Arbitration CAS 2016/A/4679 Balikesirspor FC v. Ante Kulusic, award of 27 January 2017

Panel: Mr Lars Hilliger (Denmark), President; Prof. Petros Mavroidis (Greece), Mr Bernhard Welten (Switzerland)

Football
Termination of an employment contract with just cause by the player
Late payment or non-payment of the remuneration
Principle of "positive interest"
Mitigation of damage

1. **The non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated - constitute 'just cause' for termination of the contract. The relevant criterion is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be 'insubstantial' or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning.**

2. **The injured party is entitled to a whole reparation of the damage suffered pursuant to the principle of "positive interest", under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in had the contract been performed until its expiry.**

3. **According to article 337c para. 2 CO, the employee must permit a set-off against the amount of compensation for what he saved because of the termination of the employment relationship, what he earned from other work, or what he has intentionally failed to earn. Such a rule implies that, in accordance with the general principle of fairness, the injured player must act in good faith after the breach by the club and seek other employment, showing diligence and seriousness. The duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfactory employment contract, or when, having different options, he deliberately accepts to sign the contract with less favourable financial conditions, in the absence of any valid reason to do so. However, the fact that a player did in fact sign two new employment contracts during the original contract period, is enough to consider that the player has fulfilled his obligation to mitigate his loss.**

1. THE PARTIES

1.1 Balikesirspor FC (the "Club" or "Appellant") is a Turkish professional football club actually playing in the Turkish 1. Lig after being relegated form the Turkish Süper Lig at the end of the 2014/15 season. The Club is affiliated with the Turkish Football Federation (the "TFF"), which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA").

1.2 Mr Ante Kulusic (the "Player" or "Respondent") is a Croatian professional football player, actually playing for Gençlerbirligi Spor Kulübü in the Turkish Süper Lig.

2. FACTUAL BACKGROUND

2.1 The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the decision rendered by the FIFA Dispute Resolution Chamber (the "DRC") on 28 January 2016 (the "Decision"), the written submissions of the Parties and the FIFA file. Additional facts may be set out, where relevant, in the legal considerations of the present Award.

2.2 On 31 July 2014, the Parties entered into an employment agreement valid as from the date of signing until 31 May 2017 (the "Contract").

2.3 According to Clause 3 of the Contract, the Player was entitled to receive, *inter alia*, the following net remuneration:

- Season 2014-15: ten monthly salaries of EUR 40,000 net;
- Season 2015-16: ten monthly salaries of EUR 55,000 net;
- Season 2016-17: ten monthly salaries of EUR 60,000 net.

2.4 Furthermore, Clause 3 states, *inter alia*, that *"U-21 Team compensation and Cup competitions took place in a game, premium and speciality items do not have any validity"* and *"If payments will be made in instalments then the amounts payable and dates of payment under this contract shall be clearly indicated. Otherwise, general provisions of the Code of Obligations and the terms and conditions of the Regulations on the Status and Transfer of professional Football Players shall apply"*.

2.5 The Contract further stated, *inter alia*, that the Club should be obliged *"to ensure accurate and timely payment of all salaries (regular, monthly, weekly and performance based) under this contract"* and *"to respect the Statutes, Regulations, including the Code of Ethics and Decisions of FIFA, UEFA and TFF …"* (Clause 6), and also emphasised that the Player should be obliged to *"respect the Statutes, Regulations, including Code of Ethics and Decisions of FIFA, UEFA and TFF …"* (Clause 7).

2.6 On 8 May 2015, the counsel of the Player sent a default letter dated 5 May 2015 to the Club, claiming that the Club had defaulted on its payment of the Player's salaries for the period from December 2014 (partly) until April 2015 in the net amount of EUR 189,638, and requesting payment of the said salaries on or before 15 May 2015.

2.7 By fax letter of 20 May 2015, the Player's counsel acknowledged receipt of EUR 20,000 from the Club, requested the Club to pay the remaining outstanding salaries in the amount of EUR 169,638 by 25 May 2015, stating, *inter alia*, as follows: *"Furthermore, please inform us what is the sporting and legal situation of your club towards the player in particular. Do you want to retain the service of the player? In case of silence the player will assume that the club is not interested in his services. In view of the above, if we don't receive the remaining balance of EUR 169,638 by 25 May 2015, then the player unilaterally terminate the employment relationship with Balikesirspor for just cause, without further warning".*

2.8 By fax letter of 26 May 2015, the Player's counsel acknowledged receipt of an additional EUR 40,000 from the Club, requested the Club to pay the remaining outstanding salaries in the amount of EUR 129,638 on or before 1 June 2015, stating, *inter alia*, as follows: *"Therefore, I hereby ask you on behalf of the Player,* ***for the last time****, to clarify his sporting and legal position at the club for the forthcoming 2015/16 season, in particular, whether the club is interested in pursuing the Employment Contract and in the Player's services thereof. … Finally, I was instructed to inform you that the persistent breaches of the financial terms of the Employment Contract by the Club, coupled with the uncertainty created in the Player regarding the performance of the Employment Contract by the Club in the future, are causing the Player to lose the confidence and trust he had in the performance of the said contract by the Club, which entitles him to terminate the contract for just cause with immediate effect. Therefore, I hereby give you* ***ultimate deadline until 1 June 2015*** *to put things right, i.e. to pay the Player the outstanding salaries detailed above, in full, as well as to declare in writing your interest in the Player's services and in the performance of the Employment Contract in the upcoming 2015/16 season, failing which the Player will terminate the Employment Contract without further warning, pursuant to Article 14 of the FIFA Regulations on the Status and Transfers of Players".*

