Arbitration CAS 2016/A/4884 FC Ural Sverdlovsk v. Toto Tamuz, award of 1 May 2017

Panel: Mr Sofoklis Pilavios (Greece), Sole Arbitrator

Football
Termination of the employment contract without just cause by the club
Definition of just cause to terminate a contract of employment
Burden of proof
Notice prior to terminating a contract
Payment of compensation for unlawful termination of contract

1. **In the absence of definition of the concept of just cause to terminate a contract of employment in the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP), reference can be made to Swiss law, in particular art. 337 para. 2 of the Swiss Code of Obligations (SCO), which reads that just cause corresponds to *"any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice"* of the termination. Only material breaches of an employment contract constitute just cause for its termination, *i.e.* in the circumstances of the breach at stake, the other party cannot be expected to continue the contract while the first party is in breach.**

2. **According to art. 8 of the SCO, each party to a legal procedure bears the burden of corroborating its allegations. Accordingly, it is up to the party invoking a "just cause" to establish the existence of the facts founding said "just cause".**

3. **A party will only be able to establish a just cause to terminate an employment contract if it had previously warned the other party of its unacceptable conduct or attitude.**

4. **Pursuant to art. 17 para. 1 of the FIFA RSTP, one party has to be compensated for the damages caused by the unlawful termination of an employment contract. The amount of compensation can be determined in the relevant contract. Likewise, art. 97 para. 1 of the SCO provides that *"[a]n obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damages, unless he can prove that he was not at fault"*.**

I. PARTIES

1. FC Ural Sverdlovsk Oblast (the "Club" or the "Appellant") is a professional football club, with its registered seat in Ekaterinburg, Russia. FC Ural Sverdlovsk is affiliated to the Football Union of Russia, which is, in turn, a member of the Fédération Internationale de Football Association (FIFA).

2. Mr Toto Tamuz (the "Player" or the "Respondent") is a professional football player of Israeli nationality.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 30 July 2013, FC Ural Sverdlovsk and the Player entered into an employment contract (the "Contract") under which the Player would render his professional services to the Appellant for the period between 1 August 2013 and 31 July 2015.

5. The Contract contained, *inter alia*, the following provisions:

> ***"ARTICLE 2***
> ***FOOTBALL PLAYER RIGHTS AND OBLIGATIONS***
>
> *2.1. The Football Player shall is obliged:*
>
> *2.1.1. To perform in person labor function stipulated by the present contract.*
> *2.1.2. To perform his obligations in a proper way and in good faith.*
>
> *(…)*
>
> *2.1.26. To proceed with regular training sessions in accordance with the directions of the Head coach and (or) coaches of the football team in case of temporary suspension from participation in the football matches including such suspension due to sports disqualification.*
>
> *(…)*

ARTICLE 4
TERM OF LABOR CONTRACT

4.1. As agreed by the parties the present labor contract shall be a fixed-term employment contract and on the basis of Articles 59 and 348.2 of the Labor Code of the Russian Federation shall be concluded for a definite period, namely : ***from August, 1st, 2013 to July, 31st, 2015 inclusively.***

(…)

ARTICLE 6
SALARIES AND BENEFITS

6.1. A monthly salary in the amount of ***RUB 150.000,00 (One hundred fifty thousand rubles) (hereinafter referred to as "Official Salary")*** *shall be set for the Football Player.*

(…)

ARTICLE 10
RESPONSIBILITY, FINAL PROVISIONS

10.6. In case of termination of the employment contract on initiative of the Club in the absence of misconduct (omissions) on the part of the Football Player the latter shall be entitled to receive compensation for termination in the amount of three average monthly earnings of the Football Player with the Club. The payment shall be made within two months from the date of the contract termination."

"SUPPLEMENT NO. 1 (…)

ARTICLE 2
INCENTIVE REWARDS AND OTHER BONUSES

2.1.1. Monthly incentive for professional excellence in the amount of RUB ***1.496.920 (One million four hundred ninety-six thousand nine hundred and twenty rubles)*** *shall be set for the Football Player subject to proper performance of his duties under the employment contract.*

(…)

ARTICLE 4
IMAGE RIGHTS

(…)

4.4. Amount of remuneration for transfer of image rights shall equal to ***RUB 650.000 (Six hundred and fifty thousand rubles) per month.*** *Payment of monthly remuneration for transfer of image rights shall be made prior to the twelfth day of the month following the reporting month.*

(…)

ARTICLE 5
FINAL PROVISIONS

5.1. Final remuneration to the Football Player under the present contract taking into account clause 6.1 of the present contract, clauses 2.1.1 and 4.4 of Supplement No.1 to the present contract shall amount to ***53.000 Euro (Fifty three thousand) per month equally RUB 2.296.920 (Two million two hundred ninety-six thousand nine hundred and twenty rubles) per month*** *and shall be paid no later than 12 day of following month according to present contract. The remuneration is paid in rubles at the exchange rate of the Central Bank of Russia on the date of payment.*

(…)".

