



Arbitration CAS 2016/A/4482 Etoile Sportive du Sahel v. Leopoldo Roberto Markovsky & Clube de Regatas Brasil & Fédération Internationale de Football Association (FIFA), award of 25 November 2016

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Mahmoud Hammami (Tunisia); Mr Michele Bernasconi (Switzerland)

Football

Termination of the employment contract with just cause by the player

Just cause

Duty of the club to make sure that the player is fit to play

Non-payment due to administrative and/or financial difficulties

Principle of positive interest

Duty to mitigate

1. **A player who, at the time of termination of the employment contract, is owed a full three months of salary as well as a performance bonus and has notified the club twice about the outstanding amounts, and made sufficiently clear to the club that any further delay of payment would represent a reason for termination, is entitled to terminate the employment contract for just cause. In any case, a delay in payment of salary of three months is not a final, decisive, minimum amount: a termination under Art. 14 of the FIFA Regulations on the Status and Transfer of Players (RSTP) may under certain circumstances be justified also if the amount overdue is less than three months.**
2. **It is a general rule in the world of football that it is the club's responsibility to satisfy itself before signing a player contract that the player is fit to play (accordingly, pursuant to Section 18(4) FIFA RSTP "[t]he validity of a contract may not be made subject to a successful medical examination [...]").**
3. **"Administrational and financial difficulties within the Club" cannot be invoked as an excuse for non-payment of a player. It is for the club to find a way around these "difficulties" or to bring this forward to the player in an attempt to arrive at a compromise.**
4. **Absent particular circumstances, in case of breach of contract the injured party in principle is entitled to receive as compensation the full amount it would have earned if the contract had been complied with.**
5. **The duty to mitigate damages is a general principle of contract/tort law. Compensation for damages has to be adjusted by the amounts earned during the time from the effective date of the termination until the envisaged expiration date of the contract.**

I. FACTUAL BACKGROUND

A. The Parties

1. Etoile Sportive du Sahel (the “Appellant” or the “Club”) is a football club from Sousse, Tunisia. It is a member of the Fédération Tunisienne de Football (“FTF”), which in turn is a member of the Fédération Internationale de Football Association (“FIFA”).
2. Mr Leopoldo Roberto Markovsky (the “First Respondent” or the “Player”) is a professional football player. He was born on 29 August 1983 and is of Brazilian nationality.
3. Clube de Regatas Brasil (the “Second Respondent” or the “Brazilian Club”) is a football club with its registered office in Maceió, Alagoas, Brazil. It is a member of the Brazilian Football Federation (“CBF”), itself affiliated to FIFA.
4. FIFA (the “Third Respondent” or “FIFA”) is the governing body of football at world-wide level and has its registered office in Zurich, Switzerland. FIFA was named as a Respondent in this case and also chose to enter into appearance and make submissions forcefully defending the reasoning in the decision of its Dispute Resolution Chamber.

B. The Dispute between the Parties

5. The Appellant challenges before the Court of Arbitration for Sport (“CAS”) a decision (the “Appealed Decision”) passed by the FIFA Dispute Resolution Chamber (“DRC”) on 11 June 2015, which partially accepted a claim brought by the Player, ordering the Club to pay outstanding remuneration in the amount of USD 112,500 plus 5% interest p.a., as well as compensation for breach of contract in the amount of USD 880,613 plus 5% interest p.a., both to be paid within 30 days of notification of the Appealed Decision.
6. The circumstances stated below are a summary of the main relevant facts as submitted by the Parties. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
7. On 13 January 2012, the Player and the Club signed an employment agreement valid from the date of signature until 30 June 2015 (the “Employment Contract”). Each clause of the Employment Contract is written both in French and English with the French version prevailing in case of any deviation. Linguistic errors have not been corrected in the citations which follow.
8. Pursuant to Article 3 of the Employment Contract, the Player was entitled to the following remuneration:

“1) Saison sportive 2011/2012

- salaire mensuel net de douze mille cinq cent (12.500) US dollars sur six mois, soit au total soixante quinze mille (75.000) US dollars pour les six mois.

- Une prime de rendement de soixante quinze mille (75.000) US dollars que le joueur percevra des qu'il sera régulièrement qualifié avec l'ESS.

2) Saison sportive 2012/2013

- salaire mensuel net de douze mille cinq cent (12.500) US dollars sur douze mois, soit cent cinquante mille (150.000) US dollars par an.

- Une prime de rendement de cent cinquante mille (150.000) US dollars par an servie en trois (03) parties.

Saison sportive 2013/2014

- salaire mensuel net de douze mille cinq cent (12.500) US dollars sur douze mois, soit cent cinquante mille (150.000) US dollars par an.

- Une prime de rendement de cent cinquante mille (150.000) US dollars par an servie en trois (03) parties.

Saison sportive 2014/2015

- salaire mensuel net de douze mille cinq cent (12.500) US dollars sur douze mois, soit cent cinquante mille (150.000) US dollars par an.

- Une prime de rendement de cent cinquante mille (150.000) US dollars par an servie en trois (03) parties.

[...]

1) Sport season 2011/2012

- Net monthly salary of twelve thousand five hundred (12,500) dollars of US six months, a total of sixty five thousand (75,000) US dollars for six months.

- A performance bonus of seventy five thousand (75,000) US dollars will receive the player of that will be regularly trained with the ESS.

2) Sport season 2012/2013

- Net monthly salary of twelve thousand five hundred (12,500) US dollars-over-year, one hundred fifty thousand (150,000) USD per year.