2.9 On 3 June 2015, and without having received any further payments from the Club, the Player (prematurely and) unilaterally terminated the Contract by fax letter, stating, *inter alia*, as follows:

> *"I refer to the Employment Contract entered between* ***Croatian*** *player, Mr.* ***Ante Kulusic****, and Balikesirspor Kulübü from 31.07.2014 until 31 May 2017. I refer also to the warnings sent, to Balikesirspor Kulübü on 8 and 20 May and, in particular, to the final warning of 26 May 2015, which all remained negligently hindered by the Club.*
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> *To date, Balikesirspor Kulübü is in arrears of payments of more than four months of the player's salary (i.e. EUR 169,638 net), as follows, EUR 9,638 net for the December 2014 salary due on 31.12.2014; EUR 40,000 net for the February 2015 salary due on 28.02.2015; EUR 40,000 net March 2015 salary due on 31.03.2015; EUR 40,000 net April 2015 salary due on 30.04.2015; EUR 40,000 net May 2015 salary due on 31.05.2015, pursuant to Article 3 of the Employment Contract.*
>
> *Furthermore, Balikesirspor Kulübü did not answer to the player's request for clarification of his sporting and legal situation at the club for the next season, which he interprets as lack of interest in his services by the club.*
>
> *Balikesirspor Kulübü persistent non-compliance with its financial obligations in connection with the Employment Contract and its lack of interest in the player's services for the next season caused the player Mr. Ante Kulusic to lose the confidence he had in the future performance of the Employment Contract by Balikesirspor Kulübü, which entitles him to step out from the Employment Contract with just cause immediately.*

On account of the above, I hereby unilaterally terminate the Employment Contract for just cause, with immediate effect, based on Article 14 of the FIFA Regulations on the Status and Transfer of Players.

I hereby request payment by Balikesirspor Kulübü of the outstanding amount as well as of the residual value of the Employment Contract ***immediately****. Otherwise, I will submit the labour dispute to the FIFA Dispute Resolution Chamber* ***without further warning****".*

2.10 By a resolution of 9 June 2015 by the board of directors of the TFF, the Club, due to its sporting results in the 2014-2015 season, was relegated to the PTT 1. League starting from the beginning of the 2015-2016 season.

2.11 On 22 June 2015, the Player lodged a claim for breach of contract against the Club before the DRC and requested the following net payments from the Club:

"1) The Respondent, Baliesirspor, has to pay to the Claimant, Ante Kulusic, the amount of ***EUR 169,638*** *as outstanding salaries, plus interest of 5% p.a. as follows:*

a. On EUR 9,638 as of 1 January 2015;

b. On EUR 40,000 as of 1 March 2015;

c. On EUR 40,000 as of 1 April 2015;

d. On EUR 40,000 as of 1 May 2015; and

e. On EUR 40,000 as of 1 June 2015.

3) The Respondent has to pay the Claimant the amount of EUR 1,150,000 as compensation for breach of contract, plus interest of 5% p.a. accrued since 4 June 2015 until the date of effective payment".

2.12 In support of his claim, the Player submitted, *inter alia*, that the termination of the Contract was made with just cause, in particular considering that the Club was already in arrears for a considerable amount, i.e. more than four monthly salaries, and for a significant period of time. Furthermore, the Club never replied to the Player's several default letters, just as the Club must be considered to be uninterested in the Player's services especially after its relegation, and in particular considering his high remuneration.

2.13 In its reply of 15 July 2015, the Club first submitted that it had paid EUR 230,362 to the Player, and therefore the amount of EUR 169,638 was still outstanding. However, in its second submission on 11 August 2015, the Club maintained that *"EUR 270,000.05 as well as TRY (Turkish Lira) 97,500, equivalent to EUR 32,000 have been paid to the Player for the 2014-15 season".* In view of this fact, the Club held that an amount of EUR 98,000, corresponding to less than three monthly salaries, is outstanding and that consequently, the Player did not have just cause to terminate the contract. In support of its assertions, the Club submitted the following bank receipts:

"- Receipt dated 29 August 2014 in the amount of EUR 40,000 as "August wage payment";

- Receipt dated 25 September 2014 in the amount of TRY 25,000 as "bonus payment";