6. There is a disagreement between the parties as to the facts relevant to the dispute at stake. The Sole Arbitrator will refer to such disputed matters explaining what the position of each party is, whenever possible.

7. On 5 and 6 September 2013, the Player did not attend the training sessions of the Club, as he went to Israel in order to attend a court hearing. Whereas the Club claims that the Player had no valid reason not to attend the training sessions because the Player requested permission only for the dates of 3 and 4 September, the Player submits that he was absent with the Club's approval.

8. On 28 and 29 October 2013, the Club claims that the Player did not attend the training sessions of the team without valid reason. On the contrary, the Player claims that on the said dates, he arrived at the stadium in order to receive medical treatment since he was injured, but the Club doctors were not present.

9. On 7 December 2013, the Club claims that the Player missed the training session of the team without its consent. The Player submits that on 7 December 2013, he was training with the Club's fitness trainer, since he was injured.

10. On 9 and 10 January 2014, the Club claims that the Player missed two training sessions of the team with no reason. On the other hand, the Player claims that he was not allowed to participate in such training sessions.

11. The Club cancelled the Player's monthly payments for professional excellence of article 2.1.1 of the Contract for the months October 2013, December 2013 and January 2014 because of the allegedly missed training sessions. In addition, the Club claims that it timely paid all the amounts that the Player was entitled to.

12. The Player denies all allegations of the Club and states that the Club repeatedly failed to pay him several amounts he was entitled to.

13. On 17 January 2014, the Club unilaterally terminated the Contract with the Player because the latter allegedly breached the Contract repeatedly, since he missed some training sessions and did not perform his obligations in a proper way, which is a breach of article 2.1 of the Contract.

14. On February 2014, the Player signed a new contract with the Romanian Club FC Petrolul Ploiesti, valid as from 12 February 2014 until 30 June 2014.

B. Proceedings before the FIFA Dispute Resolution Chamber

15. On 18 August 2014, the Player lodged a claim with the Dispute Resolution Chamber of FIFA (the "FIFA DRC"), maintaining that the Club had terminated the Contract without just cause, requesting the payment of EUR 155,627 corresponding to outstanding salaries for the period between 1 August 2013 and 17 January 2014, and a compensation of EUR 1,007,000 corresponding to the remaining value of the Contract.

16. By way of its response, the Club rejected the Player's claim arguing that all the outstanding payments were duly paid to the Player and, in case FIFA decided that the Club terminated the contract without just cause, the compensation for breach of contract can only consist of a maximum amount of three monthly salaries according to article 10.6 of the Contract.

17. Furthermore, on 1 December 2014, the Club lodged a counterclaim against the Player, requesting that a sum of RUB 450,000 be paid by the Player as compensation for the breach of contract by the latter, plus 5% interest *p.a.* as from 20 January 2014.

18. On 16 November 2016, the FIFA DRC rendered its decision (the "Appealed Decision"), pursuant to which it partially upheld the Player's claim. The operative part of the Appealed Decision reads as follows:

> *"1. The claim of the Claimant / Counter-Respondent, Toto Tamuz, is partially accepted.*
>
> *2. The counterclaim of the Respondent / Counter-Claimant, FC Ural Sverdlovsk, is rejected.*
>
> *3. 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 EUR 155,627 plus 5% interest p.a. until the date of effective payment as follows:*
>
> *a. 5% p.a. as of 13 September 2013 on the amount of EUR 25,656.75;*
> *b. 5% p.a. as of 13 October 2013 on the amount of EUR 25,656.75;*
> *c. 5% p.a. as of 13 November 2013 on the amount of EUR 25,656.75;*
> *d. 5% p.a. as of 13 December 2013 on the amount of EUR 25,656.75;*
> *e. 5% p.a. as of 13 January 2013 on the amount of EUR 53,000;*
>
> *4. The Respondent / Counter-Claimant has to pay to the Claimant / Counter- Respondent,* ***within 30 days*** *as from the day of notification of this decision, the amount of Russian rubles (RUB) 75,000 as rent expenses plus 5% interest p.a. as from 18 August 2014 until the date of effective payment.*