- A bonus of one hundred fifty thousand (150,000) USD per year served in three (03) parties.

3) Sport season 2013/2014

- Net monthly salary of twelve thousand five hundred (12,500) US dollars-over-year, one hundred fifty thousand (150,000) USD per year.

- A bonus of one hundred fifty thousand (150,000) USD per year served in three (03) parts.

4) Sport season 2014/2015

- Net monthly salary of twelve thousand five hundred (12,500) US dollars-over-year, one hundred fifty thousand (150,000) USD per year.

- A bonus of one hundred fifty thousand (150,000) USD per year served in three (03) parts".

9. Article 4 of the Employment Contract reads as follows:

“AVANTAGE

A. L’Etoile Sportive du Sahel prendra également en charge tous les frais de logement, soins médicaux et l’assurance contre les accidents de travail.

B. Le joueur bénéficiera de cinq (05) billets d’avion aller-retour Tunisie – Brésil par saison.

C. L’Etoile Sportive du Sahel mettra à la disposition du joueur un moyen de transport.

ADVANTAGE

A. L’Etoile Sportive du Sahel will also support all the costs of housing, medical care and insurance against accidents.

B. The player will receive five (05) tickets roundtrip Tunisia – Brazilian season.

C. L’Etoile Sportive du Sahel will provide the player a means of transport”.

10. Article 5 of the Employment Contract provides the following:

“DISPOSITIONS SPECIALES

En cas d’insuffisance ou de manque de rendement du joueur Markovsky Leopoldo Roberto, L’Etoile Sportive du Sahel se réserve le droit d’exiger de ce dernier la révision de la rémunération et les avantages prévus dans l’article 3 et 4 du présent contrat.

SPECIAL DISPOSITIONS

In case of insufficiency or yield’s fail of the player Markovsky Leopold Roberto, the Etoile Sportive du Sahel will be entitled to require from the player a review of his remuneration and advantages foreseen in articles 3 and 4 from the present contract”.

11. Article 15 of the Employment Contract reads as follows:

“REGLEMENTS DES LITIGES ET ATTRIBUTION DES COMPETENCES

Les parties conviennent de régler à l’amiable les différends qui pourront surgir à l’occasion de l’exécution du présent contrat. A défaut, il est fait attribution de juridiction à la FTF et éventuellement à la FIFA.

En cas de litige c’est la version française du contrat qui fera foi entre les parties.

REGLEMENTS OF THE LITIGATIONS AND REPUTING OF THE COMPETENCES

Them left suit to regulate to the by private agreement one the different ones that will be able to arise to the occasion of the execution of the present contract. To defect, it is done jurisdiction granting to the FTF and eventually to the FIFA. In case of litigation this is the French version of the contract that done faith between the parties”.

12. Article 16 of the Employment Contract provides the following:

“REGLEMENT LIES AU FOOTBALL

Le joueur et le club sont tenus de respecter les statuts, règlements, inclus le Code d'éthique, et décisions de la FIFA, de la Confédération, de l'association membre et, le cas échéant, de la ligue professionnelle, qui font partie intégrante du présent contrat. Les parties le confirment par leur signature.

Le joueur et le club reconnaissent que les règlements liés au football susmentionnés sont susceptibles de changer de temps en temps.

REGULATIONS LINKED TO SOCCER

The player and the club are held to respect the statutes, regulations, include the ethics Code, and decisions of the FIFA, Confederacy, association member and, if need be, professional league, that are an integral part the present contract. The parties the confirm by their signature.

The player and the club recognize that the regulations linked to aforementioned soccer are likely to change time in time”.

13. After having attended a Club's training camp in Dubai and having played in three friendly matches, the Player did not play again for the Club due to an injury suffered in February 2012.
14. On 19 April 2012, the Player sent, through his counsel, a notice to the Club, stating that between February 2012 and mid-April 2012 the Club had not paid the Player's monthly salary of USD 12,500 and the bonus of USD 75,000 pursuant to the Employment Contract. The Player also informed the Club that *“based on the established jurisprudence of the FIFA Dispute Resolution Chamber, the continued default of Etoile in connection with the non-payment of the Player's wage by more than 03 (three) consecutive months can be construed only as a breach of contract”*. Finally, the Player requested that the Club pay him by 25 April 2012 an amount of USD 100,000, consisting of overdue salaries for the months of February and March 2012 (in the total amount of USD 25,000) and the overdue bonus payment (in the amount of USD 75,000). The 19 April 2012 letter remained unanswered.
15. On 27 April 2012, the Player's counsel sent to the Club another letter pointing out that the Club had still not fulfilled its contractual obligations towards the Player and reiterating his previous request for payment of USD 100,000 and also mentioning that should the Club fail to comply with its contractual obligations by 2 May 2012, *“we will understand that the Club is terminating the employment contract entered with the Player, **with just cause**, ...”* (emphasis in the original) and present a formal claim before the FIFA Dispute Resolution Chamber against the Club. The letter remained unanswered.
16. On 3 May 2012, the Player's counsel sent to the Club a notice of termination of the Employment Contract with just cause. The letter stated that the Player was owed USD 112,500 by the Club at that time and that he would present a formal claim to FIFA requesting indemnification in the amount of approximately USD 1,050,000 *“in connection with Etoile's default”*.
17. On 12 May 2012, the Club responded to the Player's attorney, that it had paid the salary of the first contractual month (*“pour la période du 13/01/2012 au 12/02/2012”*) and indicating that the Player had been injured during the entire period spent with the Club, as evidenced by ultrasound and imaging reports attached to the letter. The Club also informed the Player that it never

intended to ignore its obligations towards him, underlining that it had provided him with housing, food and means of transport and that it had also covered his expensive treatment for the injury about which he had not informed the Club at the time of his recruitment. The Club added that it had faced organisational difficulties in the past months which prevented it from making payments. It also outlined that the Player's request for termination was unfounded because the period of non-payment of the salaries did not exceed three months, and demanded that he return to the Club, as his salaries for the previous months were at his disposal.