- Receipt dated 1 October 2014 in the amount of EUR 40,000 as "wage payment";
- Receipt dated 22 October 2014 in the amount of TRY 5,000 as "bonus payment";
- Receipt dated 4 November 2014 in the amount of EUR 40,000 as "wage payment";
- Receipt dated 26 November 2014 in the amount of EUR 40,000 as "wage payment";
- Receipt dated 23 December 2014 in the amount of TRY 10,000 as "bonus payment";
- Receipt dated 30 December 2014 in the amount of TRY 25,000 as "bonus payment";
- Receipt dated 9 January 2015 in the amount of EUR 40,000 as "October wage payment";
- Receipt dated 29 January 2015 in the amount of TRY 5,000 as "bonus payment";
- Receipt dated 3 February 2015 in the amount of TRY 5,000 as "wage payment";
- Receipt dated 5 February 2015 in the amount of EUR 361.73 as "wage payment";
- Receipt dated 5 February 2015 in the amount of EUR 39,638.37 as "wage payment";
- Receipt dated 1 April 2015 in the amount of TRY 20,000 as "bonus payment";
- Receipt dated 28 April 2015 in the amount of EUR 10,000 as "wage payment";
- Receipt dated 14 May 2015 in the amount of EUR 20,000 as "wage payment";
- Receipt dated 21 May 2015 in the amount of EUR 40,000 as "wage payment".

2.14 Furthermore, the Club insisted that the Player had failed to comply with his obligations pursuant to the Contract, and in particular with the Regulations of the TFF, which require the default letter to be issued "by notary", which is why the Contract is still in force and any termination made in violation of the TFF Regulations would be deemed a termination without just cause.

2.15 In addition, the Club made reference to Article 12bis paragraph 3 of the FIFA Regulations on the Status and Transfer of Players (the "Regulations"), according to which the deadline given to the Club to fulfil its obligation must be at least ten days, which was not respected by the Player, and the Club therefore cannot be considered to have overdue payables.

2.16 Furthermore, due to its relegation, the Club can no longer afford to pay the Player's salary. And finally, the Player is not entitled to claim compensation for breach of contract, since he never suffered any damage, and in any case, the Club's relegation and the content of the Player's new Contract should be taken into account.

2.17 In his replica of 14 October 2015, the Player submitted that the Club never submitted documentation to prove that the Contract was not terminated in accordance with the TFF Regulations, and that, in any case, such regulations are not applicable to this case. Furthermore, since his claim is based on Article 17 of the Regulations, TFF Regulations are not applicable. In any case, since the Player in fact gave the Club a deadline to comply with its obligations on several occasions, the Club was *de facto*, given a deadline of more than 10 days.

2.18 With regard to the payments made in TYR, the Player stated that these are not related to the monthly salaries pursuant to the Contract, but constitute payments of performance-related bonuses made in accordance with the Club's own sports regulations and *a contrario* of Clause 3

of the Contract. Pursuant to the Contract, all payments of the Player's salaries should be made in EUR and not in TRY.

2.19 Based on that, the Player held that until the date of termination, the Club had failed to pay him an amount of EUR 130,000, i.e. more than three monthly salaries, (EUR 10,000 corresponding to the balance of his salary for February 2015, and EUR 120,000 corresponding to his salaries for March, April and May 2015). On this account, the Player amended his claim related to his account receivable, now requesting an amount of EUR 130,000 from the Club.

2.20 In its duplica of 2 November 2015, the Club submitted that it was up to the Club to decide in which currency payments were made, and the payments made in TYR constitute salary payments. Finally, the Club presented a document confirming its relegation to the Turkish secondary division (1. PTT Lig) at the end of the 2014-2015 season.

2.21 On 27 August 2015, the Player and the Turkish football club Gençlerbirligi Spor Kulübü, signed an employment contract valid as from 27 August 2015 until 31 May 2016, and according to which the Player should receive a total remuneration of EUR 300,000. The same parties later on signed another employment contract valid as from 4 August 2016 until 31 May 2017, and according to which the Player should receive a total remuneration of EUR 340,000.

2.22 The FIFA DRC, after having confirmed its competence, concluded that the 2015 edition of the Regulations was applicable to the case.

2.23 The FIFA DRC then took note that on 3 June 2015, the Player terminated in writing the contractual relationship with the Club after having put the latter in default on three occasions. With regard to the Club's argument as to the alleged invalidity of the said default letters, the FIFA DRC noted that the Club actually proceeded to partial payments in reaction to these letters, recognising de facto the validity of the same.

2.24 With regard to the payments in TRY, in the total amount of TR 97,500, the FIFA DRC found, that such payments correspond to bonuses the Club freely undertook to pay to the Player in addition to the salary debts it had towards the Player. Since the Club, without any valid reason and for a considerable amount of time, failed to pay the Player an amount of EUR 130,000 corresponding to a part of his salary for February 2015 as well his salaries for March, April and May 2015, the FIFA DRC found that the Player had just cause to terminate the Contract unilaterally on 3 June 2015 and that, as a result, the Club should be held liable for the early termination of the Contract without just cause.

2.25 Having established that the Club is to be held liable for the early termination of the Contract, and taking into consideration Article 17 paragraph 1 of the Regulations, the FIFA DRC decided that the Player was entitled to receive from the Club an amount of money as compensation for breach of contract in addition to any outstanding payments on the basis of the Contract. As a consequence and in accordance with the principle of *pacta sunt servanda*, it was decided that the Club is liable to pay the Player the amount of EUR 130,000 as outstanding remuneration.

2.26 With regard to the compensation payable to the Player, the FIFA DRC firstly recapitulated that, in accordance with Article 17 paragraph 1 of the Regulations, the amount of compensation must be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including in particular the remuneration and other benefits due to the Player under the existing contract and/or the new contract, the time remaining of the existing contract up to a maximum of five years, and depending on whether the breach of contract falls within the protected period.