5. The Respondent / Counter-Claimant has to pay to the Claimant / Counter- Respondent, ***within 30 days*** *as from the day of notification of this decision, compensation for breach of contract in the amount of EUR 159,000 plus 5% interest p.a. on said amount as from 18 August 2014 until the date of effective payment.*

6. In the event that the amounts due to the Claimant / Counter-Respondent in accordance with the above-mentioned numbers 3, 4 and 5 are not paid by the Respondent / Counter-Claimant within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

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

8. The Claimant / Counter Respondent is directed to inform the Respondent / Counter-Claimant immediately and directly of the account number to which the remittances are to be made and to notify the Dispute Resolution Chamber of every payment received".

19. On 16 November 2016, FIFA communicated to the parties the grounds of the Appealed Decision, *inter alia*, determining the following:

"9. Having established the foregoing, the Chamber pointed out that the main issue of the present dispute was to establish whether the contract had been terminated with or without just cause by the club on 17 January 2014. Entering into substance of the matter at hand, the Chamber recalled the basic principle of burden of proof, as stipulated in art. 12 par. 3 of the Procedural Rules, according to which a party claiming a right on the basis of an alleged fact shall carry the respective burden of proof. In particular, the Chamber noted that in the present case, the club bore the burden of proving that the reasons put forward by the club could justify the termination of the contract in the present matter, as well as that it in fact paid the player the remuneration claimed as outstanding or of proving that it had valid reasons for not having complied with such contractual obligation.

(…)

16. Notwithstanding the above, regardless of the question whether the player indeed missed the training session on 5 September 2013, on 28 October and 29 October 2013, or any training after the winter break, which again has not been proven by the club at the Chamber's satisfaction, the Chamber was of the firm opinion that the club did, in any case, not have just cause to prematurely terminate the employment contract with the player, since such breach could not legitimately be considered as being severe enough to justify the termination of the contract. In this respect, the members of the Chamber determined that there were more lenient measures to be taken (e.g., among others, a suspension, a warning or a proportionate fine) in order to sanction the (alleged) absences of the player.

17. On account of the above, the Chamber decided that the club had no just cause to unilaterally terminate the employment relationship between the player and the club and, therefore, concluded that the club had terminated the contract without just cause on 17 January 2014. Consequently, the club is to be held liable for the early termination of the employment contract without just cause.

18. Bearing in mind the previous considerations, the Chamber went on to deal with the consequences of the early termination of the employment contract without just cause.

19. First of all the members of the Chamber concurred that the club must fulfil its obligations as per the employment contract up until the day of termination of the contract in accordance with the general principle of "pacta sunt servada".

(…)

24. However, regardless of the foregoing remarks, the Chamber emphasised that a "cancellation" amounting to the total amount of EUR 102,456 (3 X EUR 34,152 as per point I.2 above) for allegedly missing several training sessions and alleged unprofessional behaviour, is manifestly excessive and disproportionate and cannot be upheld. Hence, the Chamber was unanimous in its conclusion that the "cancellation" of the player's "invoice for professional allowance" for the months of October 2013, December 2013 and January 2014, must be disregarded.

25. Subsequently, the Chamber noted that the club only presented payment receipts and bank statements, which are not signed by the player. What is more, the player contested that he received the amounts the club claims to have paid him and reiterates that the amount of EUR 155,627 remained outstanding. Moreover, the club could not provide further evidence that it timely paid the full monthly salary of EUR 53,000 for the period between 1 August 2013 and 17 January 2014.

26. As a result, the Chamber held that it had no other option than to disregard the payment receipts and bank statements submitted by the club and established that the player's claim in relation to the outstanding salaries could be accepted, since-with reference to art. 12 par. 3 of the Procedural Rules- the club could not substantiate its defence. As a result, the player's claim for outstanding salaries in the amount of EUR 155,627 is accepted.

27. In addition, with respect to the claim of the player for reimbursement of apartment rent in the amount of EUR 7,762, the Chamber noted that the club, in its reply, acknowledged its obligation to provide the player with an apartment and housing allowances. The player, on the other hand, only submitted (written) proof of costs occurred for apartment rent in the total amount of RUB 75,000. Therefore, it could be established that the club is obliged to pay the amount of RUB 75,000 to the player.

