our complete disposal at the saniRad s.r.l, via J.F. Kennedy 3, 33019 Tricesimo (Udine), where you will sustain a medical follow-up specialists. Despite this, we were surprised to discover in the Italian media [link] news that Mr Obodo was found in Udine by police in a car with his friend, who was carrying marijuana.*

*Such a misconduct of the player of FC Dinamo Minsk may not reflect in a good way on the reputation of the club. Moreover, we should note that it was not the first fact of the improper behavior of Mr Obodo who is an employee of FC Dinamo-Minsk (please, find attached the screenshots from the leading Belarusian sporting news portal [www.goals.by](http://www.goals.by)).*

*Based on the above and for the sake of good order, according to art. No.2.6 of the contract of employment No. 09/13-F dated 11 February 2013 FC Dinamo-Minsk instructs you to pass drug tests in the following FIFA Medical Centre of Excellence:*

[...]

*You should be at the place of passing medical tests on 5 July 2013 at 14:00 (local time).*

[...]”.

25. On 3 July 2013, the Player’s counsel sent a letter to the Club informing it that (i) the Player was still injured (“The exams, therefore, show a temporary impossibility to train of the player, due to the injury, and the significant detriment of the injury occurred in Belarus, as certified in the date of 4<sup>th</sup> June 2013, that, clearly, was not treated with sufficient attention by your medical staff, with the obvious risk of further serious injury, then occurred”), that (ii) the news published by the media was not true, that (iii) he accepted to undergo the requested drug test and that, (iv) he was at the Club’s disposal at the Italian “Fisiology Center” where he was performing the prescribed therapies and following a rehabilitative program to recover from his injury.

26. On 4 July 2013, the Club sent a letter to the Player informing him that the Club would send a representative to attend the Player’s drug test.

27. On 5 July 2015, the Player underwent the drug test in presence of the Club’s representative.

28. On 8 July 2013, the Player's counsel sent to the Club the Player's rehabilitation program issued by Dr. Borra on 3 July 2013, according to which the "*Patient presents severe pain in the pubic zone (even with the simply cough)*", as well as with a medical prescription issued by Dr. Francesco Lijoi with the pharmacology treatment to be followed by the Player during his period of treatment.
29. On 24 July 2013, the Player's counsel informed the Club that he had ended the first stage of the rehabilitation program and that he was going to start the second-phase of his rehabilitation treatment, underlining in this regard that "[...] *the evaluation of Professor Borra shows the protracted, for at least another two weeks, of the temporary impossibility to train of the player*" and indicating that the "*medical and physiotherapeutic staff of the centre is at your full disposal for any other information and clarification*". Together with this correspondence the Player's counsel enclosed a medical report issued by the "*Fisiology Center*" that was treating the Player.
30. On 25 July 2013, the Player's counsel sent a letter to the Club informing it that "*the Drug test is totally negative and shows that Mr Obodo has not taken any drugs*", enclosing the results of the drug test therein.
31. The Club did not pay the Player's salary of July 2013.
32. On 12 August 2013, the Club sent a letter to the Player requesting the latter to inform it about his process of rehabilitation and his date of return to Minsk.
33. On 21 August 2013, the Club sent a letter to the Player requesting again to provide it with all the relevant information in connection with the rehabilitation program that he was undergoing and to inform it about his date of return to Minsk.
34. On 27 August 2013, the Player's counsel sent a letter to the Club with the "[...] *certification of the Dr Marco Cola that states the programme of care that Mr Obodo is attending in his centre*" and providing it with the details of the new medical center where the rehabilitation program of this stage was going to be held. At the same time, he informed the Club that the "*evaluation of Dr Cola shows the protracted temporary impossibility to train of the player, for at least another two weeks*".
35. On 30 August 2013, the Club sent a letter to the Player requesting the latter to provide it with a "*detailed plan of his final rehabilitation*" as well as with the date of his return to Minsk, as "*the second and final stage of Belarus Premiere League Championship will start soon and our club is need in high quality players to reach high goals which were set by high management of the club*".
36. The Club did not pay the Player's salary of August 2013.
37. On 6 September 2013, the Player's counsel sent a letter to the Club informing the latter that the Player's rehabilitation was going to be completed on 7 September 2013 and that "*Next Monday, 09 September 2013, therefore, the player will return at your disposal in Belarus and will be able to train and work for your club*". A medical certification issued by Dr. Marco Cola was enclosed to this correspondence.
38. On 12 September 2013, once the Player had already returned to Belarus, the Club addressed another letter to the latter stating, *inter alia*, the following:

*“[...] FC “Dinamo-Minsk” acknowledges receipt of the letter dated 6 September 2013 and confirms that Mr Christian Udubuesi Obodo has come back to Minsk, Belarus on evening of 9 September 2013 and now taking part in training sessions of the “A” team.*

*As was indicated by Dr Cola in his certification, the player will be work for individual program at least one week before the start to train with all teammates. For the stake of good order the detailed plan of training differentiated for Mr Obodo from 10 to 17 September 2013 will be translated and provided soon.*

*Despite the player’s returning to the FC Dinamo-Minsk disposal, we would like to make some remarks and requests in course of our communications.*

*According to your explanations, Mr. Christian Udubuesi Obodo was in Italy from 27 June 2013 till 8 September 2013 and has pass the programme of rehabilitation from injury in his pubic area. As Club with which Mr Obodo has valid employment contract, we would like to underline again that player **was not at the place of working for more than 2 months**. Due to this fact we kindly ask you and, consequently, Mr Obodo to provide us detailed report about rehabilitation proces s from the period of 27 June 2013 to 8 September 2013. We cordially insist that the report above should contain full information about each day of player’s staying in Italy with indicating of concrete recovery activities an exercises (with its duration), which were carried out by Mr Obodo on the mentioned term. Any documents confirming the passing of the relevant activities and exercises must be signed by a responsible physician and attached to the report. In course of our request also we like to underline that evaluations and certificates of Professor Borra, Dr Cola and other Italian doctors contains **only general information** about process of rehabilitation without concrete terms, programs, plans and its durations.*

*Also the management of FC Dinamo-Minsk would like to pay your attention to the following behavior of Mr Christian Obodo Udubuesi. Due to the fact that the player was absent for a long time in the location of the team, the Club management wants to stay in touch with the foreign player and, if necessary, hold negotiations for the settlement of all arisen disputes and misunderstandings. However, the player after arriving in Minsk, Belarus, is taking all possible measures to be unavailable before the club management representatives at time outside the training sessions. In particular, he did not return calls or even turn off his cell phone. Such behavior in our strong belief is unacceptable for a high level professional player. Please, be so kind to take note of this information.*

*[...]”.*

39. On 18 September 2013, the Player’s counsel sent a letter to the Club stating that during the next days he would send the reports and certifications issued by Dr. Borra and Dr. Cola. In this letter he also warned the Club that the Player was “attending a very dangerous double daily training program that could compromise the hard rehabilitative work done in Italy” and that such training conditions should “be considered absolutely in violation of the ordinary health and safety rights of the employee according to the ordinary and supranational law applicable to the employment relationship and in particular according to the Health and Safety safeguards established by the “European Framework Agreement regarding the minimum requirements for standard Player Contracts in the Professional Football Sector in the European Union, and in the rest of the UEFA Territory”, that is directly applicable to the contract of employment”.