3. The Proceedings before the DRC

18. On 7 May 2012, the Player filed a claim against the Club before the FIFA DRC requesting that the Club be ordered to pay the outstanding salaries in the amount of USD 37,500, an outstanding bonus of USD 75,000, USD 925,000 as compensation for breach of contract, the equivalent amount of five roundtrip tickets Tunisia – Brazil, and that sporting sanctions be imposed upon the Club. In the submissions it was argued that the Parties had concluded a valid employment agreement, according to which the Club was obliged to pay to the Player salaries and bonuses throughout the contractual period, an obligation which the Club had failed to respect. It was thus argued by the Player that he had terminated his Employment Contract with just cause and that he was entitled to the requested amounts.
19. On 16 June 2012, the Club filed a counterclaim requesting that the FIFA DRC reject the Player's claim and order the Player to pay to the Club USD 1,500,000 as compensation for the breach of his Employment Contract without just cause.
20. On 11 June 2015, the DRC partially accepted the Player's claim and rejected the counterclaim.
21. The operative part of the Appealed Decision reads as follows:

“1. The claim of the Claimant/ Counter-Respondent, Leopoldo Roberto Markovsky, is admissible.

2. The claim of the Claimant/ Counter-Respondent is partially accepted.

3. The claim of the Respondent/ Counter-Claimant, Etoile Sportive du Sahel, is rejected.

4. The Respondent/ Counter-Claimant has 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 USD 112,500 plus 5% p.a. as from 7 May 2012 until the date of effective payment.

5. The Respondent/ Counter-Claimant has to pay to the Claimant/ Counter-Respondent for breach of contract in the amount of USD 880,613 within 30 days as from the date of notification of this decision.

6. In the event that the amount stipulated in point 5. is not paid within the stated time limit, interest at the rate of 5% p.a. will fall due as of expiry of the aforementioned time limit.

7. In the event that the amounts stipulated in points 4. and 5. are not paid within the stated time limit,

the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

8. Any further claim lodged by the Claimant/Counter-Respondent is rejected.

9. 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”.

22. The Appealed Decision with grounds was notified to the Parties on 10 February 2016.

II. ARBITRAL PROCEEDINGS

1. Initiation of the CAS proceedings

23. On 29 February 2016, the Club filed a Statement of Appeal against the Appealed Decision before the CAS and nominated Mr Mahmoud Hammami as arbitrator.

24. Following an exchange between CAS and the Parties regarding the language of the proceedings, the President of the CAS Appeals Arbitration Division issued on 18 March 2016 an Order on Language determining English as the language of the proceedings and ordering the Club to file, within 10 days from the notification of the Order, a translation into English of its Statement of Appeal and its Appeal Brief in accordance with Article R51 of the Code of Sports-related Arbitration (“CAS Code”).

25. On 18 March 2016, the Player nominated Mr Michele A.R. Bernasconi as arbitrator.

26. On 21 March 2016, FIFA informed the CAS Court Office that it did not object to Mr Bernasconi’s appointment as arbitrator.

27. On 22 March 2016, the CAS Court Office granted to the Brazilian Club a deadline until 24 March 2016 to confirm Mr Bernasconi’s nomination as arbitrator.

28. On 8 April 2016, the CAS Court Office informed the Parties that as the Brazilian Club had failed to state its position concerning Mr Bernasconi’s nomination as arbitrator it was confirmed that Mr Bernasconi has been jointly nominated by the Respondents.

29. On 7 April 2016, the Club filed its Appeal Brief.

30. On 9 May 2016, the CAS Court Office informed the Parties that the Brazilian Club had not submitted any answer within the prescribed deadline.

31. On 30 May 2016, the Club paid the entire advance on costs for the procedure.

32. Also on 30 May 2016, the CAS Court Office informed the Parties about the constitution of the

Panel as follows:

President: Mr Dirk-Reiner Martens, Attorney-at-law, Munich, Germany

Arbitrators: Mr Mahmoud Hammami, Attorney-at-law, Ariana, Tunisia
Mr Michele A.R. Bernasconi, Attorney-at-law, Zurich, Switzerland

33. On 20 June 2016, the Player filed his Answer.
34. On 20 June 2016, FIFA filed its Answer.
35. On 8 August 2016, the Player signed the Order of Procedure.
36. On 9 August 2016, the Club signed the Order of Procedure.
37. On 10 August 2016 FIFA, signed the Order of Procedure.
38. The Brazilian Club failed to sign and return the Order of Procedure.
39. On 31 August 2016 a hearing was held in Lausanne, Switzerland. The Panel was assisted by Mr William Sternheimer, CAS Deputy Secretary General. The following attended the hearing:
 - For the Appellant: Mr Adel Ghith, Secretary General; Ms Leila Arnold and Mr Patrick Ocak, Counsel.
 - For Mr Markovsky, in addition to himself, Messrs Nilo Effori and Luca Tettamanti, Counsel.
 - For FIFA: Mr Antoine Bonnet, Legal Counsel.
40. At the inception of the hearing, the persons present confirmed that they had no objections to the constitution of the Panel and that they agreed that CAS had jurisdiction to decide the case.
41. At the conclusion of the hearing, the Parties confirmed that they had no objections to the manner in which the procedure had been handled and that their right to be heard had been fully respected.