(…)

35. In application of the relevant provision, the Chamber held that it first of all had to clarify whether the pertinent employment contract contained any clause, by means of which the parties had beforehand agreed upon a compensation payable by the contractual parties in the event of breach of contract. Upon careful examination of the employment contract concluded between the player and the club, the members of the Chamber took note that article 10.6 of the contract provides for the following: "In case of termination of the employment contract on initiative of the Club in the absence of misconduct (omissions) on the part of the Football player the latter shall be entitled to receive compensation for termination in the amount of three average monthly earnings of the Football player with the club (…)".

(…)

39. Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the club must pay the amount of EUR 159,000 to the player as compensation for breach of contract in the present matter".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 7 December 2016, the Appellant lodged a statement of appeal in accordance with articles R47 and R48 of the Code of Sports-related Arbitration (the " Code") with the Court of Arbitration for Sport (the "CAS"), challenging the Appealed Decision.

21. With its statement of appeal, the Appellant requested that its appeal be submitted to a Sole Arbitrator in accordance with article R50 of the Code and called the Fédération Internationale de Football Association ("FIFA") as a second Respondent.

22. On 15 December 2016, FIFA requested to be excluded from the procedure.

23. On 16 December 2016, the CAS Court Office acknowledged receipt of FIFA's request to be excluded from the proceedings and invited the Appellant to advise the CAS Court Office whether it maintained its appeal against FIFA.

24. On 16 December 2016, the Appellant withdrew its appeal against FIFA.

25. On 19 December 2016, the CAS Court Office informed the parties that the Respondent had not provided his position on the Appellant's request for the appointment of a Sole Arbitrator, within the deadline prescribed.

26. On 23 December 2016, the Appellant filed its appeal brief requesting from the CAS that:

"1) The appeal filed by the FC Ural is upheld.

2) The par. 3 and par. 5 of the Appealed Decision No. 14-01561/pam passed by FIFA Dispute Resolution Chamber on 16 November 2016 is set aside.

3) The Respondent shall bear all costs incurred with the present procedure.

4) The Respondent shall pay to the FC Ural a contribution towards its legal and other costs, in an amount to be determined at the discretion of the Panel.

Or <u>alternatively</u> (without prejudice and only in the case if prayers under par. 78 and above are rejected):

1) The appeal filed by the FC Ural is upheld.

2) The par. 3 and par. 5 of the Appealed Decision No. 14-01561/pam passed by FIFA Dispute Resolution Chamber on 16 November 2016 is set aside.

3) The FC Ural is obliged to pay compensation to the Respondent in the amount of one month salary.

4) The Respondent shall bear all costs incurred with the present procedure.

5) The Respondent shall pay to the FC Ural a contribution towards its legal and other costs, in an amount to be determined at the discretion of the Panel".

27. On 27 December 2016, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided to submit the matter to a Sole Arbitrator to be appointed in accordance with article R54 of the Code.

28. On 15 January 2017, the Respondent filed his answer in accordance with article R55 of the Code.

29. On 17 January 2017, the CAS Court Office invited the parties to state whether they prefer a hearing to be held in this matter.

30. On 20 January 2017, the Appellant advised the CAS Court Office that it preferred that a hearing be held in the present matter.

31. On 23 January 2017, the Respondent informed the CAS Court Office that he opposed the oral hearing and that he preferred that the Sole Arbitrator issue an award solely based on the parties' written submissions. In case it was determined that a hearing shall be held, the Respondent requested from the CAS Court Office to conduct a hearing by video-conference or tele-conference.

32. On 27 January 2017, the CAS Court Office informed the parties that Mr Sofoklis Pilavios, attorney-at-law in Athens, Greece, had been appointed as Sole Arbitrator in this matter by the President of the CAS Appeals Arbitration Division.

33. On 8 February 2017, the CAS Court Office informed the parties that the Sole Arbitrator had decided that a hearing shall be held in accordance with article R57 of the Code. The Sole Arbitrator informed the Respondent that he was free to attend in person or via video-conference.

34. On 8 February 2017, the CAS Court Office issued an Order of Procedure, which was signed and returned to the CAS by the parties on 14 February 2017.

35. On 6 March 2017, a hearing took place at the CAS Headquarters in Lausanne, Switzerland. The Sole Arbitrator was assisted by Mr William Sternheimer, CAS Deputy Secretary General.