40. The Club did not pay the Player's salary of September 2013.
41. On 3 October 2013, the Player's counsel sent another letter to the Club requesting the latter to immediately reinstate the Player in the first team, and to settle all the outstanding salaries (i.e. May, June, July, August and September). In its relevant part this letter reads as follows:

“[...]

*In name and behalf of Mr Christian Udubuesi Obodo, following the communication of the last 18<sup>th</sup> September, having regard to the exhausting and unjustified training program currently attended by the player, the player observes ut sequitur.*

*Notwithstanding his last communication, your technical staff persists to assign to Mr Obodo a very dangerous double daily training program that has to be considered absolutely unlawful and unjustified, having in mind the severe injury suffered by the player in reason of the misdiagnosis of your medical staff in the last may 2013.*

*According to the advice of the Italian doctors, consulted about your decisions, not without concern, was observed that the training programme, that Mr Obodo is currently performing alone without the control of your technical staff, could compromise the hard rehabilitative work done in Italy, as well as permanently the career of the player.*

*As already observed, the training program is carried out in absence of the other team-mates in very precarious health and safety conditions.*

*The circumstances, therefore, still detect in terms of serious violation of the canons of good faith and fair in the execution of the employment relationship, only if we add to this that the player is also currently emarginated from the rest of the team.*

[...]

*For these reason we invite you to assign immediately, and no later than tomorrow 4<sup>th</sup> October 2013, an ordinary training program to Mr Obodo, reintegrating him with the rest of the team-mates, under the control of you technical staff.*

*We, also, specify you that, in the negative, the player will act you, immediately, in front of the FIFA for the damages.*

*We, also, take the opportunity of this letter to formal notice you the immediately, and no later than the next seven days, payment of the wages matured by the player from the month of may [sic] 2013 at today, not paid at the contract deadline, specifying you that, in the negative, the player will act in front of the FIFA.*

[...]”.

42. On 9 October 2013, the Club gave notice to the Player's counsel of its decision to terminate the Contract based on the following grounds: (i) the Player's failure to show high level of athletic performance and make maximum efforts; (ii) the Player's failure to follow instructions and inform the Club; (iii) the Player's absence from the Club for more than two months

without justification and (iv) the Player's failure to follow the obligation to not break the "rules of morality".

43. On the same date, the Player's counsel objected the Player's dismissal, stating that:

*"[...] The dismissal, first of all, have to be considered null and void due of the lack of its direct communication to Mr Obodo, that doesn't consent to give efficacy to your decision.*

*Despite of this, the unilateral resignation of the contract is absolutely null and void because it is founded on false and discriminatory motivations, which show only the illegitimacy of your decision; therefore, the dismissal is not legitimated by a just cause.*

*For these reasons we invite you to reintegrate immediately Mr Obodo in his workplace.*

*[...]*

*We, also, take the opportunity of this letter to formal notice you, once again, the immediately payment of the wages matured by the player from the month of May 2013 at today, not paid at the contract deadlines. [...]"*

44. On 10 October 2013, the Club sent a letter to the Player stating, *inter alia*, the following:

*"[...] Article 9.1 of the Contract states that it may be terminated in case of non-fulfillment by the employee of the clauses provided for in the second article of the Contract, thus following a number of infringements of the Contract performed by Mr. Christian Obodo and legitimated by just cause as explained in the notice dated 9 October 2013 FC Dinamo-Minsk has terminated the Contact. The notice was sent to representatives of Mr. Christian Obodo Studio Legale Associato Miranda, agent Augusto Carpeggiani and Italian Managers Group S.p.A, furthermore it was handed to the player [...].*

*FC Dinamo-Minsk rejects false accusations with regard to individual training program of Mr. Christian Obodo provided in the letter dated 3 October 2013. Please be informed that individual training program performed by the player was ordinary, safe and necessary program, based on French methodic and performed by a number of players of FC Dinamo-Minsk previously [...].*

*Mr. Christian Obodo had to perform it due to poor physical fitness –the player was not ready to play in official football matches. Physical fitness of Mr. Christian Obodo had not allowed him to play entire match and show high intensity without harm to his health.*

*However, despite his poor physical fitness Mr. Christian Obodo was not making maximum efforts during individual training program. [...] The player has missed some individual training without a good reason as well. Following lack of willingness of Mr. Christian Obodo to perform individual training program properly, a number of fitness tests showed a low level of physical fitness of the player.*

*Following aforementioned facts FC Dinamo-Minsk had no other option but to terminate the Contract [...]"*

45. On 16 October 2013, the Player underwent further medical examinations in Bologna (Italy) at the "Isokinetic Sport Rehabilitation Network" (a FIFA Medical Centre of Excellence) where he was treated by Dr. Nanni and his medical team.

46. On 5 November 2013, Dr. Nanni issued a certificate stating that *“We don’t have any doubt about the possibility to play football as a professional player from a musculoskeletal and osteoarticular point of view”*.
47. On 28 January 2014, the Respondent concluded a new employment contract with the Portuguese football club, Sporting Club Olhanense valid as from 29 January 2014 until 30 June 2014 and according to which he had to receive a total remuneration of EUR 30,000.