2.27 Since the Parties had not provided otherwise in the Contract, the FIFA DRC then proceeded with the calculation of the total remuneration to the Player under the terms of the Contract. Finding that the Player's remuneration pursuant to the Contract as from June 2015 until 31 May 2017 amounted to EUR 1,150,000, the FIFA DRC found that the said amount should serve as the basis for the determination of the amount of compensation for breach of contract.

2.28 The FIFA DRC then noted, that the Player, according to his statement, had signed a new employment contract with a new club valid until 31 May 2016, according to which he was entitled to receive a total remuneration of EUR 300,000.

2.29 Consequently, and considering that the Player had secured a remuneration from his new club corresponding to EUR 300,000, the FIFA DRC decided that the Club must pay the amount of EUR 850,000 to the Player, which was considered to be a reasonable and justified amount of compensation for breach of contract.

2.30 On 28 January 2016, the FIFA DRC issued its decision (the "Decision") stating, *inter alia*, as follows:

1. *"The claim of the [Player] is partially accepted.*

2. *The [Club] has to pay to the [Player]**within 30 days** as from the date of notification of this decision, outstanding remuneration in the amount of EUR 130,000 plus 5% interest p.a. until the date of effective payment as follows:*

   a) *5% p.a. as of 1 March 2015 on the amount of EUR 10,000;*
   b) *5% p.a. as of 1 April 2015 on the amount of EUR 40,000;*
   c) *5% p.a. as of 1May 2015 on the amount of EUR 40,000;*
   d) *5% p.a. as of 1June 2015 on the amount of EUR 40,000.*

3. *The [Club] has to pay to the [Player] **within 30 days** as from the date of notification of this decision, compensation for breach of contract amounting to EUR 850,000 plus 5% interest p.a. on said amount as from 22 June 2015 until the date of effective payment.*

4. *In the event that the amounts plus interest due to the [Player] in accordance with the abovementioned points 2. and 3. are not paid by the [Club] within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

5. Any further claim lodged by the [Player] is rejected.

6. …".

3 SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

3.1 On 27 June 2016, the Appellant filed his Statement of Appeal in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (the "Code") against the Decision rendered by the DRC on 28 January 2016.

3.2 On 4 July 2016, the Appellant filed his Appeal Brief in accordance with Article R51 of the Code.

3.3 On 10 August 2016, the Respondent filed its Answer in accordance with Article R55 of the Code.

3.4 By letter dated 18 August 2016, in accordance with Article R54 of the Code, the Parties were informed by the CAS Court Office that the Panel had been constituted as follows: Mr Lars Hilliger, attorney-at-law in Copenhagen, Denmark, as President of the Panel, Mr Petros C. Mavroidis, Professor at Law in Commugny, Switzerland (nominated by the Appellant), and Mr Bernard Welten, attorney-at-law in Bern, Switzerland (nominated by the Respondent) as arbitrators of the Panel.

3.5 By letter of 31 October 2016, and following the Parties' submissions on the same issue, the CAS Court Office informed the Parties that the Panel deemed itself sufficiently informed to decide the case and render an award, based solely on the written submissions received without holding a hearing.

3.6 On 2 November 2016, the Appellant and the Respondent signed the Order of Procedure.

3.7 By letter of 29 November 2016, and upon instruction from the Panel pursuant to Article R44.3 of the Code, the CAS Court Office, invited the Respondent to inform the CAS Court Office *"whether he signed a new employment contract(s) with a club after the termination of his contractual relationship with the Turkish football club Genclerbirligi Spor by 31 May 2016"* and, in the affirmative, to file a copy of such employment contract(s).

3.8 By letter of 2 December 2016, the Respondent submitted a copy of his employment contract between the Turkish football club Genclerbirligi Spor and himself, valid as from 4 August 2016 until 31 May 2017.

3.9 By signing the Order of Procedure, the Parties confirmed their agreement that the case should be decided solely on the basis of the written submissions and that their right to be heard had been duly respected.

3.10 The Panel examined carefully and took into account in its deliberations all the evidence and arguments resented by the Parties, even if they have not been expressly summarised in the present Award.

4. CAS JURISDICTION AND ADMISSIBILITY OF THE APPEAL

4.1 Article R47 of the Code states as follows: *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".*

4.2 With respect to the Decision, the jurisdiction of the CAS derives from art. 67 par. 1 of the FIFA Statutes as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"*. In addition, neither the Appellant nor the Respondent objected to the jurisdiction of CAS, which was furthermore confirmed by the Parties signing the Order of Procedure.

4.3 The Decision with its grounds was notified to the Appellant on 6 June 2016 and the Appellant's Statement of Appeal was lodged on 27 June 2016, *i.e.* within the statutory time limit of 21 days set forth in art. 67 par. 1 of the FIFA Statues, which is not disputed. Furthermore, the Statement of Appeal and the Appeal Brief complied with all the requirements of Articles R48 and R51 of the Code.