2. The Parties' Positions and Prayers for Relief

42. The following section summarises the Parties' main arguments in support of their respective prayers for relief.

a. The Club

43. The Club argues that:

- it concluded a valid employment contract with the Player on 13 January 2012. In accordance with said contract, the Club paid to the Player in February 2012 the salary for *“the period from January 13, 2012 to February 12, 2012”*;
- on 27 February 2012, the Player underwent a medical examination, as he was not fit to play. The examination showed that the Player was suffering from a severe muscle injury. The Club provided medical care to the Player but his health did not improve;
- on 13 March 2012, the Club proposed to the Player to reduce the financial benefits under his Employment Contract in accordance with Article 5, or to mutually terminate it;
- the Player was subject to an additional medical examination on 16 March 2012, which showed no improvement of his condition. The Club attempted again to reach an agreement on reducing the Player’s financial benefits, again without success;
- an echography performed on 23 April 2012 showed significant progress in the Player’s condition. However, as from the end of April 2012, the Club was unable to get in touch with the Player who no longer followed his recovery programme;
- after having received in early May the notice of termination of the Employment Contract, the Appellant sent to the Player a letter requesting that he returns to the Club in order to fulfill his contractual obligations, indicating that the overdue salaries for the months of March and April 2012 were at his disposal;
- the Club had faced administrative and financial difficulties from March to May 2012, as its Board had been dissolved which prevented it from making any kind of payments. As a further reason for its failure to make the payments due to the Player, the Club added at the hearing that this failure was caused by the “Arab revolution” which had put the country into chaos;
- the overdue salaries owed to the Player did not cover a period of 90 days as the FIFA DRC had argued in the Appealed Decision. The termination by the Player was therefore unlawful;
- the bonuses of USD 150,000 per season were in fact performance bonuses the payment of which depended on the number of official match appearances as specified in the rules of the Tunisian Football Federation which were made part of the Employment Contract pursuant to Articles 8 and 16. As the Player did not play a single official match he was not entitled to any bonuses; and,
- following his departure from Tunisia, the Player signed player contracts for salaries way below his market value which was a clear sign of bad faith.

44. In light of the above, the Appellant requests the CAS:

“1. To accept our appeal against the decision of the “DRC” FIFA, in connection with this case

2. To review the sentence of the “DRC” in its entirety.

3. To authorize an oral session to present our testimonies in relation with this case.

4. To declare that the player had terminated his contract with our club without just cause.

5. To grant our club the payment of the amount of One million five hundred thousand US dollars (USD 1,500,000) for termination of contract without just cause. This amount should be jointly and mutually recognized by the player and the Brazilian club “Clube de Regatas” as requested in our letters to FIFA “DRC” dated 16 June 2012 (see attachment no. 17) and dated 16 July 2012 (see attachment no. 18)

6. In case, all the above arguments failed to convince your honourable court, we would really appreciate softening of the initial judgement terms.

7. So, if the panel decides to give just cause to the player, we would hope that the court takes into account his bad faith in his statements concerning his new employment contracts and not to grant him the financial compensation for breach of his contract with our club.

8. To condemn the player to pay all the expenses and costs of this arbitration”.

45. At the end of the hearing on 31 August 2016 the Club requested that the entire FIFA file in this case be added to the CAS file and that it be granted time to review the FIFA file and possibly make further submissions in the exercise of its right to be heard.

b. The Player

46. The Player states that on 13 January 2012, he concluded the Employment Contract with the Club, valid from 13 January 2012 to 30 June 2015.

47. The Player regularly trained with and played for the Appellant during the pre-season period, a fact which the Club had originally denied but then admitted at the hearing. During a training session at the end of February he suffered a minor muscular injury.

48. Immediately after the he became injured, the Club started pressuring the Player to either sign an agreement accepting a reduction of his salary from USD 12,500 to USD 1,500 or to agree to an early termination of the Employment Contract without compensation. The Player sent two warning letters to the Club, requesting payment of the outstanding amounts owed. As the Club did not comply with such request, the Player terminated his contract, invoking just cause.

49. The Player argues that, contrary to the Club’s allegations, he fulfilled his contractual obligations, training with the Club’s team and playing for it in three friendly matches.

50. The Player further points out that the treatment for his injury was not appropriate and that when trying to attend the recovery sessions he sometimes found the physiotherapy department

closed, without any prior notice, thus losing several days of his recovery period.