### III. PROCEEDINGS BEFORE FIFA DISPUTE RESOLUTION CHAMBER

48. On 9 April 2014, the Respondent filed a claim before the FIFA Dispute Resolution Chamber (“FIFA DRC”) against the Appellant claiming *inter alia* the payment of the following amounts: (i) EUR 100,000 as outstanding salaries of May, June, July, August and September 2013, plus social contributions and interests; (ii) EUR 200,000 as compensation for breach of contract; (iii) EUR 500,000 as compensation for the injury and the health damages suffered and (iv) EUR 5,000 for the medical expenses incurred by the Player.
49. On 11 June 2014, the Appellant filed its Answer and Counterclaim before FIFA DRC, claiming to the Player compensation in amount of EUR 90,000 *“due to improper fulfilment of contractual obligations”*.
50. On 23 July 2015, FIFA DRC passed the following decision:
  1. *The claim of the Claimant/ Counter-Respondent, Christian Udubuesi Obodo, is partially accepted.*
  2. *The Respondent/ Counter-Claimant, FC Dinamo Minsk is ordered to pay to the Claimant/ Counter-Respondent, **within 30 days** as from the date of notification of this decision, outstanding remuneration in the amount of EUR 100,000 plus 5% interest p.a. until the date of effective payment as follow:*
    - a. *5% p.a. on the amount of EUR 20,000 as from 1 June 2013;*
    - b. *5% p.a. on the amount of EUR 20,000 as from 1 July 2013;*
    - c. *5% p.a. on the amount of EUR 20,000 as from 1 August 2013;*
    - d. *5% p.a. on the amount of EUR 20,000 as from 1 September 2013;*
    - e. *5% p.a. on the amount of EUR 20,000 as from 1 October 2013;*
  3. *In the event that the amount and interest due to the Claimant/ Counter-Respondent in accordance with the above-mentioned number 2. is not paid by the Respondent/ Counter- Claimant within the stated time lime, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
  4. *The Respondent/ Counter-Claimant is ordered to pay to the Claimant/ Counter- Respondent, **within 30 days** as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 170,000.*

5. *In the event that the amount due to the Claimant/Counter-Respondent in accordance with the above-mentioned number 4. is not paid by the Respondent/Counter-Claimant within the stated time limit, interest at the rate of 5% p.a. will fall due as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
  6. *Any further claim lodged by the Claimant/Counter-Respondent is rejected.*
  7. *The counter-claim lodged by the Respondent/Counter-Claimant is rejected.*
  8. *The Claimant/Counter-Respondent is directed to inform the Respondent/Counter Claimant, immediately and directly, of the account number to which the remittances are to be made and to notify the Dispute Resolution Chamber of every payment received.*
51. On 4 August 2015, the findings of the decision passed by the FIFA DRC were served to the parties.
52. On 10 August 2015, the Appellant requested FIFA to notify it the grounds of the decision rendered on 23 July 2015 by the FIFA DRC.
53. On 18 November 2015, the grounds of the decision rendered by the FIFA DRC on 23 July 2015 were notified to the parties.

#### **IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

54. On 8 December 2015, the Appellant filed a Statement of Appeal before the Court of Arbitration for Sport (the “CAS”) against the Player in accordance with Article R47 et seq. of the Code of Sports-Related Arbitration (the “Code”), challenging the decision rendered by the FIFA DRC on 23 July 2015 (the “Appealed Decision”), with the following requests for relief
1. *The appeal filed by FC Dinamo Minsk against the Decision issued on 23 July 2015 by the Dispute Resolution Chamber of Fédération Internationale de Football Association is upheld.*
  2. *The Decision issued on 23 July 2015 by the Dispute Resolution Chamber of Fédération Internationale de Football Association is annulled.*
  3. *The new decision is issued - the claim of Christian Udubuesi Obodo filed against FC Dinamo Minsk on 9 April 2014 is rejected.*
  4. *The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne in their entirety by Christian Udubuesi Obodo.*
  5. *Christian Udubuesi Obodo shall bear its own expenses and is ordered to pay FC Dinamo Minsk a contribution towards the legal fees and expenses incurred in connection with these arbitration proceedings*

*in an amount to be determined at the discretion of the Panel, but of no less than CHF 20,000 (twenty thousand Swiss Francs).*

55. On 9 December 2015, the CAS Court Office informed the parties about the Statement of Appeal filed by the Appellant. Also on this same date the CAS Court Office invited FIFA to state whether it intended to participate in the present arbitration proceedings.
56. On 18 December 2015, the Appellant filed its Appeal Brief in which it reiterated the prayers for relief previously filed with its Statement of Appeal. In its Appeal Brief, the Appellant also announced that it had requested its bank to issue a certificate in connection with some payments allegedly made to the Player that the Appellant was going to produce to the file as soon as the bank issued it.
57. On the same date, FIFA informed the CAS Court Office that it did not want to intervene in the present arbitration proceedings.
58. On 28 December 2015, the Appellant sent a letter to the CAS Court Office enclosing a certificate issued by the Belarusian bank “Priorbank” and dated 18 December, as well as some bank excerpts regarding 3 payments that the Club had made to the Respondent on 13 June 2013, 12 July 2013 and 10 October 2013.
59. On the same date, the CAS Court Office invited the Respondent to file with his Answer his position in connection with the admissibility of the Appellant’s comments and documents.
60. On 15 January 2016, the Respondent filed his Answer before the CAS, requesting the following:
  - *To dismiss the appeal presented by the Appellant;*
  - *To confirm the decision of the FIFA Dispute Resolution Chamber dated 18<sup>th</sup> November 2015;*
  - *In the not believed hypothesis of annulment of the Decision appealed, to confirm that the dismissal notified to Mr [sic] Obodo in date 9<sup>th</sup> October 2013 was not assisted by a Just Cause, confirming the obligation of the Appellant to pay wage and damages as settled by the FIFA Dispute Resolution Chamber;*
  - *To burden on the appellant all costs and legal expenses of this procedure.*
61. On 27 January 2016, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided to submit the present procedure to a Sole Arbitrator. It also informed the parties that they were no longer authorized to supplement or amend their requests of their arguments, produce new exhibits, or specify further evidence in which they intended to rely.

