Arbitration CAS 2016/A/4898 FC Torpedo Moscow v. Adam Kokoszka, award of 24 August 2017

Panel: Prof. Lukas Handschin (Switzerland), Sole Arbitrator

Football
Termination of the employment contract with just cause by the player
System of termination according to the FIFA RSTP
Compensation for damages according to the FIFA RSTP

1. **Article 13 of the FIFA Regulations on the Status and Transfer of Players (RSTP) rules that employment contracts between players and clubs shall be respected and can only be terminated when the term of a contract expires or by mutual agreement of the parties. In all other situations, a contract may be terminated without consequences if there is a just cause (Article 14 RSTP).**

2. **Article 17 para. 1 RSTP establishes that the compensation for breach of contract shall be calculated with due consideration of 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 (amortized over the term of the contract) and whether the contractual breach falls within a protected period. This provision closely follows article 337b of the Swiss Code of Obligation which grants as compensation to the party not being in breach of contract an amount corresponding to all claims out of their employment relationship, reduced by the amount which he earned under his new employment agreement.**

I. PARTIES

1. Joint Stock Company Football Club "Torpedo Moscow" (the "Appellant" or the "Club") is a football club based in Moscow, Russia, currently taking part in the Professional Football League (third division) affiliated with the Russian Football Union, which in turn is a member of the Fédération Internationale de Football Association ("FIFA").

2. Mr Adam Kokoszka (the "Respondent" or the "Player") is a Polish professional football player who currently plays for Wroclawki Klub Sportowy Slask Wroclaw AS ("FC Slask") performing in Extraklasa (top Polish football league). During the season 2014/2015 the Player was employed with the Appellant.

II. FACTS & PROCEEDINGS BEFORE FIFA

3. On 2 July 2014, the Respondent entered into an employment contract (the "Contract") with the Appellant valid from 18 July 2014 until 31 May 2017. The relevant clauses of the Contract are as follows:

- According to Article 8.1 of the Contract, the Player's monthly salary was as follows: in the period from 18 July 2014 to 30 November 2014: 670,000 roubles; in the period from 1 December 2014 to 30 June 2015: 750,000 roubles and in the period from 1 July 2015 to 31 May 2017: 835,000 roubles.

- According to Article 17.3, the Contract may be terminated *"at the initiative of the employer in connection with the adoption by the employer the decision to pre-mature rupture of this contract. In this case, the employee shall be paid compensation for the early termination of the said contract in the amount of three salaries listed in point 8.1 of this contract"*.

- Article 17.5 of the Contract provides that: *"in case, if the results of the sports season 2014-2015 or this season 2015-2016 the team of the Employer will leave, the Employer shall have the right, but not earlier than 1 June 2015 (on the basis of the 2014-2015 season) or not earlier than 1 June 2016 (based on the results of the season 2015- 2016) terminate the employment contract unilaterally without the use in relation to the employer any sanctions, including sanctions of her financial nature"*.

- Article 18 of the Contract reads as follows: *"in the event of early termination of the contract of employment at the initiative of the employee (at his own request) without serious reasons, (…) The employee shall be required with one months from the date of early termination of this contract to make in favour of the employer a cash payment of EUR (recte RUB) 20 million"*.

4. On 13 April 2015, the Respondent sent a letter in which he put the Appellant in default, requesting the payment of RUB 2,503,955.70, which consists part of the Player's salary of December 2014 and the gross Player's salaries of January, February and March 2015. Furthermore, the Respondent set a time limit of three days to settle the alleged debt, emphasising that otherwise he would terminate the Contract and starts proceedings before the FIFA's Dispute Resolution Chamber (FIFA-DRC).

5. By letter dated 20 April 2015, the Respondent terminated the Contract, stressing that the Appellant failed to pay his outstanding salaries as previously requested. The Appellant did not react to such Respondent's letters.