51. Contrary to the Club's allegations, the Player never received any warning letter from the Club regarding unlawful behaviour which would constitute a breach of the Employment Agreement. The Club's contention that the Player himself requested that his salary payments be suspended for the period of his injury is untrue and unproven.
52. Article 5 of the Employment Contract does not entitle the Club to unilaterally reduce the Player's salary in case of injury, but merely "*to require from the Player a review of his remuneration and advantages*". Therefore the Player legitimately rejected both the proposal concerning the reduction of his salaries and the one aimed at reaching an agreement on the termination of his employment relationship with the Club without any compensation.
53. The Player argues that if a certain clause provided for a reduction of his salary without establishing its new amount, one of the essential elements of the contract as per FIFA DRC jurisprudence - the remuneration - would be undefined and thus left at the complete discretion of one of the parties, which would render the contract to be invalid.
54. Article 5 of the Employment Contract could also be considered null and void insofar as it was unlawful to reduce the Player's salary because of his alleged poor performance or of an injury, pursuant to well established FIFA DRC jurisprudence.
55. The Club's attempt to force the early termination of the Employment Contract clearly demonstrates the Club's intention to dismiss the Player without just cause.
56. A breach of the contractual obligation of the Club to pay the salary and other benefits to the Player falls within the definition of "*just cause*" provided for in Article 14 FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"). Moreover, a unilateral termination of the contract is accepted when the essential conditions under which the contract was concluded are no longer present. In this case, the Club owed the Player at the time of his termination the 2011/2012 bonus of USD 75,000, as well as the salaries for three months.
57. The Player quotes the award rendered in CAS 2006/A/1180, where the Panel considered that the non-payment of one month's salary and eleven match bonuses constituted just cause to terminate the contract. In the matter at hand, the non-payment constituted a substantial breach of contract considering that three months of salary were overdue and the bonus alone corresponded to 50% of the total value of the first year of the Employment Contract.
58. The Player concluded that pursuant to the Employment Contract, monthly payments fell due at the end of each month (January, February, March etc.) and therefore the amount outstanding at the time the claim was lodged with FIFA was equivalent to three months plus the bonus.
59. According to the Player, the FIFA DRC correctly calculated the damages owed to him, including an amount of USD 1,613 for one flight ticket (roundtrip Tunisia/Brazil) to be paid by the Club pursuant to Article 4 of the Employment Contract. Thus, the total amount due to

the Player by the Club for the breach of the Employment Contract was USD 993,113, according to the calculation below:

- Outstanding bonus of USD 75,000;
- Outstanding salaries: USD 37,500 corresponding to the salaries for February, March and April 2012,
- Compensation for breach of contract USD 880,613

60. The Player requests the CAS to decide as follows:

- 1. The appeal filed by Etoile Sportive du Sahel against the challenged decision issued by FIFA DRC on 11 June 2015 is dismissed;*
- 2. The challenged FIFA DRC decision on 11 June 2015 is confirmed;*
- 3. The Appellant shall pay and charged with all the procedural costs of this arbitration procedure;*
- 4. The Appellant shall pay the Respondent a contribution to his legal fees and costs suffered in connection with this arbitration in an amount to be set at the discretion of the Panel.*

61. At the hearing on 31 August 2016 the Player specified (partly correcting statements in his written submissions) the salaries he earned from the time of the termination of the Employment Contract until the contractual end date of such contract as follows:

- 60,000 Brazilian Real (“BRL”) from the Brazilian Club for a period between 10 July 2013 and 15 December 2013,
- 36,000 USD from a club in Thailand for a period from 1 June 2014 to 30 November 2014, and
- 20,000 BRL from a further club in Brazil from 26 March to 10 July 2015.

62. The Player agreed that these amounts would be taken into account in connection with his duty to mitigate the damages.

c. The Brazilian Club

63. The Brazilian Club did not enter into appearance, made no submissions and did not participate in the hearing.

d. FIFA

64. FIFA argues that contrary to the Club’s allegations, it did not receive the letter reportedly sent

by the Club on 12 May 2012, in which it invited the Player to return to the Club and resume his duties. Moreover, even if said letter was indeed sent, FIFA was only a copied recipient thereof, alongside the Fédération Tunisienne de Football and the Confederação Brasileira de Futebol, and the letter does not contain any request towards FIFA to forward it to the Player.

65. Except for the new but unproven allegation that the Player would have agreed to postpone the payment of his remuneration, the Club brought forward before CAS the same arguments it had presented before the DRC as to the substance of the matter which the DRC duly addressed in the Appealed Decision.
66. Contrary to the Club's interpretation of Article 3 of the Employment Contract, this article does not stipulate that the Player's monthly salary shall be paid every thirty days beginning on the starting date of the Employment Contract which would result, as wrongly argued by the Club, in the Player's salary for the month of January 2012 having become due in mid-February.
67. FIFA stresses that according to the Employment Contract the Player is entitled to USD 12,500 for each of the six months representing the remainder of the first season (i.e. January to June 2012). Otherwise, the Employment Contract would have had to speak of 5 (or 5.5) months only. In the absence of further contractual specifications in relation to payment dates, the DRC thus correctly concluded that the Parties had actually agreed that the Player was entitled to receive USD 12,500 at the end of each month, including for the month of January 2012. The Club's attempt to reduce to 2.5 the number of monthly salaries outstanding at the time of termination is unjustified. Moreover, the Player also had a claim for an outstanding bonus payment of USD 75,000 at the time of termination.
68. The Club's initial argument that the Player never played for the Club and was thus not entitled to any of the so-called "*bonus payments*" is also unfounded. Such payments are provided for in Article 3 of the Employment Contract, which does not set out any appearance-related condition for the Player to be entitled to receive the amounts in question. Hence, the DRC made a correct application of the wording of said contractual clause. As the document submitted by the Club before the CAS allegedly assisting in the analysis of the nature of the respective payments was already at its disposal during the proceedings before the DRC, FIFA requests on the basis of Art. R57 paragraph 3 of the CAS Code that the Panel exclude the Club's attachment no. 16 to the Appeal Brief.
69. FIFA submits that, contrary to the Club's allegations, in the present case the DRC fully complied with the provisions of Art. 17 of the FIFA RSTP when assessing the components of the amount of compensation payable to the Player. Moreover, the DRC had duly asked the Player for a copy of the contracts he may have signed with other clubs after the termination of the Employment Contract with the Appellant and proactively verified and completed the Player's Answer in this respect by using information contained in the FIFA Transfer Matching System.
70. In response to the Club's request that the entire FIFA file be added to the CAS file, FIFA emphasized that all documents in FIFA's possession in this matter were made available to the

Club during the proceedings before the DRC.