62. On 28 January 2016, the Respondent informed the CAS Court Office that he preferred that the Sole Arbitrator rendered an award based solely on the parties written submissions, without holding an oral hearing.
63. On 3 February 2016, the Appellant informed the CAS Court Office that it preferred a hearing to be held in the present matter.
64. On 12 February 2016, pursuant to Article R54 of the Code the CAS Court Office informed the parties that Mr. José Juan Pintó, attorney-at-law in Barcelona (Spain), had been appointed as the Sole Arbitrator in this case. No objections were raised as to the appointment of the referred arbitrator to rule the present dispute.
65. On 19 February 2016, the CAS Court Office informed the parties that, on the grounds explained therein, the Sole Arbitrator had decided to admit the evidence filed by the Appellant in its letter dated 28 December 2015. At the same time, the CAS Court Office informed the parties that, pursuant to Article R57 of the Code, the Sole Arbitrator had decided to hold a hearing in this procedure.
66. On the same date, pursuant to Article R57 of the Code and on behalf of the Sole Arbitrator, the CAS Court Office requested FIFA to provide a copy of the complete case file related to the present procedure.
67. On 1 March 2016, FIFA submitted the complete FIFA DRC case file.
68. The hearing of the present procedure took place in Lausanne on 30 March 2016. At the hearing the Appellant was represented by its lawyers, Dr. Andrius Smaliukas and Mr. Julius Zaleskis, and the Respondent by his lawyer Mr. Luca Miranda. In addition, Mr. Brent J. Nowicki, counsel to the CAS and Mr. Yago Vázquez Moraga, *ad hoc* clerk, assisted the Sole Arbitrator at the hearing.
69. At the outset of the hearing, the Sole Arbitrator invited the parties to try to reach an amicable agreement in this case. However, although the parties held some discussions and made some proposals in this regard, they did not reach any agreement and, thus, the hearing resumed.
70. During the hearing, the parties had the opportunity to present their case and to submit all their arguments in support of their petitions. At the end of the hearing, all the parties expressly declared that they did not have any objection with respect to the procedure and that their right to be heard had been fully respected.
71. Both parties countersigned the Order of Procedure issued by the CAS Court Office.

## **V. SUMMARY OF THE PARTIES' SUBMISSIONS**

72. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Sole Arbitrator, however,

has carefully considered all the submissions made by the parties, even if no explicit reference is made in what immediately follows.

**A. The Appellant**

- *As to the Appealed Decision*

73. The Appealed Decision wrongfully rejected the Club's just cause to terminate the contract. In particular, it rejected the following three just causes which individually and/or jointly considered entitled the Appellant to terminate the Contract:

- i. the Respondent's unauthorized leave;
- ii. his uncooperative attitude and
- iii. his harmful behaviour that damaged the Club's reputation.

74. Contrary to what had been decided in the Appealed Decision, the Respondent seriously breached the Contract and failed to provide the Appellant with the professional football services for which he had been hired.

- *The Respondent's unauthorized leave as a just cause for the termination of the Contract*

75. By leaving the Club without authorization for more than two months, the Respondent committed the most serious breach of Contract that a professional football player could commit.

76. In accordance with the CAS jurisprudence the Respondent's unauthorized leave was a material breach of the Contract and thus a just cause for termination. In this regard, prior to the termination of the Contract, and as provided in the CAS jurisprudence, the Appellant warned the Respondent on multiple occasions that his conduct was a breach of contract.

77. In this context, the Appellant acted diligently and in accordance with the principle of contractual stability, trying to preserve the Contract and conducting a thorough investigation of the Player's complex and uncertain situation in order to get the full picture of the situation before taking the final decision of terminating the Contract.

78. The Appellant cannot be considered as late in terminating the Contract because it was simply trying to preserve it instead of terminating it immediately, and thus it was trying to respect the principle of contractual stability. Contrary to FIFA DRC opinion, the Appellant never accepted that the Respondent's rehabilitation took place in Italy. On the contrary, the Respondent's trip to Italy was an unauthorized leave and a gross violation of the Contract. In these circumstances, the Appellant had no other option but to dismiss the Player.

- *The Respondent's uncooperative attitude as a just cause for the termination of the Contract.*

79. The Respondent's uncooperative attitude was systematic and continuous. This was already happening before he left Belarus without the authorization of the Club, when he had already missed workouts, refused to perform medical examinations and rejected the results of the medical examinations.
80. Moreover, the Respondent's uncooperative attitude continued while he was staying in Italy since he failed to provide the requested information on time and likewise never provided full information about each of the days he stayed in Italy (i.e. from 27 June 2013 to 8 September 2013).
81. In addition, after coming back to Minsk from his unauthorized stay in Italy, the Respondent maintained his uncooperative attitude, missing individual trainings, being permanently late when attending it, interfering in the training process, arguing with the coach, refusing to undergo medical tests and not performing the exercises assigned to him by the coach of the team properly.
82. Pursuant to the CAS jurisprudence, the athlete is obliged to do whatever is necessary on his part to maintain his working capacity or, otherwise, this could constitute serious breach of his duties, giving a just cause for the early termination of a contract.
- *The Respondent's behavior damaging the Appellant's reputation as a just cause for the termination of the Contract*
83. The Appealed Decision failed to properly judge that the Respondent violated the "rules of morality" by behaving in such a way that damaged the Appellant's reputation.
84. While staying in Italy the Respondent was detained by the police in the companionship of two alleged prostitutes and somebody carrying marijuana. Furthermore, pictures of the Respondent holding a glass of drink in his hand and surrounded by various bottles of alcohol spread in the internet and were also published by the Belarusian media.
- *As to the excessive amounts awarded by FIFA DRC*
85. In the event that the Sole Arbitrator considers that the Appellant had not a just cause to terminate the Contract, the remuneration and compensation awarded to the Respondent in the Appealed Decision should be reduced. FIFA DRC did not take into account the Respondent's misconduct and improperly applied a general mitigation obligation. In addition, FIFA DRC did not take into account that part of the remuneration (i.e. EUR 4,446.83) had been already paid to him.
86. The Respondent was awarded with almost the maximum available remuneration and compensation amount despite the fact that he had failed to exercise his promised performance and breached the Contract in a significant number of times.