36. The following persons attended the hearing:

- The Appellant was represented by its legal counsel, Ms Darina Nikitina.
- The Respondent was represented by his legal counsel, Mr Roi Rozen and Mr Guy Primor.

37. At the outset of the hearing, the parties confirmed that they did not have any objection as to the appointment of the Sole Arbitrator.

38. At the conclusion of the hearing, the parties confirmed that their right to be heard and to be treated equally in the present proceedings before the Sole Arbitrator had been fully respected, following which the Sole Arbitrator closed the hearing and announced that his award would be rendered in due course.

IV. SUBMISSIONS OF THE PARTIES

39. The following outline of the parties' positions is illustrative only and does not necessarily comprise every submission advanced by the parties. The Sole Arbitrator has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

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

- The Respondent's behaviour for a lasting period towards the Appellant and the Contract obligations was of such a severity that it legitimately caused the Appellant's confidence in the Respondent to be lost.

- The Respondent's missed trainings on 5-6 September 2013, on 28-29 October 2013, on 7 December 2013 and on 9-10 January 2014 resulted in the imposition of three fines as disciplinary measures to the Respondent.

- The Appellant believes that the lasting serious breaches of the Contract by the Respondent gave a right to the Appellant to terminate the Contract unilaterally with just cause. As a result, no compensation is due by the Appellant to the Respondent.

- The FIFA DRC did not consider the Player's misconduct for the purposes of calculation of the compensation. The behavior of the Respondent definitely needs to be taken into account in order to establish the amount of compensation to be paid by the Appellant (if any). To the Appellant's opinion, such compensation cannot exceed the amount of one month salary.

- In October 2013, December 2013 and January 2014, the Respondent was fined in the amount of 100% of monthly incentive payment for professional excellence (article 2.1.1 of the Contract), as he missed training sessions of the Club. Salaries and other payments for August 2013, September 2013 and November 2013 were paid in full to the Respondent by the Appellant. As a result, no outstanding remuneration is due in favour of the Player.

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

- The Appellant's accusations regarding any absences of the Respondent from training are false, made in bad faith and were found to be incorrect and unreliable.

- In any case, the absence from training by any player does not justify a brutal and unilateral termination of the Contract. In accordance with the FIFA DRC decision, the Appellant was found to have terminated the Contract without just cause.

- The Appellant had no basis to reduce the Respondent's salary.

- The Appellant owes to the Respondent outstanding remuneration for the salaries between 1 August 2013 and 17 January 2014. The Appellant only presented payment receipts and bank statements, which are not signed by the Player. The Appellant could not provide further evidence that it timely paid the full monthly salaries for the period between 1 August 2013 and 17 January 2014.

- Even if the Respondent had not properly fulfilled his contractual obligations, the Appellant, before terminating the Contract, could and should have used more lenient measures towards the Respondent to fulfil his duties under the Contract.

V. JURISDICTION

42. The jurisdiction of the CAS, which is not disputed, derives from article 58 para. 1 of the FIFA Statutes (2016 edition) 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"* and article R47 of the Code.

43. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.

44. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

45. The appeal was filed within the 21 days set by article 58 para. 1 of the FIFA Statutes (2016 edition) and article R49 of the Code. The appeal complied with all other requirements of article R48 of the Code, including the payment of the CAS Court Office fee.

46. It follows that the appeal is admissible.

VII. APPLICABLE LAW

47. Article R58 of the Code provides 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".*

48. Article R58 of the Code indicates how the Sole Arbitrator must determine which substantive rules/laws are to be applied to the merits of the dispute. This provision recognizes the pre-eminence of the *"applicable regulations"* to the *"rules of law chosen by the parties"*, which are only applicable *"subsidiarily"*. Article R58 of the Code does not admit any derogation and imposes a hierarchy of norms, which implies for the Sole Arbitrator the obligation to resolve the matter pursuant to the regulations of the relevant *"federation, association or sports-related body"*.

49. The Sole Arbitrator observes that on the one hand, according to article 57 para. 2 of the FIFA Statutes, *"[t]he 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"*.