4.4 It follows that the CAS has jurisdiction to decide on the Appeal and that the Appeal is admissible.

5. APPLICABLE LAW

5.1 Article R58 of the Code states as follows: *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

5.2 Art. 66 par. 2 of the FIFA Statutes states as follows: *"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".*

5.3 In his submission, the Respondent maintains that pursuant to Article R58 of the Code, the Regulations are applicable and, additionally, Swiss law. The Appellant failed to make any submission on this issue.

5.4 Based on the above, the Panel is therefore satisfied to accept the application of the Regulations and, additionally, Swiss law, both insofar as the application relates to the normative application and interpretation of the Regulations, and to the extent that the Panel has to decide on matters not addressed in the Regulations.

5.5 Finally, the Panel agrees with the DRC that the FIFA Regulations on the Status and Transfer of Players (2015 edition) are applicable to the present matter.

6. THE PARTIES' REQUESTS FOR RELIEF AND POSITIONS

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

6.2 The Appellant

6.2.1 In its Appeal Brief of 4 July 2016, the Appellant requested the following from the CAS:

1. *"The stay of execution of the decision taken by FIFA DRC until our appeal objection is concluded*[1]*,*
2. *The acceptance of our appeal application against the decision of FIFA DRC and annulment of the decision,*
3. *Ascertaining that client club has no debt to football player since all contractual fees were paid to the football player,*
4. *Designating that the football player unfairly terminated the contract made between the parties,*
5. *Refusal of termination compensation and fee demands,*
6. *In case of the decision that the football player is right in the termination; making at least 90% of discount by taking into account; the service period of the football player with the client club, the fact that the football player got rid of the fulfillment of the contract and released his work force, occupational experience, cost saved due to the non-fulfillment of the work being the subject of the contract, etc., and similar decisions.*
7. *Charging judiciary costs and expenses, and attorney's fee to the opposite party".*

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

a) First of all, the Club has no financial obligations towards the Player pursuant to the Contract, since it has fulfilled all its obligations and made all payments in full.

b) Since all payments to the Player pursuant to the Contract were made in full, the early termination of the Contract by the Player on 3 June 2015 was made without just cause.

c) As such, there was no legal ground for awarding compensation to the Player for the Club's alleged breach of contract.

d) In any case, the amount of compensation to be paid by the Club to the Player pursuant to the Decision constitutes an exorbitant amount and is disproportional to the damage suffered by the Player.

e) The Contract was terminated on 3 June 2015 and, as such, the remuneration to be earned by the Player with a new club from this date until the original expiry date of the Contract,

[1] By letter dated 12 July 2016, the Appellant withdrew its request for a stay.

31 May 2017, should have been taken into consideration in order to reduce or mitigate the compensation payable to the Player.

f) The DRC was not able to determine the actual loss of the Player due to the termination of the Contract, which should consequently not be taken into consideration when determining the amount of compensation to be paid, if any.

g) Furthermore, the benefits gained by the Player as a result of the termination of the Contract, should be taken into consideration and deducted from the loss of the Player.

h) The Player failed to fulfil his obligation to mitigate his loss, since he did not sign a new employment contract with another Turkish football club, but instead left the country and signed an employment contract with a foreign football club, consequently earning less than he would have been able to do in Turkey.

6.3 **The Respondent**

6.3.1 In his Answer of 10 August 2016, the Respondent filed the following requests for relief:

1. *"To reject the appeal filed by the Appellant against the decision passed on 28 January 2016 by the FIFA Dispute Resolution Chamber.*

2. *To order the Appellant to bear all the costs incurred with the present procedure.*

3. *To order the Appellant to pay to the Respondent a contribution towards his legal and other costs, in an amount to be determined at the discretion of the Panel".*

6.3.2 In support of his requests for relief, the Respondent submitted as follows:

a) Pursuant to Article 14 of the Regulations, a party to a contract is entitled to terminate the contract without consequences of any kind if there is just cause.

b) A club's payment obligation pursuant to an employment contract with a football player is the main obligation towards the player and non-payment or late payment of the player's salary by the club may constitute just cause for termination of the said contract.

c) At the time of the unilateral and premature termination of the Contract by the Player, the outstanding remuneration payable to the Player amounted to EUR 130,000, (EUR 10,000 as the balance of the salary for February 2015 due on 28 February 2015, EUR 40,000 as the salary for March 2015 due on 31 March 2015, EUR 40,000 as the salary for April 2015 due on 30 April 2015 and EUR 40,000 as the salary for May 2015 due on 31 May 2015).

d) Before the DRC, the Club acknowledged the debt of the said amount to the Player at the time of the termination of the Contract; however, during these proceedings, the Club stated that it had fulfilled all its obligations towards the Player and made its payments in full, which is disputed by the Player.

e) The Club never submitted any evidence documenting such alleged payments or in any other way discharged the burden of proof to establish that it paid the outstanding amount of EUR 130,000 to the Player.

f) In any case, the Club's acknowledgement of its debt to the Player made in its submission to the DRC is valid whether or not a cause of obligation is mentioned.

g) In light of the Club's failure to meet its payments obligation in respect of a considerable amount and for a significant period of time, combined with its failure to respond to the three default letters, including the request to receive information regarding the Club's plans for the Player, the continuation of the employment relationship between the Parties under the Contract could not be expected, since such breach caused the loss of confidence and trust the Player had in the future performance of the Contract by the Club.