87. Particularly, the FIFA DRC did not take into proper account that the Respondent performed a significant number of acts of misconduct, including but not limited to: (i) leaving Minsk and staying in Italy without the Appellant's authorization; (ii) missing a number of workouts; (iii) failing to inform the Appellant in due course about the rehabilitation program; (iv) failing to follow instructions to perform medical examinations; (v) failing to follow instructions with regard to properly performing the exercises during the workouts, (vi) arguing with the coach; (vii) not making maximum efforts during the workouts; (viii) refusing to perform an individual training program and (ix) being detained by police in a car with drugs and alleged prostitutes.
88. Under Articles 1, 2, 4, 5, 11, 13 of the "*Supplementary Agreement*", the above-mentioned listed acts of misconduct carried out by the Respondent constituted a basis for imposing fines on the Respondent, i.e. sums of money which have to be paid by the Respondent to the Appellant or deducted from his remuneration. In this regard, as the Respondent continuously breached the Contract prior to its termination, there is a basis to significantly reduce not only the compensation, but also the outstanding remuneration.
- *As to the general mitigation obligation improperly applied by FIFA DRC*
89. The Appealed Decision did not take into account that the Respondent did not make the reasonable efforts to reduce his damages and/or losses and improperly applied a general mitigation obligation, and thus awarded the Respondent an excessive compensation amount.
90. Since the termination of the Contract on 9 October 2013 and until 29 January 2014 (i.e. almost 4 months), the Respondent did not enter into an agreement with any football club. Specifically, the Respondent agreed to play in the Olhanense from 29 January 2014 until 30 June 2014 for a monthly remuneration of EUR 6,000, which is an amount three times lower than the remuneration paid to the Respondent by the Appellant.

## **B. The Respondent**

- *As to the Appealed Decision*
91. The Respondent's conduct cannot justify the Appellant's unilateral termination of the Contract. In particular, such dismissal represents the *extrema ratio* of the employer, which has to be rigorously justified by a gross violation of the contract. The Appealed Decision clearly specifies that the procedural evidences of the case demonstrate that the Respondent was in fact affected by an injury, despite the Appellant's opinion.
92. Therefore, it is clear that the Appellant has not respected its most important obligation, which is inherent to any employment relationship, i.e. the protection of the health and safety conditions of an employer at work.
- *As to the alleged unauthorized leave of the Respondent*

93. The Respondent has always acted in good faith and in full compliance with the provisions set forth in the Contract during his stay in Italy for rehabilitation purposes. The FIFA DRC correctly followed and interpreted Article 14 of the RSTP.
94. Contrary to the Appellant's submissions, the just cause for the dismissal has to be verified on a case by case basis and, in this regard, the Appealed Decision correctly specified and motivated that "*the player's absence for the relevant period of time can, under the given circumstances, not be considered as a justified reason to terminate the employment contract [...]*".
95. In addition, the grounds of the Appealed Decision perfectly fit with the rules regarding the termination of an employment contract established in Article 337.1 of the Swiss Code of Obligations. Particularly, as interpreted by the well-established jurisprudence of the Swiss Courts, the termination of a contract for just cause has to be communicated immediately and, at the case at stake, the Respondent's absence cannot be considered as just cause for the termination of the Contract given that the Appellant waited for more than two months to terminate the Contract, thus violating the above-mentioned principle of immediate reaction.
96. Moreover, as clearly stated in the Appealed Decision, the Player returned to the Club at the beginning of September 2013 and trained with the Club during a full month until the Appellant decided to terminate the Contract on 9 October 2013.
97. Therefore, it is clear that the Respondent's absence could not constitute a just cause for his dismissal.
- *As to the Respondent's alleged uncooperative attitude*
98. The alleged uncooperative attitude of the Respondent was never argued before by the Appellant and, therefore, it should be deemed inadmissible at the present procedural stage. In this context, the Appellant's abrupt change of motivations submitted with its Appeal Brief represent an amendment of the claim that is not admissible in a second instance procedure.
99. Notwithstanding this, the alleged uncooperative attitude of the Respondent is totally groundless and is not supported by any evidence. In this regard, pursuant to the burden of the proof established in Article 8 of the Swiss Civil Code, as the Appellant has failed to prove the facts it alleges, this argument should be rejected.
100. Moreover, the Respondent's medical certification issued by Professor Nanni on 5 November 2013 demonstrates that the alleged poor physical fitness and lack of working capacity are false.
- *As to the Player's alleged harmful behaviour*
101. The Appellant has not proved the alleged Respondent's bad behaviour, limiting the arguments submitted in its Appeal Brief to defamatory assumptions. The negative results of the drug test show sufficiently the unfairness of such allegations.

102. Therefore, pursuant to Article R51 of the Code, the assumptions made by the Appellant have to be dismissed and considered totally groundless.

- *As to the alleged disproportionate amounts awarded to the Player in the Appealed Decision*

103. FIFA DRC has correctly applied the well-established CAS jurisprudence and Swiss Law, specifically Article 337c (para. 1 and 2) of the Swiss Code of Obligations, when calculating the amount due as outstanding remuneration (i.e. EUR 100,000) and as damages (i.e. EUR 170,000). In particular, to calculate the amount of the compensation for damages, FIFA DRC previously deducted the amounts agreed with Olhanense (i.e. EUR 30,000) from the remaining value of the Contract (i.e. EUR 200,000).

104. By entering into a new employment contract with Olhanense the Player has complied with his obligation to mitigate damages.

105. With regard to the payments of EUR 4,446.83 allegedly made concerning the Player's credit card, even assuming that these payments were made, such credit card was withdrawn from May 2013 and therefore, this amount was never available for the Player.

## **VI. JURISDICTION**

106. 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 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 that body.*

107. In the present case the jurisdiction of the CAS, which has not been disputed by any party, arises out of Article 66 and 67.1 of the FIFA Statutes, in connection with the above-mentioned Article R47 of the Code.

108. Therefore, the Sole Arbitrator considers that the CAS has jurisdiction to hear this appeal.

## **VII. ADMISSIBILITY**

109. Pursuant to Article 67, para. 1 of the FIFA Statutes, in connection with Article R49 of the Code, the Appellant had 21 days from the notification of the Appealed Decision to file its Statement of Appeal before the CAS.

110. The grounds of the Appealed Decision were communicated to the Appellant on 18 November 2015, and the Statement of Appeal was filed on 8 December 2015, i.e. within the time limit required both by FIFA Statutes and Article R49 of the Code.
111. Consequently, the Appeal filed by the Appellant is admissible.

### **VIII. APPLICABLE LAW**

112. Article R58 of the Code reads 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

113. In addition, Article 66 par. 2 of the FIFA Statutes provides that:

*The 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.*

114. In light of the abovementioned, the Sole Arbitrator rules that, as it has been sustained by both parties, the applicable law to the present dispute is the FIFA Regulations and, additionally, Swiss law.

### **IX. MERITS**

115. Taking into account the facts in dispute and how the parties have presented their case, the Sole Arbitrator considers that to settle this appeal, the following issues shall be addressed and decided:

- (i) Was the Contract terminated with just cause?  
if not;
- (ii) What are the financial consequences of the early termination of the Contract?