71. FIFA requests:

- 1. That the CAS rejects the appeal at stake and confirms at the presently challenged decision passed by the Dispute Resolution Chamber on 11 June 2015 in its entirety.*
- 2. That the CAS orders the Appellant to bear all the costs of the present appeal proceedings.*
- 3. That the CAS orders the Appellant to cover all legal expenses of FIFA related to the proceedings at hand.*

III. IN LAW

1. Jurisdiction

72. The jurisdiction of the CAS is undisputed and was confirmed by all Parties attending the hearing. It derives from Article R47 of the CAS Code and Article 66(1) of the FIFA Statutes (2015 edition, in force at the time when the present Appeal was filed) in connection with Article 24(2) FIFA RSTP.

73. Article R47 of the CAS Code stipulates:

“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”.

74. Articles 66(1) of the FIFA Statutes states:

“FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players’ agents”.

75. Article 24(2) FIFA RSTP provides that:

“[...] Decisions reached by the Dispute Resolution Chamber or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)”.

76. The present Appeal is directed against a final decision of a federation, the statutes and regulations of which provide for an arbitration clause in favour of the CAS. Thus, the appeal falls within the scope of Article R47 CAS Code. It follows that CAS has jurisdiction over the present matter.

2. Admissibility

77. In accordance with Article 67(1) of the FIFA Statutes,

“appeals against final decisions passed by FIFA’s legal bodies [...] shall be lodged with CAS within 21 days of notification of the decision in question”.

78. The Appealed Decision was notified to the Club on 10 February 2016 and the Statement of Appeal was filed on 29 February 2016, hence within the required 21 day time-limit. As a result the appeal is admissible.

3. Scope of the Panel’s Review

79. According to Article R57 of the CAS Code, the Panel has full power to review the facts and the law of the case (“trial *de novo*”).

4. Applicable Law

80. The applicable law is identified by the Panel in accordance with Article R58 of the CAS Code and Article 66(2) of the FIFA Statutes.

81. Pursuant to Article R58 of the CAS Code, the Panel is required to 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

82. Article 66(2) of the FIFA Statutes provides:

“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”.

83. Accordingly, and in light of Article R58 of the CAS Code and Article 66(2) of the FIFA Statutes, the Panel rules that the Statutes and Regulations of FIFA shall apply primarily and, subsidiarily, Swiss law.

84. With regard to the question which edition of the FIFA RSTP shall apply, the Panel concludes that the FIFA RSTP (2010 edition) are applicable because the Employment Contract was concluded in February 2012.

85. The relevant sections of the FIFA RSTP in the present matter provide for the following:

“14 Terminating a contract with just cause

A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.

[...]

17 Consequences of terminating a contract without just cause

The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of 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.

2. Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.

[...]”.

IV. THE MERITS

86. The outcome of this case will depend on the answers to the following questions:

- Which salaries were owed to the Player at the time of the termination of the Employment Contract? (1.1 below)
- Was the Club entitled to unilaterally reduce the Player’s salary, or, if not, was the Player obligated to agree to a reduction of his salary? (1.2 below)
- Was the Player owed the performance bonuses under the Employment Contract? (1.3 below)
- Did the Player have a right to terminate the Employment Contract for cause because of the Club’s failure to pay the amounts found to be owed under the foregoing three questions? (2. below)
- Was the Player estopped from exercising his right to terminate the Employment Contract

because of special circumstances prevailing at the time of the signing of the Employment Contract (pre-existing injury), during the life of the Employment Contract (the Player's inability to play official matches) or at the time of the termination of the Employment Contract (administrational and financial difficulties within the Club, post-revolutionary chaos, force majeure)? (3. below)

- Did the Player comply with his duty to mitigate his damages? (4. below)
- As a result of the answers to the foregoing questions, what amount, if any, is owed to the Player in terms of salary and bonus? How much, if anything, is owed to the Player as compensation for breach of contract by the Club? (5. below)

1. The Remuneration

1.1 The Salary

87. The Appealed Decision found that the Club owed to the Player in terms of outstanding salaries a total of USD 37,500, i.e. the salaries for the months of February, March and April 2012 at USD 12,500 each.
88. In essence, the Club argues that the Employment Contract was signed on 13 January 2012 and that consequently the payment made to the Player on 12 February 2012 (partly paid to the Player's agent) represented the first salary for the period from 13 January to 12 February 2012. As a result, no more than 2.5 months' salaries were owed until the date of termination.
89. The Panel disagrees with this analysis. The Employment Contract provides that for the (remaining) season 2011/2012 the Player would receive "*salairé mensuel net de douze mille cinq cent (12,500 USD) sur six mois, soit au total soixante quinze mille (75,000 USD) pour les six mois*". This language allows only one interpretation: The Player is owed the monthly salary for six full months, not only for five or five and one half months. Consequently the payment made in mid-February 2012 was the monthly salary for January 2012. The fact that this payment was partly made to the Player's agent – which the Player now claims was not provided for in the Employment Contract – was not challenged by the Player before the DRC whose decision the Player wants this Panel to confirm. It is thus not for the Panel to make any ruling on the Club's partial payment of the Player's salary for January 2012 to his agent.
90. In conclusion, the DRC was correct in finding that the Player was owed USD 12,500 each at the end of February, March and April 2012.