6. In the following 3 months after the termination of the Contract, the Player's salary was at RUB 750,000, a total of RUB 2,250,000. From 1 July 2015 the monthly salary was increased to RUB 835,000. This means that the remuneration after 1 July 2015 until May 2017 was in total RUB 19,205,000 (23 months). The Appellant claimed, that RUB 914,041 were paid; the Respondent did not challenge this assertion.

7. On 7 July 2015, the Player entered into an employment contract with the Polish Club Slask Wroclaw valid until May 2017 in accordance to which the Player was entitled to receive a monthly salary of PLN 5'000.

8. On 11 September 2015, the Player filed a claim before the FIFA DRC against the Club seeking the payment of RUB 20'820'125,50 as a compensation for breach of contract. The Club, in turn, rejected the Player's claim on the grounds that it tried to pay the Player's outstanding salaries as far as it was possible.

9. On 18 August 2016, the FIFA Dispute Resolution Chamber rendered a decision (the "Appealed Decision") in accordance to which the claim filed by the Player was partially upheld and the Club was ordered to pay the Player RUB 5,451.46 as interest for late payment and RUB 18,690,959 as compensation for breach of contract.

10. On 30 November 2016, the Player received from his new club a match award for the year 2015/2016 of PLN 42'759.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 8 December 2016, the Appellant filed its statement of appeal with the Court of Arbitration for Sport (the "CAS") against the Player with respect to the Appealed Decision, pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code"). With its statement of appeal, the Appellant requested to submit this matter to a Sole Arbitrator.

12. On 14 December 2016, the Respondent was invited to state whether he agreed to submit the present procedure to a Sole Arbitrator within five days. The Respondent remained silent in this respect.

13. On 23 December 2016, the President of the CAS Appeals Arbitration Division, taking into account the circumstances of the case, decided to submit this matter to a Sole Arbitrator.

14. On the same date, the Appellant filed its appeal brief, pursuant to Article R51 of the Code. With its appeal brief, the Appellant requested the Sole Arbitrator to order the Respondent the production of the following documents: *(i) copies of all contracts concluded between the Respondent and FC Slask in relation with the Respondent's sporting activity as a professional football player and (ii) copies of bank statements, certified by the bank, confirming the amount of remuneration received by the Respondent from FC Slask as from the date of signing the contract with FC Slask as from the date of signing the contract with FC Slask on 2 July 2015*.

15. On 13 January 2017, the Respondent filed his answer, pursuant to Article R55 of the Code.

16. On 16 January 2017, the parties were invited to inform the CAS Court Office whether they preferred a hearing in this matter or for the Sole Arbitrator to issue an award based solely on the parties' written submissions.

17. On 19 January 2017, the Appellant informed the CAS Court Office that it preferred a hearing to be held.

18. On 20 January 2017, the Respondent informed the CAS Court Office that it preferred an award to be rendered on the sole basis of the parties' written submission.

19. On 28 February 2017, the CAS Court Office informed the parties that Mr Lukas Handschin had been appointed as Sole Arbitrator by the President of the CAS Appeals Arbitration Division.

20. On 6 March 2017, the Sole Arbitrator ordered the Respondent:

    1. To disclose all contracts concluded between the respondent and FC Slask in relation to the respondent sporting activity as a professional football player

    2. To disclose all remuneration received from FC Slask in relation to the respondents sporting activity as a professional football player (base salary and bonus) from 2 July 2015 until 6 March 2017.

    3. To provide copies of bank statements, certified by the bank, confirming the amount of remuneration received by the respondent from FC Slask as from 2 July 2015 until 6 March 2017.

    4. To declare all remuneration received from FC Slask in relation to the respondents sporting activity as a professional football player (base salary and bonus) from 2 July 2015 until 6 March 2017.