#### **A. Was the Contract terminated with just cause?**

116. In summary, the Appellant sustains that during the validity of the Contract, the Player continuously breached his obligations towards the Club and that it had no other choice but to terminate the Contract pursuant to Art. 14 of the FIFA Regulations on the Status and Transfer of Players (“RSTP”). In particular, the Appellant considers that the termination of the Contract executed on 9 October 2013 was justified by the three facts that were referred to in the termination letter of that date:

- i. the Player's alleged unauthorized leave to Italy and his absence during 2 months;
- ii. the Player's lack of physical fitness and proper cooperative attitude; and
- iii. the Player's breach of the Club's rules of morality and conduct.

Therefore, in the Appellant's opinion the Appealed Decision misinterpreted the facts in dispute and thus wrongfully considered that the Appellant did not have a just cause to unilaterally terminate the Contract.

117. In contrast, the Respondent rejects the facts, conducts and behaviour that the Appellant attributes to him and sustains that, indeed, it was the Appellant who breached the Contract, putting the Respondent's health at risk, not offering him the necessary safety conditions to perform his job and, what is more, not paying him his monthly salary since May 2013. In short, the Respondent sustains that he had always acted in good faith and in full compliance with the terms of the Contract, without breaching any of his contractual obligations.
118. From the proven facts the Sole Arbitrator observes that the controversy that took place between the parties started as a result of the physical problems that afflicted the Player almost since he started to train and play for the Appellant. In this regard, the Sole Arbitrator starts his reasoning from the fact that the Player's first medical examination took place on 18 March 2013 which proves that the pain he alleged to suffer was real and, at least, that at this very moment he suffered a "*non better specified infection*" (Answer to the Appeal, page 5) that required an antibiotic treatment.
119. In addition, the facts following to this first exploration reveal that the medical treatment prescribed by the doctors of the Minsk State Emergency Hospital did not heal the Player's injury or illness that indeed got worse. For this reason, and with the authorization of the Appellant, the Player later underwent medical examinations with Dr. Cugat, a prestigious sports medicine doctor of the Hospital Quirón in Barcelona. According to Dr. Cugat's medical report issued on April 2013, at that time the Player "*was complaining that when shooting he had pain in the pubis and left abductor*". In accordance with his report, Dr. Cugat found that the Player had a stress fracture of the pubic area, also known as athletic pubalgia, that had to be treated with Physiotherapy (through a Rehabilitation program) and "*if satisfactory results were not achieved, surgical treatment would be necessary*".
120. From these proven facts the Sole Arbitrator first reaches the conclusion that, despite what the Appellant sustains, at that time (April 2013) the Player was indeed injured and suffered a pubalgia that had to be treated under the supervision of a specialist doctor.
121. Both parties have also recognized that on 1 June 2013, given that the Player's health did not improve, the Player attempted to take a plane to Italy to undergo further medical examinations in the "Clinic Villa Stuart" of Rome. However, the Appellant did not allow the Player to fly to Italy to undergo those medical exams, preventing him to take the plane that day. Instead, following the Appellant's instructions, on 4 June 2013 the Player underwent a new medical examination in the "Municipal Clinic Emergency Hospital" of Minsk, where a NMR was

performed. In the Sole Arbitrator's opinion, this clearly proves that, regardless of the extent of his injury, at that time the Player was still injured.

122. In this regard, as further evidence of the Player's injury, the Sole Arbitrator observes that on 17 June 2013 the Appellant (not the Player) requested Dr. Cugat to assess the findings of the NMR and to give his medical opinion thereon. For the sake of clarity, the Sole Arbitrator stresses that he has reached the conclusion that it was the Appellant who again contacted Dr. Cugat due to the fact that the letter that the latter sent on this same date (17 June 2013) made reference to a previous telephone call held with someone called "Mr. Oleg" (*"As discussed by telephone with Mr. Oleg today Monday 17<sup>th</sup> June 2013, please find below a brief description of the proposed surgery"*), who in turn is the same person to which Dr. Cugat's medical team ("sporttrauma") had sent, a couple of months before, the invoice for the medical services rendered on April 2013. The fact that Mr. Oleg was acting on behalf of the Appellant is proven by the email dated 25 April 2013 in which Dr. Cugat's team sent the invoice to the Appellant, which was addressed to "Mr. Oleg" to the email address [dynamo@minsk.by](mailto:dynamo@minsk.by).
123. According to this letter from Dr. Cugat, in order to overcome his injury the Player would have had to undergo a surgery and to be hospitalized for about 2 days. In addition, to complete his treatment the Player would have had to *"Start physiotherapy and rehabilitation program"*, whose recovery time was *"estimated at 2 months according to patient evolution"*. In the Sole Arbitrator's view, the fact that at that time (17 June 2013) Dr. Cugat was prescribing the Player surgery and a rehabilitation program lasting 2 months clearly demonstrates that in mid-June 2013 the Player was still injured, and that any treatment or therapy that the Player would have had previously undergone under the Appellant's supervision had been unsuccessful.
124. The Sole Arbitrator notes that it is from that moment the main disagreements between the parties started occurring. The Player, who wanted to be examined in Italy by an independent doctor, decided, without the Appellant's consent, to go to Italy to be examined by Dr. Gian Paolo Degano at the medical center SaniRad. The Respondent sustains that this was a lawful decision due to the fact that (i) at that moment the Appellant was already in breach of the Contract, because it already owed the Player the salary of May and June 2013 and (ii) with his refusal to allow the Respondent to be examined by a specialist doctor the Appellant was also breaching clause 4.9 of the Contract, that establishes that one of its responsibilities was *"To organize scientific-methodical and medical maintenance of the EMPLOYEE'S training, including: [...] treatment in case of need at specialized medical institutions"*. Therefore, in the Respondent's view the particular circumstances at stake justified and legitimated his decision to travel to Italy to be examined by Dr. Degano.
125. In this regard, the Sole Arbitrator agrees with the Respondent and with FIFA DRC and considers that, in these circumstances, the Player's leave cannot be considered as a breach of the Contract.
126. In particular it shall be taken into account that immediately after the Player's arrival to Italy, his counsel informed the Appellant about the situation of the Player. In this regard, by means of a letter dated 27 June 2013, the Player's counsel informed the Club that the Player was still affected by the injury, enclosing a medical certificate issued by Dr. Degano that confirmed the

*“sever sufferance to the pubic region with external periosteal of 8mm”* and that, as a consequence, the Respondent was going to undergo further medical tests in order *“to verify the extent of the damage and perform therapies and rehabilitative care”*. In addition, in this correspondence the Respondent’s counsel informed the Appellant that *“The player will remain at your complete disposal of your medical staff at the saniRad s.r.l”*., thus fulfilling not only with his contractual obligations (clause 2.28 of the Contract) but also with the general principle of good faith in the performance of contracts.