h) The Player warned the Club on three occasions in writing, making it clear to the Club that the failure of the Club to comply with its payment obligations would trigger the termination of the Contract by the Player. Even so, each of the said letters was left ignored and unanswered by the Club.

i) Therefore, the Player had just cause to terminate the Contract on 3 June 2015.

j) In accordance with the principle of *pacta sunt servanda*, the Player is entitled to receive all due and outstanding remuneration pursuant to the Contract until the termination of the Contract on 3 June 2015 in the amount of EUR 130,000.

k) With regard to the compensation payable to the Player, the Player agrees with the DRC in the Decision that, in accordance with Article 17 paragraph 1 of the Regulations, the amount of compensation must be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including in particular, the remuneration and other benefits due to the Player under the existing contract and/or the new contract, the time remaining of the existing contract up to a maximum of five years, and depending on whether the breach of contract falls within the protected period.

l) The compensation should be set to the entire payment of remuneration pursuant to the Contract for the remainder of the period of contract, reduced by any payment the Player receives or received, respectively intentionally failed to earn from a third party or what he saved as expenses for the same period.

m) Pursuant to the Contract, the remaining salaries under the Contract amount to EUR 550,000 net for the 2015-2016 season; and EUR 600,000 net for the 2016-2017 season; totalling EUR 1,150,000 net for the remaining period of contract, which should serve as the basis for the determination of the compensation payable by the Club for breach of contract.

n) The Player agrees that any remuneration earned by the Player from other clubs during the remainder of the original period of contract between the Parties may be deducted, but the Club bears the burden of proof to establish the concrete elements which would justify the application of the said deduction.

o) The Club failed to submit any evidence proving that the Player signed an employment contract with another club after the termination of the Contract on 3 June 2015, nor has the Club asked the Player to disclose such employment contracts.

p) The Player did in fact meet his obligation to mitigate his damage and, thus, disclosed to FIFA the receipt of an amount corresponding to EUR 300,000 under his new contract with Gençlerbirligi Spor Kulübü, valid from 27 August 2015 until 31 May 2016, and the said amount must therefore be deducted from EUR 1,150,000 when calculating the amount of compensation to be paid to the Player by the Club. Therefore, the Player agrees with the DRC that the compensation for breach of contract due by the Club to the Player amounts to EUR 850,000 net.

q) Finally, the Club neither challenged the interest rate applicable to the outstanding amount payable by the Club to the Player, nor the dates from which interest must be calculated at such a rate.

7. MERITS

7.1 Initially, the Panel notes that it is undisputed that the Parties signed the Contract valid from 31 July 214 until 31 May 2017 (i.e. three sporting seasons) and that, according to the Contract, the Player was entitled to receive, *inter alia*, the following amounts as remuneration for the work performed under the Contract:

- Season 2014-15: ten monthly salaries of EUR 40,000 net;
- Season 2015-16: ten monthly salaries of EUR 55,000 net;
- Season 2016-17: ten monthly salaries of EUR 60,000 net.

7.2 It is further undisputed that the Player fulfilled his obligations under the Contract, until 3 June 2015, when the Player, following three written default letters to the Club due to the Club's alleged non-payment of the Player's salaries, unilaterally and prematurely, terminated the contractual relationship between the Parties.

7.3 However, the Parties disagree over whether the termination of the Contract by the Player was with or without just cause and, accordingly, what the financial consequences of this termination, if any, should be for the Parties.

7.4 Thus, the main issues to be resolved by the Panel are:

a) Did the Player terminate the Contract with or without just cause?

b) What are the financial consequences for the Parties of the early termination of the Contract?

a) Did the Player terminate the Contract with or without just cause?

7.5 To reach a decision on this issue, the Panel has conducted an in-depth analysis of the facts of the case and the information and evidence gathered during the proceedings, including the information and evidence gathered during the proceedings before the DRC.

7.6 Initially, the Panel notes that the Player submits that, on the date of the Player's termination of the contractual relationship, the Club was in default with its payments to the Player in the amount of EUR 130,000, corresponding to part of his salary for February 2015 as well his salaries for March, April and May 2015. Based on that, the Player was entitled to terminate the contractual relationship with just cause.

7.7 The Club, on the other hand, submits that it has fulfilled all its payment obligations towards the Player pursuant to the Contract and that the termination of the contractual relationship was consequently made without just cause.

7.8 Based on the facts of the case and the Parties' submissions, the Panel finds that it is up to the Appellant to discharge the burden of proof to establish that it had in fact fulfilled its payment obligations pursuant to the Contract at the time of the Player's termination of the Contract, i.e. on 3 June 2015.

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

7.10 However, the Panel finds that the Appellant has not adequately discharged the burden of proof to establish that it had in fact fulfilled its payment obligations pursuant to the Contract at the time of the Player's termination of the Contract. In that connection, the Panel attaches particular importance to the failure by the Club to produce evidence documenting the alleged payments of the outstanding amount, and – after having examined the evidence presented to the DRC – the Panel finds that insufficient evidence has been produced to show that these payments relate to the payments of the Player's remuneration pursuant to the Contract for the remaining part of the February 2015 salary as well as for the Player's salaries for March, April and May 2015. In the Panel's view, the evidence produced thus concerns payments of the Player's salaries and bonuses for different months.