21. On 14 March 2017, the Respondent provided the CAS with the documents ordered by the Sole Arbitrator.

22. On 22 March 2017, the Sole Arbitrator decided to hold a hearing, pursuant to Article R57 of the Code.

23. On 27 March 2017, in view of the parties' availabilities, the CAS Court Office informed the parties that the hearing will take place in Lausanne on 10 May 2017.

24. On 29 March 2017, the CAS Court Office, on behalf of the Sole Arbitration, issued the Order of Procedures, which was then signed by both parties without making any objection.

25. The hearing was held on 10 May 2017. At the hearing the Appellant was represented by Ms Darina Nikitina, whereas the Respondent was represented by Mr Miroslav Szulc.

26. After the parties' opening statements, the expert offered by the Appellant, Mr Jakub Andreas Grajewski, gave testimony via skype. The expert claimed that he had reliable information that the Respondent earned EUR 9'000 per month in his new club. He was, however, unable to tell the season in which he earned such amount and to explain why he did not provide any evidence to support his expert report. He said that the Coach of FC Slask told him this. The

expert also stated that he is convinced that there are two agreements but only one was sent to the Polish Football-League. However, the Sole Arbitrator notes that the expert did not provide any evidence to support such statement. Furthermore, there were no questions to the Appellant. The Respondent was asked by the Appellant if his salary of PLN 5'000 with his current team was gross or net. The Respondent replied that his salary of PLN 5'000 is gross; so that's the reason why he received a lower amount from his current club at his bank account. At the end of the hearing, the parties were asked whether their right to be heard had been fully respected, which both parties confirmed.

IV. PARTIES' REQUESTS FOR RELIEF

(I) Position of the Appellant

27. With its appeal brief, the Appellant requested the following prayers for relief:

1) to set aside par.3 of the challenged decision which reads as follows: "the Respondent has to pay to the claimant compensation for breach of contract in the amount of RUB 18,690,959 within 30 days from the date of notification of this decision".

primarily:

2) To issue a new decision establishing that no compensation shall be paid by the Appellant to the Respondent.

Alternatively (only if the above is not supported):

3) to issue a new decision condemning the Appellant to pay the Respondent nor more than RUB 2,250,000 gross as the compensation for breach of contract.

Alternatively (only if the above is not supported):

4) to issue a new decision condemning the Appellant to pay the Respondent nor more than RUB 3,838,559 gross as they compensation for the breach of contract.

5) To order the Respondent to bear all the costs incurred with the present procedure.

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

28. As an initial matter, the Appellant considered that the applicable law to this dispute is FIFA regulations and, subsidiarily, Swiss Law.

29. The Appellant considers that it shall not pay any compensation for the early termination of the Contract as it was the will of the Respondent to terminate the Contract due to the financial problems of the Club. Furthermore, the Appellant holds that according to paragraph 17.5 of the Contract, the club was entitled to unilaterally terminate such Contract with the Player in the event that the team would be relegated to the Russian Second Division. Since the Club

was relegated to the Russian Second Division at the end of the season 2014/2015, the Contract had to be terminated anyway.

30. The Appellant alleges that to determine the consequences derived from the termination of the Contract it is necessary to establish which party breached the Contract. Thus, the Appellant holds that in the case at hand there is no formal difference between a breach of the contract without just cause by the Club and the termination of the contract with just cause by the Player. The Appellant considers that article 17.3 of the Contract, which provides that the Club is obliged to pay the Player 3-month salaries as compensation for termination of the Contract without just cause, also applies in case the Player terminates the Contract with just cause. The Appellant holds that the breach of Contract by the Club was not fraudulent since it was only caused due to its financial difficulties.

31. Furthermore, should the Sole Arbitrator decides that article 17.3 of the Contract is not applicable to the present case, the Appellant considers that article 17.1 of the FIFA RSTP establishes that the amount of compensation for breach of contract should be reduced taking into account the remuneration with FC Slask. After the termination of the Contract, the Respondent tried to mitigate his damages and signed on 2 July 2015 an employment contract with FC Slask.