127. This is also confirmed by the behaviour that the Respondent had during his stay in Italy, keeping the Appellant constantly informed about his situation and the evolution of his rehabilitation program, constantly sending the relevant medical reports and rehabilitation programs, and being at the Appellant’s disposal during the whole rehabilitation process.

128. In addition , the Sole Arbitrator notes that:

- a) When the Respondent left Belarus without the Appellant’s consent, the latter was already in flagrant breach of Contract, because it had not paid the Respondent’s salary of May and June 2013.
- b) On the other hand, the correspondence exchanged between the parties while the Player was being under treatment in Italy (i.e. as from 27 June 2013 until 12 September 2013) demonstrates that the Appellant tacitly consented to the Player’s leave and authorized him to perform his rehabilitation in Italy. Thus, even though in its first letter (i.e. 28 June 2013) the Appellant requested the Player to return to Minsk, in the rest of the correspondence sent by the Appellant at that time, it never requested the Player to return to Belarus, or warned him that with his absence he was in breach of the Contract. On the contrary, the Appellant limited its correspondence to request information about the evolution of the Player’s rehabilitation and hence made him believe that the Appellant had tacitly accepted that his rehabilitation was taking place in Italy.

In this regard, the fact that the Appellant never applied the *“system of fines applied to the players of CLUB for the improper fulfilment of the contractual obligations”* envisaged in Clause 1.9 of the Contract, and never imposed to the Respondent any of the fines established in the *“Annex 1 for the SUPPLEMENTARY AGREEMENT”*, is interpreted by the Sole Arbitrator as proof that the Appellant did not consider that the Respondent was in breach of the Contract. On this particular point the Sole Arbitrator recalls that, as the CAS jurisprudence has declared, *“for a party to be allowed to validly terminate an employment contract, it must have warned the other party, in order for the latter to have had the chance, if it deemed that the complaint to be legitimate, to comply with its obligations”* (CAS 2013/A/3091-3093).

The Sole Arbitrator is convinced that, in these circumstances, according to the rule *nemo potest venire contra factum proprium*, the Appellant created legitimate expectations to the Respondent that led him to believe that the Club had tacitly authorized him to follow the rehabilitation program in Italy. Therefore, the Appellant is bound by its own acts and thus after having been legitimating for more than two months the Player’s absence, it cannot later pretend that such absence was to be considered as a breach of the Contract.

In line with this, the Sole Arbitrator is of the opinion that the fact that the Player returned to the Club on 9 September 2013 and trained with the Appellant during a full month until the Contract was terminated by the latter on 9 October 2013, proves that the Appellant did not consider that the Respondent was in breach of Contract.

- c) Finally, for the sake of completeness, the Sole Arbitrator deems it convenient to remark that, even though the Respondent followed all the medical instructions of the Appellant, after more than three months he had not resolved his physical problems in spite of the treatment followed by the Club's indication. In these circumstances the Sole Arbitrator considers that it was lawful for him to seek an alternative and independent medical opinion from a specialized medical center in order to protect and guarantee his fundamental right to health, given that the Club was being unable to do so.
129. For all these reasons the Sole Arbitrator reaches the conclusion that the Respondent's leave to Italy to undergo medical exams and a rehabilitation program was not, taking into account the circumstance of this case, a breach of the Contract and thus the Appellant did not have just cause to terminate the Contract on that basis. This is absolutely in line with the interpretation to be given to Article 14.2 of the RSTP which demands that the definition and the existence of "just cause" for terminating a contract be assessed on a case by case basis, taking into account the circumstances at stake. Therefore, the Sole Arbitrator considers that the Appealed Decision correctly specified and motivated that *"the player's absence for the relevant period of time can, under the given circumstances [as those at stake], not be considered as a justified reason to terminate the employment contract and therefore, the Chamber decided to reject the argument of Dinamo"*.
130. On the other hand and with regard to the rest of just causes to terminate the Contract alleged by the Appellant, the Sole Arbitrator shall reject them due to their lack of factual and legal basis. First of all, with regard to the alleged Respondent's violation of the *"rules of morality"*, the Sole Arbitrator has concluded that the Appellant has not brought any evidence to support that statement. In this regard, the Appellant has neither proved that the Respondent was found in company of two prostitutes nor that he was "detained" by the police. The contradictory press releases produced by the Appellant at best can demonstrate that on July 2013 the car in which Respondent was travelling together with two girls and one friend was stopped by the police, and that the latter was arrested for being in possession of marijuana. But the Appellant's insinuation that these two girls were prostitutes is not supported by any objective evidence. In addition, the fact that the Respondent voluntarily accepted to undergo the drug test requested by the Appellant, as well as its negative result, not only proves that he had not consumed marijuana (or any other drug), but also leads the Sole Arbitrator to rely on the version of the facts given by the Respondent (i.e. that these girls were not prostitutes, but simply two friends of his). Therefore, the Sole Arbitrator considers that this incident did not cause any damage to the Appellant's reputation and that, even in that purported case, it cannot be considered as just cause to terminate the Contract almost three months after the facts occurred.
131. The Sole Arbitrator comes to the same conclusion when it analyzes the second purported ground for termination, namely that, in the Appellant's view, a violation of the *"rules of morality"*. This purported fact is nothing but an alleged picture of the Respondent at his

birthday party where he is drinking something from a glass. In the Sole Arbitrator's view, this cannot be considered as a breach of any of the Player's contractual obligations, or just cause to terminate the Contract.