50. On the other hand, pursuant to article R58 of the Code, the dispute is to be decided subsidiarily by the *"rules of law chosen by the parties"*. In this respect, articles 4.1 and 8.1 of the Contract provide that *"As agreed by the parties the present labor contract shall be a fixed-term employment contract and on the basis of Articles 59 and 348.2 of the Labor Code of the Russian Federation shall be concluded for a definite period: from August 1st, 2013 to July 31st, 2015 inclusively"* and *"The contract shall be terminated in the order and on the grounds stipulated by the labor legislation of the Russian Federation (…)"* respectively.

51. The case at hand was submitted to the FIFA DRC on 18 August 2014, hence after 1 August 2014, which is the date when the revised Regulations on the Status and Transfer of Players (2014 edition, the "FIFA Regulations") came into force. These are the editions of the rules and regulations under which the case shall be assessed.

52. Since the parties elected to submit their dispute to the FIFA DRC and since it remained undisputed that the present matter is to be resolved on the basis of the regulations of FIFA, including article 57 para. 2 of the FIFA Statutes, the Sole Arbitrator will, subject to the primacy of the applicable regulations of FIFA, subsidiarily apply Swiss law in case of a lacuna and Russian legislation to the extent warranted, *i.e.* particularly insofar the parties specifically elected certain contractual aspects to be governed by Russian legislation.

VIII. MERITS

53. According to article R57 of the Code, the Sole Arbitrator has *"full power to review the facts and the law"*. As repeatedly stated in the jurisprudence of the CAS, by reference to this provision, the CAS appeals arbitration procedure entails a *de novo* review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is

the function of the Sole Arbitrator to make an independent determination as to merits (see CAS 2007/A/1394).

54. In light of the facts of the case and the arguments of the parties, the Sole Arbitrator shall firstly examine whether the Appellant terminated the Contract with just cause or not and, secondly, shall deal with the financial consequences resulting from the termination of the Contract.

A. The termination of the Contract by the Appellant

55. The first issue to be resolved is whether the Appellant terminated the Contract with or without just cause.

56. The Appellant justifies its termination of the Contract by claiming that the Respondent was not fulfilling his contractual obligations, as he missed training sessions without the permission of the Club, breached the sporting schedule and presented an inappropriate behaviour that damaged the reputation of the Club.

57. In particular, the Appellant issued an order for the termination of the Contract on 17 January 2014, which states that it unilaterally terminated the Contract because of the lasting serious breaches by the Respondent.

58. The Appellant claims that the Respondent repeatedly breached the Contract, missing trainings on 5 and 6 September 2013, on 28 and 29 October 2013, on 7 December 2013, as well as on 9 and 10 January 2014 without the permission of the Appellant.

59. The Appellant reports in his termination order that *"On January 10, 2014 written explanations about absence at work were requested from Toto Tamuz; however the worker refused to give written explanations and didn't provide them after two working days about what the Statement from 15.01.2014 was drawn up"*.

60. As a result, in view of the fact that the abovementioned conduct on the part of the Respondent constituted a violation of the provisions of the Contract and of the Labour Code of the Russian Federation (sub item "a" item 6 p.1 Art 81), the Appellant submits that its decision to terminate the Contract on 17 January 2014 was justified.

61. In this respect and in order for the Sole Arbitrator to determine whether the facts alleged by the Appellant justify the early termination of the Contract, the Sole Arbitrator refers to article 14 of the FIFA Regulations, which states *"A contract may be terminated unilaterally by either party without consequences, where there is just cause"*.

62. Nevertheless, the FIFA Regulations do not define what constitutes *"just cause"*. As a result, the definition of just cause and whether just cause exists is established on a case-by-case basis.

63. Therefore, the Sole Arbitrator turns his attention to the relevant provisions of the applicable law and the case law developed by the CAS on this question.

64. In this context, because of the subsidiary application of Swiss law and in view of the fact that this is not governed by the FIFA Regulations, article 337 para.2 of the Swiss Code of Obligations ("SCO") provides that:

> *"In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice".*

65. Furthermore, pursuant to the well-established jurisprudence of the CAS, only material breaches of an employment contract constitute just cause for its termination. The breach must be material in the sense that, in the circumstances of the breach at stake, the other party cannot be expected to continue the contract while the first party is in breach (CAS 2004/A/587; CAS 2006/A/1180; CAS 2006/A/1100; and CAS 2011/A/2567).