32. The Appellant contends that the Player's remuneration is higher than PLN 5,000 per month. For example, the remuneration of the Player under his first contract with FC Slask foresaw a salary of PLN 60,600 per month. The Appellant argues that the remuneration for the season 2015/2016 was approximately PLN 50,000 the season 2016/2017 PLN 40,000. According to FIFA jurisprudence, if the amount of compensation is not determined by the contract, it should be calculated as residual book value with the former Club (the Appellant) reduced by earnings received by the Player in his new club (FC Slask). In view of that, the Appellant considers that the compensation to be paid to the Player amounts to the residual value of the Contract reduced by the amount the Player earned during his employment contract FC Slask.

(II) Position of the Respondent

33. With his answer, the Respondent requested the following prayers for relief:

1) dismiss the appeal of Torpedo Moscow.

2) Decide that the decision of the FIFA Dispute Resolution Chamber under the appeal is wholly upheld.

3) Decide that Adam Kokoszka had just cause to terminate the contract

4) Award the Respondent this further or other relief - as the panel deems fit

5) Decide that the Appellant bears all the costs of the present arbitration

6) Decide that the Respondent should make a contribution to reimburse the legal costs that Adam Kokoszka has incurred in the present proceedings

34. The Respondent concurs with the Appellant that the applicable law to this matter is FIFA Regulations and, subisdiarily, Swiss Law.

35. The Respondent maintains that he had just cause to terminate the Contract. The Appellant wishes to refer to Article 17.5 of the Contract, in accordance to which the Appellant was entitled to unilaterally terminate the Contract if at the end of the season the club was relegated to the Russian Second Division. The Respondent, in turn, considers that such clause is irrelevant to the present dispute because the Club did not unilaterally terminate the Contract.

36. The Respondent contends that Article 17.3 of the Contract is not applicable to this dispute since it was himself and not the Club who terminated the contract.

37. The Respondent holds that the FIFA DRC had properly calculated the damages in the Appealed Decision. The Respondent asserts that because of the Appellant's breach of Contract, the Respondent had *"a very unpleasant negotiation position"*. Also the fact that the Appellant did not deregister the Respondent from the FIFA TMS made it difficult to the Player to receive higher remuneration's offer from other clubs. He states that the only employment offer that he had after the termination of the Contract was the one given by his current club, FC Slask.

V. JURISDICTION AND ADMISSIBILITY

38. Article 58.1 of the FIFA Statutes reads as follows:

> *"Appeals 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".*

39. Article R47 of the Code states:

> *"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".*

40. In light of these provisions, the Sole Arbitrator considers that CAS has jurisdiction to hear this mater. Furthermore, both parties had signed the Order of Procedure confirming CAS jurisdiction to hear this dispute.

41. The grounds of the Appealed Decision were notified to the Appellant on 18 November 2016 and the statement of appeal was filed on 8 December 2016. Therefore, the statement of appeal was submitted within the 21-day deadline established by the FIFA Statutes. Therefore, the appeal is admissible.

VI. APPLICABLE LAW

42. Article 57.2 of the FIFA-Statutes reads 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".*

43. Pursuant to Article R58 of the Code, in an appeal arbitration procedure before the CAS:

> *"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".*

44. Furthermore, both parties agreed that the applicable law to this dispute is FIFA Regulations and, subsidiarily, Swiss Law.

45. Therefore the Sole Arbitrator considers that the applicable law to this dispute is FIFA Regulations and, subsidiarily, Swiss Law.

VII. MERITS

46. On 13 April 2015, the Respondent sent a letter in which he put the Appellant in default, requesting the payment of RUB 2,503,955.70. Furthermore the Respondent gave three days to the Appellant to settle the alleged debt, emphasising that otherwise he would start proceedings before the FIFA's Dispute Resolution Chamber. The Appellant, in turn, did not answer to the Respondent. On 20 April 2015, the Respondent terminated the Contract in writing, stressing that the Appellant failed to pay him the amounts requested previously. The Appellant rejected the Respondent's claim. The Club stated that it tried to pay the outstanding salaries, as far as it was possible due to its financial problems.