132. Finally, for similar reasons, the Sole Arbitrator also rejects the alleged uncooperative attitude of the Respondent as a just cause to terminate the Contract. The Appellant intends to sustain this argument with two different facts. First of all that, allegedly, before leaving to Italy the Respondent would have missed some workouts. The Appellant has produced some statements ("*Official Note*") issued by the "*Administrator of the main team*" Mr. Serey Pavlyuchuk, according to which the Respondent would have missed some workouts on the 20, 21, 22, 23 June 2013 and part of the workout of 26 June 2013. However, none of these "Notes" were signed by the Player (in particular, the "Note" issued on 24 June 2013 and addressed to the Respondent, in which the space for the Player's signature is empty). Moreover, even assuming that this was true, from this evidence it cannot be concluded that the Respondent did not have any just cause not to attend these workouts. Indeed, the Appellant's position is contradictory with the fact that, even though the Respondent purportedly was missing these workouts, the Club did not open any disciplinary proceedings against him, as warned in the Appellant's Notice dated 24 June 2013 (that, as previously said, had never been signed by the Respondent). In addition, taking into account that at that time the Respondent was injured and that the dates of these workouts practically coincide with the date in which the Respondent left Belarus to follow medical treatment in Italy, the Sole Arbitrator concludes that, ultimately, this alleged absenteeism is not relevant and in no case could lead to justify the termination of the Contract.
133. On the other hand, the Appellant maintains that, once the Respondent had come back to Minsk and had resumed his training, he did not make all the necessary efforts during his workouts. In particular, the Appellant sustains that "*the poor physical fitness of the Respondent was caused by his unauthorized leave to Italy and failure to do whatever is necessary on his part to maintain his working capacity, as well as failure to make maximum efforts and follow instructions of the coach*". The Appellant tries to support this assertion with a report drafted by one of his employees, the Chief Coach Mr. Robert Maaskant (who has not been examined in this arbitration procedure). However, from the study of this report the Sole Arbitrator does not find any reason that could justify the termination of the Contract by the Appellant.
134. In addition, the Sole Arbitrator notices that the Appellant's assertion is indeed contradictory with the medical certificate that an independent third expert, the "*Isokinetic Sport Rehabilitation Network*" (which is a FIFA Medical Centre of Excellence) issued on 5 November 2013, according to which the values that the Respondent reached during the medical test passed on 16 October 2013 (i.e. 7 days after the Appellant terminated the Contract) "*are values much better than the most of professional football players*", that the Player "*showed the attitude to perform specific [Sic] sport activity*" and that they "*don't have any doubt about the possibility to play football as a professional player from a musculoskeletal and osteoarticular point of view*".
135. Moreover, even if it was true that the Respondent was in bad physical condition, it is very likely that this circumstance was not deliberate but a consequence of the injury from which he had been recovering for more than two months. Therefore, in this context, pursuant to the constant CAS jurisprudence, this fact shall not constitute a breach of contract or a just cause

for the early termination of a contract, because “*if the player cannot provide the club with his working capacity due to illness or injury, this does not constitute a breach of contract*” (CAS 2009/A/1956).

136. As a consequence of all the foregoing, the Sole Arbitrator considers that the Appellant did not have any just cause to terminate the Contract and thus, by executing the termination on 9 October 2013, it breached the Contract.

**B. What are the financial consequences of the early termination of the Contract?**

137. Pursuant to Art. 17.1 of the RSTP (“*Consequences of terminating a contract without just cause*”), “*In all cases, the party in breach shall pay compensation. Subject to the provisions of article 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*”.
138. After having carefully reviewed the Appealed Decision, the Sole Arbitrator concludes that the assessment of the financial consequences of the Appellant’s termination of the Contract without just cause done by FIFA DRC is impeccable, and the corresponding calculations are correct. In particular, the Sole Arbitrator notes that to determine the financial consequences of the unjust termination of the Contract, the Appealed Decision took into account the following values:
- The remuneration due to the Respondent at the time of the termination (salaries of May, June, July, August and September 2013), amounting to EUR 100,000.
  - The remaining Contract value (ten months until it would have expired), that was EUR 200,000.
  - The value of the new employment contract that the Respondent signed with the Portuguese club SC Olhanense (valid as from January 2014 until 30 June 2014), that was EUR 30,000.
139. Therefore, FIFA DRC correctly decided to order the Appellant to pay to the Respondent the following amounts:
- i. Outstanding remuneration: EUR 100,000 (EUR 20,000 corresponding to 1 June 2013, 1 July 2013, 1 August 2013, 1 September 2013 and 1 October 2013), plus 5% of interests p.a. as from the respective due dates of each payment until the date of effective payment.
  - ii. Compensation for breach of contract: EUR 170,000 plus interests at the rate of 5% p.a. as of the expiry of time limit granted for its payment.

140. The Sole Arbitrator does not find any reason leading to the reduction of the compensation granted to the Respondent in the previous instance, as requested by the Appellant. On the contrary, taking into account that when the Appellant decided to terminate the Contract, it already was in flagrant and essential breach of the Contract, owing the Respondent 5 monthly salaries, the Sole Arbitrator considers that the termination of the Contract was not only done without just cause, but that it was especially unfair and abusive, thus being the compensation granted to the Respondent absolutely fair and appropriate taking into account the circumstances at stake. Therefore, the Sole Arbitrator shall reject the Appellant's request to reduce the compensation granted to the Respondent by the Appealed Decision.
141. Finally, with regard to the payments in the total amount of EUR 4,446.83 that the Appellant maintains to have already paid to the Respondent's bank credit card, the Sole Arbitrator shall reject the Appellant's petition to deduct this amount from the amount granted to the Respondent in concept of outstanding remuneration. In this regard, the Sole Arbitrator firstly notes that the Respondent denies having received this amount. In addition, the Sole Arbitrator finds quite surprising that the last alleged payment was made on 10 October 2013, i.e. the day after the Appellant decided to terminate the Contract. Furthermore, the bank certificates produced by the Appellant to intend to prove that this amount was paid to the Respondent, simply prove that on 13 June 2013, 12 July 2013 and 10 October 2013 the Appellant transferred different amounts (i.e. EUR 2,272.81, EUR 1,600.36 and EUR 573.66, respectively) to a bank account that was linked to a credit card allegedly issued in favour of the Respondent. However, the latter affirms that that credit card was withdrawn by the Appellant on May 2013 and hence that he never cashed these amounts.
142. In these circumstances, as the Appellant has neither duly proven that these amounts were certainly cashed by the Respondent, nor that the credit card was indeed used by the latter (which could have been done by means of the corresponding credit card statement), it has not discharged the necessary burden of proof that would have led to the deduction of these amounts. Therefore, the Sole Arbitrator rejects the petition made by the Appellant in this regard.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed by FC Dinamo Minsk against the Decision rendered by the Dispute Resolution Chamber of FIFA on 23 July 2015 is dismissed.

2. The decision rendered by the Dispute Resolution Chamber of FIFA on 23 July 2015 is upheld.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.