66. In addition, in accordance with the principle of the burden of proof, which is a basic principle in every legal system that is also established in article 8 of the Swiss Civil Code ("SCC"), each party to a legal procedure bears the burden of corroborating its allegations. In other words, any party deriving a right from an alleged fact shall carry the burden of proof and, in the matter at hand, it is up to the party invoking a "just cause" to establish the existence of the facts founding this "just cause" (see IBARROLA J., La jurisprudence du TAS en matière de football – Questions de procédure et de droit de fond, in BERNASCONI/RIGOZZI (eds.), The Proceedings before the Court of Arbitration for Sports, Berne 2007, p. 252 and also, *ex multis*, CAS 2009/A/1810 & 1811).

67. Therefore, the questions for the Sole Arbitrator to decide are whether the Appellant has discharged its burden of proof in establishing the facts it alleged in its appeal brief and then, in the affirmative, whether the material-breach threshold was crossed by the Respondent's alleged conduct.

68. Based on the facts and evidence adduced and the submissions of the parties made at the hearing, the Sole Arbitrator is of the opinion that the Appellant did not provide satisfactory evidence that the Respondent was absent without permission from the training sessions on 5-6 September 2013. Furthermore, the Appellant did not provide sufficient evidence that the Respondent was indeed absent from the training sessions of the Club on 28-29 October 2013, on 7 December 2013 and on 9-10 January 2014.

69. In this context, and considering that the Respondent disputed the allegations of the Appellant by claiming that he was never absent without the permission of the Appellant and that there were no planned training sessions during the Christmas break, the Sole Arbitrator finds that the Appellant has not adduced evidence proving the allegation that the Respondent missed repeatedly training sessions of the Club on his own initiative and without any permission. The Sole Arbitrator also notes that the Appellant failed to prove the facts alleged in his complaints regarding the Respondent's behaviour away from the pitch.

70. Consequently, the Sole Arbitrator finds that the Appellant has not discharged its burden of proof in establishing the facts alleged in its appeal brief, which are relevant to the circumstances

of the Respondent's absence from the aforementioned training sessions and the reasons that justify the unilateral termination.

71. It is important to highlight that pursuant to well-established jurisprudence of the CAS, a party will only be able to establish a just cause to terminate the employment contract if it had previously warned the other party of its unacceptable conduct or attitude (CAS 2012/A/2698).

72. Moreover, CAS has repeatedly adjudicated that only material breaches of an employment contract constitute just cause for its termination. The breach must be material in the sense that in the circumstances of the breach at stake the other party cannot be expected to continue the contract while the first party is in breach (CAS 2004/A/587; CAS 2006/A/1180; CAS 2006/A/1100; and CAS 2011/A/2567). In particular, as the CAS Panel established in the case CAS 2009/A/1956 that:

> *"According to Swiss law, which applies additionally, and as emphasized by the FIFA Dispute DRC in the appealed decision, the termination of the contract with immediate effect is to be applied as ultima ratio. When the breaches of the contract by a player are not serious, for instance in case of disciplinary problems resulting from the behaviour of such player, a termination with immediate effect shall only occur when the employee has been warned beforehand and made aware that a repetition of the act for which warnings have been issued might lead to the termination of the contract (on this point, see for instance the decision of the Swiss Supreme Court published in DTF 121 III 467)".*

73. In the present case, the Sole Arbitrator finds that there is no evidence that the Respondent has been warned of a possible termination of the Contract because of his alleged incorrect behavior, prior to rescission of the Contract on 17 January 2014.

74. Moreover, based on the facts and evidence adduced, the Sole Arbitrator is of the opinion that, regardless of the question whether the Respondent indeed missed the above-mentioned training sessions or of the facts alleged by the Appellant regarding the Respondent's behaviour away from the pitch, *quod non*, the Appellant had more lenient measures to take in order to sanction the Respondent and, at any case, should have expressly warned the Respondent beforehand.

75. Consequently, irrespective of the issue of the burden of proof, which the Appellant failed to discharge, the Sole Arbitrator is of the opinion that the Appellant in any event did not have sufficient reasons to prematurely and unilaterally terminate the Contract with the Respondent.

76. In light of the foregoing, the Sole Arbitrator concurs with the FIFA DRC and is clearly of the opinion that the Appellant did not establish the existence of a just cause in order to terminate the Contract. The Sole Arbitrator does not consider that the Appellant has produced convincing evidence on this point and considers this to be sufficient ground to reject the appeal.

B. The financial consequences

77. The Sole Arbitrator has no hesitation to confirm the Appealed Decision on this part as well, which ruled that the Respondent was entitled to the payment of outstanding remuneration in

the amount of EUR 155,627 as well as compensation for breach of contract in the amount of EUR 159,000.