7.11 The Panel therefore concludes that the Club was in default with its payments to the Player in the amount of EUR 130,000, corresponding to part of his salary for February 2015 as well his salaries for March, April and May 2015 at the time of the Player's termination of the Contract on 3 June 2015.

7.12 With regard as to whether the Club's default on payments to the Player constitutes just cause for termination of the Contract, the Panel notes that, according to the CAS jurisprudence, *"the non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated […] - constitute 'just cause' for termination of the contract […]; for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be 'insubstantial' or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract"* (see CAS 2006/A/1180, para. 26).

7.13 In the present case, both prerequisites are met. The Club failed to comply with a major part of its payment obligation, i.e. more than three months' remuneration. Furthermore, the Player's counsel warned the Club several times about its breach of obligations. The said letters pointed out not only the Club's breaches of its obligations, but also quite clearly and unambiguously emphasized that the Player was not prepared to tolerate such breaches of obligations in the future. In the last warning of 26 May 2015, the Club was finally given a last deadline to settle the outstanding debts. In this regard the letter expressly states, *inter alia*, as follows: *"Finally, I was instructed to inform you that the persistent breaches of the financial terms of the Employment Contract by the Club, coupled with the uncertainty created in the Player regarding the performance of the Employment Contract by the Club in the future, are causing the Player to lose the confidence and trust he had in the performance of the said contract by the Club, which entitles him to terminate the contract for just cause with immediate effect. Therefore, I hereby give you* ***ultimate deadline until 1 June 2015*** *to put things right, i.e. to pay the Player the outstanding salaries detailed above, in full, as well as to declare in writing your interest in the Player's services and in the performance of the Employment Contract in the upcoming 2015/16 season, failing which the Player will terminate the Employment Contract without further warning, pursuant to Article 14 of the FIFA Regulations on the Status and Transfers of Players".*

7.14 Based on these facts, the Panel finds that the Club was in breach of the Contract and the Player, therefore, had just cause to terminate the Contract on 3 June 2015.

b) What are the financial consequences for the Parties of the early termination of the Contract?

7.15 The Panel notes, that since the Contract was terminated with just cause by the Player, it has to address i) the Player's claim for payment of the outstanding remuneration of EUR 130,000 and ii) the Player's claim for compensation for breach of contract.

7.16 With regard to the Player's claim for payment of the outstanding remuneration of EUR 130,000 and in view of the fact that it is undisputed that the Player fulfilled his obligations under the Contract until the termination date and in accordance with the general principle of *pacta sunt servanda*, the Panel finds that the Club should have fulfilled its contractual obligations to the Player until the date of termination of the Contract on 3 June 2015.

7.17 As explained above (see para. 7.11), at the time of the Player's termination of the Contract on 3 June 2015, the Club was still owing to the Player remunerations in the total amount of EUR 130,000.

7.18 The Panel is of the opinion that the Club is therefore clearly obligated to pay this amount to the Player as outstanding remuneration.

7.19 Further, the Panel sees no reason to deviate from the Decision concerning the interest rate and therefore confirms that the Player is entitled to receive interests at the rate of 5% p.a. of the said amount as follows:

5% p.a. as of 1 March 2015 on the amount of EUR 10,000;

5% p.a. as of 1 April 2015 on the amount of EUR 40,000;

5% p.a. as of 1May 2015 on the amount of EUR 40,000;

5% p.a. as of 1June 2015 on the amount of EUR 40,000.

7.20 With regard to the Player's claim for compensation for breach of contract, and since the Club is held liable for the early termination of the Contract due to its breach of contract, the Panel finds that the Player is entitled, subject to Article 17 paragraph 1 of the Regulations, to receive financial compensation for breach of contract in addition to the above-mentioned payments of outstanding remuneration.

7.21 Article 17 paragraph 1 of the Regulations states as follows:

"The following 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 the protected period".*

7.22 With reference to the foregoing, the Panel finds that it is undisputed that no agreement has been concluded between the Parties on the amount of compensation payable in the event of breach of contract, and the Panel also notes that the Parties do not disagree that the Player, for the remainder of the period of contract, would have been entitled to receive a salary of EUR 1,150,000.

7.23 Finally, it is undisputed that the Player, in the period after the termination of the Contract and until the original expiry date, signed two employment contracts with the Turkish football club Gençlerbirligi Spor Kulübü, valid as from 27 August until 31 May 2016 and as from 4 August 2016 until 31 May 2017, respectively, and according to which the Player should receive a total remuneration of EUR 300,000 and EUR 340,000, respectively.

7.24 Initially, the Panel notes, in consistency with the well-established CAS jurisprudence, that the injured party is entitled to a whole reparation of the damage suffered pursuant to the principle of *"positive interest"*, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in had the contract been performed until its expiry (CAS 2012/A/2698; CAS 2008/A/1447).