1.2 The Reduction of the Salary due to Non-performance by the Player

91. The Club argues that it requested the Player to agree to a reduction of his salary from USD 12,500 to USD 1,500 and that it had a right to do so according to Article 5 of the Employment Contract pursuant to which "*en cas d'insuffisance ou de manque de rendement du joueur ...*, [the Club]

se réserve le droit d'exiger de ce dernier la révision de la rémunération ...”.

92. The Panel sees no reason to reflect on the proper interpretation of this provision in the Employment Contract. It is obvious that it does not give the Club a unilateral right to change the Player's salary and the Club does not claim that an agreement on a reduction of the Player's salary has been reached. The Club simply once requested a reduction of the salary to which the Player did not agree and did not have to agree given the drastic extent of the proposed reduction. Under these circumstances the Panel does not have to enter into a discussion whether “*insuffisance ou manque de rendement*” would include the Player's inability to play because of an injury and, if so, what the extent of the reduction of the salary would be.
93. In conclusion, no reduction of the Player's salary is justified pursuant to Article 5 of the Employment Contract.

1.3 The Performance Bonus

94. Pursuant to Article 3 of the Employment Contract the Player was entitled for the 2011/12 season to “*une prime de rendement de ... (75,000) USD que le joueur percevra des qu’il sera régulièrement qualifié avec l’ESS [the Club]*”.
95. The Club argues that the payment of this performance bonus was subject to the Player's participation in the Club's official matches, such condition being set out in detail in the rules of the Tunisian Football Federation. Since the Player did not play a single official match for the Club, no performance bonus is owed according to the Club.
96. The Panel does not share the analysis advanced by the Club.
97. While it is true that the Employment Contract makes reference to the “*statutes, regulations ... of the association member...., that are an integral part [of] the present contract*” (Article 16), such reference is not sufficient to amend the Club's unconditional and specific commitment to pay a performance bonus. Also, the Club confirmed at the hearing that it did not deliver, on the occasion of the signing of the Employment Contract or later, to the Player a copy of the relevant regulations, but argued that it summarised verbally to the Player the content of such regulations which the Player denies. Consequently, the Club failed to discharge its burden of proof in this regard.
98. As a final note on this point, it appears to the Panel that the regulations in the rules of the Tunisian Football Federation relative to performance bonuses represent minimum requirements which the clubs are free to amend in favour of the players. This is what happened in this case when the Club unconditionally promised to pay the performance bonus to the Player, no matter whether he participated in official matches.
99. As a result, the Player was owed USD 75,000 as soon as he was “*régulièrement qualifié*” with the Club which the Club admitted in its statement to the Dispute Resolution Body of the Tunisian Football Federation was the case in mid-January 2012.

1.4 Conclusion on Salaries and Bonuses

100. In summary, the Player was owed a total of USD 112,500 at the time he rendered his notice of termination of the Employment Contract.

2. The termination right under the FIFA RSTP

101. Having found that the Player was owed the amounts he claimed he was owed at the time when he terminated the Employment Contract, the Panel now has to determine whether such termination was valid under the applicable rules.

102. Article 14 of the FIFA RSTP provides that “*a contract may be terminated ... where there is just cause*”. FIFA’s commentary on the FIFA RTSP quotes as an example for a termination for just cause a case where “*a player has not been paid his salary for over 3 months*”.

103. At the time of termination, the Player was owed a full three months of salary as well as a performance bonus of USD 75,000. The Player had notified the Club by letters of 19 and 27 April 2016 about the outstanding amounts, and made sufficiently clear to the Club that any further delay of payment would represent a reason for termination.

104. Considering the above and FIFA’s commentary on the FIFA RTSP the Panel is of the view that the Club clearly committed a breach of contract and that the Player was entitled to terminate the Employment Contract for just cause. As a side comment, the Panel wishes to underline that the Panel does not share the interpretation advanced by the Club of the example contained in the FIFA Commentary of a delay in payment of salary of three months as being a final, decisive, minimum amount: A termination under Art. 14 FIFA RSTP may under certain circumstances be justified also if the amount overdue is less than three months.

3. Was the Player estopped from exercising his right to terminate the Contract?

105. The Club argues that the exercise by the Player of the right to terminate was “*illegal*” under the special circumstances of this case, as follows:

- because due to his (pre-existing) injury the Player was unable to play a single official match for the Club;
- because the failure to pay the Player’s salaries and bonus was caused by “*administrational and financial difficulties within the Club*” and the post-revolutionary chaos which prevailed in Tunisia in the early part of 2012.

106. The Club argues that the Player had a pre-existing injury at the time of signing the Employment Contract which he did not disclose to the Club, an allegation which the Player denies. This argument is to no avail as the Club failed to discharge its burden of proving that the alleged pre-existing injury in fact existed. In addition, it is a general rule in the world of football that it is the club’s responsibility to satisfy itself before signing a player contract that the player is fit to

play (accordingly, pursuant to Section 18(4) FIFA RSTP “[t]he validity of a contract may not be made subject to a successful medical examination [...]”).

107. For the reasons set out above and in the absence of a clause to that effect in the Employment Contract, the Club cannot invoke as a reason for its failure to pay the Player what he was owed the fact that he did not play a single official match for the Club. This is clearly the Club’s risk.
108. Likewise, the Club cannot invoke alleged “*administrational and financial difficulties within the Club*” as an excuse for non-payment of the Player. It would have been for the Club to find a way around these “*difficulties*” or to bring this forward to the Player in an attempt to arrive at a compromise.
109. Finally, the Club’s claim for a state of *force majeure* because of “*post-revolutionary chaos in Tunisia*” must fail. The Club signed a high value contract with the Player in January 2012 and failed to show that the alleged instability in Tunisia in February/March/April 2012 was any different than in January 2012.
110. In summary, therefore, the reasons brought forward by the Club do not estop the Player from invoking the Club’s breach of contract.