78. With respect to the payment of the Respondent's outstanding remuneration, the Sole Arbitrator notes that the Appellant is under the obligation to fulfil its duties and financial obligations under the Contract, in accordance with the general principle of *"pacta sunt servanda"*.

79. In support of its appeal, the Appellant contends that no outstanding remuneration is due in favour of the Respondent, as in October 2013, December 2013 and January 2014, the Respondent was fined in the amount of 100% of the monthly incentive payment for professional excellence, which is provided for under article 2.1.1 of the Contract, on the grounds that he missed the aforementioned training sessions. Moreover, the Appellant claims that the salaries and other payments for August 2013, September 2013 and November 2013 were paid in full to the Respondent.

80. The Respondent submits that the *"cancellation"* of his *"invoice for professional allowance"* for the months of October 2013, December 2013 and January 2014, amounting to the total amount of EUR 102,456 for allegedly missing several training sessions and alleged unprofessional behaviour, is excessive and must be disregarded.

81. In addition, the Respondent claims that the Appellant failed to pay in full his monthly salaries and bonuses for the period between 1 August 2013 and 17 January 2014. As a result, an outstanding remuneration in the amount of EUR 155,627 is owed by the Appellant.

82. In light of the Respondent's refusal to confirm the facts adduced by the Appellant, the Sole Arbitrator notes that the Appellant was unable to submit any solid evidence that it timely paid the full monthly salary of EUR 53,000 for the period between 1 August 2013 and 17 January 2014 to the Respondent. The Appellant only presented payment receipts and bank statements, which are not signed by the Respondent.

83. Furthermore, the Appellant did not dispute the Respondent's claim that he has received only the amount of EUR 109,373, which corresponds to part of his salaries under the Contract for the period between 1 August 2013 and 17 January 2014.

84. The Sole Arbitrator finds that the Appellant's *"cancellation"* of the *"invoice for professional allowance"* for allegedly missed training sessions for the months October 2013, December 2013 and January 2014 cannot be justified as the Appellant has not sufficiently proven its grievances against the Respondent and, in addition, the Appellant provides no applicable legal basis for such sanction in the Contract or the applicable law. As a result, the reduction of the Respondent's salary must be rejected.

85. Consequently, the Sole Arbitrator concludes that the Appellant did not pay to the Respondent his salaries in full for the period between 1 August 2013 and 17 January 2014. Said salaries correspond to a total amount of EUR 265,000 (53,000 x 5). In line with the Respondent's submission, however, the Sole Arbitrator finds that the Appellant only paid to the Respondent

the amount of EUR 109,373, a fact which is not disputed. The Sole Arbitrator, therefore, confirms the Appealed Decision in this part and finds that the Respondent is entitled to receive the amount of EUR 155,627 as outstanding remuneration for the period between 1 August 2013 and 17 January 2014 (265,000 – 109,373).

86. As far as the matter of the Player's compensation for the early termination is concerned, according to article 17 para.1 of the FIFA Regulations, a player has to be compensated for the damages caused by the unlawful termination of an employment contract and, in principle, the amount of compensation can be determined in the contract.

87. Article 97 para. 1 of the SCO also stipulates that:

> *"An obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damage, unless he can prove that he was not at fault".*

88. According to article 10.6 of the Contract, *"in case of termination of the employment contract on initiative of the Club in the absent of misconduct (omissions) on the part of the Football Player the latter shall be entitled to receive compensation for termination in the amount of three average monthly earning of the Football Player with the Club".*

89. As a result, the Sole Arbitrator concludes that the Appellant must pay to the Respondent three average monthly salaries amounting to the total amount of EUR 159,000 (EUR 53,000 x 3).

90. In light of the foregoing and taking into account the relevant provisions of the Contract and the FIFA Regulations, the Sole Arbitrator considers that the Respondent is entitled to the payment of outstanding remuneration and compensation for the early termination of the Contract, as follows:

a) EUR 155,627 as outstanding remuneration for the period between 1 August 2013 and 17 January 2014, and

b) EUR 159,000 as compensation for breach of contract, corresponding to three average monthly salaries of the Respondent according to article 10.6 of the Contract.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the FC Ural Sverdlovsk on 7 December 2016 against the decision issued on 16 November 2016 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.

2. The decision issued on 16 November 2016 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

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