7.25 Moreover, the Panel observes that Article 337c paragraph 1 and 2 of the Swiss Code of Obligations ("CO") provides the following: *"(1) Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration. (2) Such damages are reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work".*

7.26 In view of the above, the Panel is satisfied to note that the Player has the right to have his compensation determined under the provisions of Article 17 of the Regulations, in the light of the principle of *"positive interest"* as specified above and with due consideration to the duty to mitigate damages according to Swiss law, which is consistent with CAS jurisprudence (CAS 2005/A/909-910-911; CAS 2005/A/801; CAS 2004/A/587).

7.27 At the date of the Decision, the Decision correctly deducted the salaries the Player received under the employment contract with the Turkish football club Gençlerbirligi Spor Kulübü, valid as from 27 August 2015 until 31 May 2016, i.e. an amount of EUR 300,000.

7.28 However, later on and after the Decision was issued, the same Parties signed another employment contract valid as from 4 August 2016 until 31 May 2017, and according to which the Player should receive a total remuneration of EUR 340,000; this remuneration must also be deducted from the amount the Player was originally entitled to be paid for the remainder of the contract period.

7.29. As a consequence, the Panel holds that the Player, in principle, is entitled to receive from the Appellant the amount of EUR 510,000 (EUR 1,150,000 less EUR 300,000 and EUR 340,000).

7.30 The Club, however, submits that the compensation payable to the Player must be assessed in view of the circumstances of this particular case, for instance by taking into account that the Player failed to sign a new contract sooner at a level of remuneration similar to that of the value of the Contract. In addition, the amount of compensation awarded to the Player by the DRC constitutes an exorbitant amount and is disproportional to the damage suffered by the Player.

7.31 Based on the facts of the case and the Parties' submissions, the Panel is not persuaded by the allegations of the Club with respect to the alleged failure by the Player to mitigate his damage because he only accepted to sign new employment contracts with less favourable financial conditions.

7.32 As already outlined above, according to Article 337c paragraph 2 CO, the duty to mitigate is related to the rule that the employee must permit a set-off against the amount of compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn.

7.33 In the opinion of the Panel, such a rule implies that, in accordance with the general principle of fairness, the injured player must act in good faith after the club's breach of contract and seek another employment, showing diligence and seriousness. The Panel considers that this principle is aimed at limiting the damages deriving from the breach and at avoiding that a possible breach committed by the club could turn into an unjust enrichment for the injured party.

7.34 Moreover, the wording of Article 337c paragraph 2 CO, with reference to what the employee intentionally failed to earn, suggests that the duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfactory employment contract, or when, having different options, he deliberately accepts to sign the contract with less favourable financial conditions, in the absence of any valid reason to do so.

7.35 The Panel emphasises in this context that the circumstance that a player received a higher remuneration under his former contract than the relevant player will receive under his new contract is not in itself sufficient to lead to an automatic and further reduction of the compensation payable to the player from his former club being the difference between the two salaries.

7.36 Based on the foregoing, including the fact that the Player did in fact sign two new employment contracts during the original contract period and since the Club (see para 7.9) did not submit any evidence proving differently, the Panel finds that the Player must be considered to have fulfilled his obligation to mitigate his loss. The Panel finds that the residual value of the Contract of EUR 1,150,000 must be reduced, therefore, by the value of the Player's new contracts, i.e. EUR 640,000. The Club has to pay to the Player an amount of EUR 510,000 as compensation for breach of contract.

7.37 The Panel sees no reason to deviate from the Decision concerning the interest rate and, therefore, confirms that the Player is entitled to receive interests at the rate of 5% p.a. of the said amount as from 22 June 2015 until the date of effective payment.

8. SUMMARY

8.1 Based on the foregoing and after taking into consideration all evidence produced and all arguments made, the Panel finds that the Respondent is entitled to receive from the Appellant

the payment of the outstanding remuneration of EUR 130,000 plus interests of 5% p.a. as of 1 March 2015 on EUR 10,000, as of 1 April 2015 on EUR 40,000, as of 1 May 2015 on EUR 40,000 respectively as of 1 June 2015 on EUR 40,000.

8.2 Furthermore, and as the Panel finds that the Respondent terminated the contractual relationship between the Parties with just cause, in accordance with Article 17 paragraph 1 of the Regulations, the Appellant has to pay the sum of EUR 510,000 plus interests of 5% p.a. as of 22 June 2015 to the Respondent as compensation for breach of contract.

8.3 The Appeal filed against the Decision is therefore partially upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 27 June 2016 by Balikesirspor FC against the decision rendered by the FIFA Dispute Resolution Chamber on 28 January 2016 is partially upheld.

2. Balikesirspor FC shall pay to Mr Ante Kulusic an amount of EUR 130,000 as outstanding remuneration plus interest at the rate of 5% p.a. of said amount as follows:

   5% p.a. as of 1 March 2015 on the amount of EUR 10,000;

   5% p.a. as of 1 April 2015 on the amount of EUR 40,000;

   5% p.a. as of 1May 2015 on the amount of EUR 40,000;

   5% p.a. as of 1June 2015 on the amount of EUR 40,000.

3. Balikesirspor FC shall pay to Mr Ante Kulusic an amount of EUR 510,000 as compensation for breach of contract plus interests at the rate of 5% p.a. of said amount as from 22 June 2015.

(…)

6. All further and other requests for relief are dismissed.