4. Did the Player breach his duty to mitigate his damages?

111. The Club contends that the Player acted in bad faith when he signed contracts for extremely low salaries during the period after his departure from the Club until the envisaged end of his contract with the Club (30 June 2015).
112. In fact, compared to his rich contract with the Club, the Player contracted for very low salaries in Brazil and Thailand. However, it has to be borne in mind that the Player was still injured when he left Tunisia and that he had no playing practice for more than a year when he finally found a new club in Brazil in 2013. Also, the Player was over 30 years of age at the relevant time and was thus past the prime time of his career. Ultimately, there is no indication that the Player lied when he specified at the hearing before this Panel the amounts he earned which amounts were higher than those presented during the proceedings before the DRC which operates to his disadvantage.
113. In conclusion, therefore, the Panel has no basis to find that the Player failed to duly mitigate his damages.

5. The Quantum

114. As shown above the Player was owed USD 112,500 at the time when the Employment Contract came to an end as a result of the Player’s termination for breach of contract by the Club.
115. Additionally, according to Article 17(1) of the FIFA RSTP “*the party in breach shall pay compensation*”.

116. In this regard, the Panel in essence agrees with the application by the FIFA DRC of Article 17(1) FIFA RSTP and the calculation conducted by it, which took into account, *inter alia*, the remuneration due to the Player pursuant to the Employment Contract, the time remaining on said contract, as well as the professional situation of the Player after the early termination.
117. Absent particular circumstances, the Panel finds that in case of breach of contract the injured party in principle is entitled to receive as compensation the full amount it would have earned if the contract had been complied with (cf. CAS 2005/A/801, para 66; CAS 2006/A/1061, para. 15; CAS 2006/A/1062, para. 22; CAS 2008/A/1517, para. 65; and CAS 2008/A/1518, para. 70). In the case at hand, for the period from 1 May 2012 until 30 June 2015 the Player would have earned
- salaries for the months May and June 2012 of 12,500 each (USD 25,000),
 - annual salaries for the seasons 2012/13, 2013/14 and 2014/15 of USD 150,000 each (USD 450,000), and
 - performance bonuses for the seasons 2012/13, 2013/14 and 2014/15 of USD 150,000 each (USD 450,000),
- i.e. a total of: USD 925,000.
118. The duty to mitigate damages is a general principle of contract/tort law and the Player has agreed that his compensation has to be adjusted by the amounts he earned during the time from the effective date of his termination (3 May 2012) until the envisaged expiration date of his contract (30 June 2015). At the hearing, the Player specified these amounts as follows:
- 60,000 BRL from July to December 2013, which at an average exchange rate of 0,438 USD per 1 BRL during the relevant time period (according to currency exchange rates available on the Internet), amounts to USD 26,295;
 - USD 36,000 from 1 June to 30 November 2014;
 - 20,000 BRL from March to July 2015, which at an average exchange rate of 0,3208 USD per 1 BRL during the relevant time period, amounts to USD 6,416.80.
- This leads to a total amount of USD 68,711.80.
119. This amount needs to be deducted from the amount of compensation calculated above. Taking into account the circumstances of this case, including the submissions of the Parties, the Panel sees no reason to further reduce the claim of the Player.
120. In addition to the above, by asking this Panel to confirm the Appealed Decision the Player maintains that he is owed the costs of one flight ticket (roundtrip Tunisia/Brazil) in the amount of USD 1,613 as previously held by the FIFA DRC.

121. The Panel notes that pursuant to Article 4 of the Employment Contract, the Player was entitled to receive from the Club five flight tickets (roundtrip Tunisia/Brazil) per season. Although no evidence has been adduced by the Player in the present proceedings whether he incurred such costs, the Panel awards the requested sum, considering that the Club did not explicitly object to the Player's claim and because the Player – at least initially – travelled to Tunisia and returned once the relationship with the Club had ended.

122. The Player's claims thus amount to:

- USD 112,500
- USD 925,000
- USD 1,613
- minus USD 68,711.80

Total: USD 970,401.20

123. As a result the Panel awards an amount of USD 970,401.20 as compensation to the Player.

6. Interest

124. The FIFA DRC awarded to the Player 5 % interest per annum on the outstanding salary and bonus payment since 7 May 2012 (i.e. the date of filing the claim before the FIFA DRC) and on the compensation as of the 31st day following the notification of the Appealed Decision. This finding has not been challenged by the Parties. Although interest could have been applied at an earlier date (cf. CAS 2012/A/2874), the Panel, therefore, cannot adjust the FIFA DRC's decision.

7. Other prayers for relief

125. All other prayers for relief, including the counterclaim of the Club in the amount of USD 1,500,000, are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed on 29 February 2016 by Etoile Sportive du Sahel against the decision rendered by the FIFA Dispute Resolution Chamber on 11 June 2015 is partially upheld.
2. The item 5 of the decision rendered by the FIFA Dispute Resolution Chamber on 11 June 2015 is amended as follows:

Etoile Sportive du Sahel has to pay to Leopoldo Roberto Markovsky for breach of contract in the amount of USD 857,901.20 as of 12 March 2016.

3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.