47. Both parties agreed that the Contract was terminated by the Player on 20 April 2015. Conversely, the parties are not in agreement regarding the consequences of such termination.

48. The Sole Arbitrator wishes to refer to Article 17.3 of the Contract which reads as follows: *"this contract may be terminated at the initiative of the employer in connection with the adaption by the employer the decision to premature rupture of this contract. In this case, the employee shall be paid compensation for the early termination of said contract in the amount of three salaries listed in point 8.1 of this contract".* The Sole Arbitrators notes that this clause refers to the termination at the initiative of the Club, not the Player. However, the Sole Arbitrator notes that in the case at hand it was the Player who terminated the Contract due to the Club's failure to play his outstanding salaries. Consequently, the Sole Arbitrator considers that this clause is irrelevant to this dispute.

49. Furthermore, the Appellant considers that according to paragraph 17.5 of the Contract, the Club was entitled to early terminate if at the end of the season the Club was relegated to the

Russian second division. The Respondent holds that this option is only given when it is based on the results of the sport-season, but not if the Club is relegated for other reasons, such as for example financial difficulties. The Sole Arbitrator considers that this question can be left open. This right is only an option: the Club had the right to unilaterally terminate the Contract if the club's team is relegated to a lower league. However, the Club did not use this option as the latter did not terminate the Contract.

50. Article 18 of the Contract foresees the consequences of the Player's termination of the Contract without just cause. However, the Sole Arbitrator considers that this clause is not applicable since the Player had just cause to terminate the Contract for the reasons provided below.

51. Article 13 of the RSTP rules that employment contracts between players and clubs shall be respected and can only be terminated when the term of a contract expires or by mutual agreement of the parties. In all other situations, a contract may be terminated without consequences if there is a just cause (Article 14 RSTP). The requirements of article 15 and 16 RSTP are not given; the Appellant did not assert that any of the requirements which are described in article 15 and 16 RSTP are given. In sum, the Sole Arbitrator considers that the Player had just cause to terminate the Contract for the same reasons given in the Appealed Decision.

52. Article 17 para. 1 RSTP establishes that the compensation for breach of contract shall be calculated with due consideration of 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 (amortized over the term of the contract) and whether the contractual breach falls within a protected period.

53. According to CAS jurisprudence (e.g. *CAS 2015/A/4220*), the above-mentioned provision closely follows article 337b of the Swiss Code of Obligation (CO) which grants as compensation to the party not being in breach of contract an amount corresponding to all claims out of their employment relationship, reduced by the amount which he earned under his new employment agreement (Art. 337b CO: *"Where the good cause for terminating the employment relationship with immediate effect consists in breach of contract by one party, he is fully liable in damages with due regard to all claims arising under the employment relationship"*).

54. Furthermore, according to article 337c al. 2 CO, *"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"*.

55. The Appellant did not prove that the Respondent intentionally has a low remuneration and that he would have a higher remuneration if he had tried. The Appellant asserts that the Respondent earns more than the official salary but it did not file any reliable evidence in this regard. The Sole Arbitrator notes that the burden of proof for this allegation lies with the Appellant, pursuant to Article 8 of the Swiss Civil Code.

56. The Sole Arbitrator shall therefore compare the player's hypothetical financial situation without the Club's breach of contract and his financial situation following such breach.

57. In the following 3 months after the termination of the Contract, the Player's salary was at RUB 750,000, a total of RUB 2,250,000. From 1 July 2015 the monthly salary was increased to RUB 835,000. This means that the remuneration after 1 July 2015 until May 2017 was in total RUB 19,205,000 (23 months). The Appellant claimed, that RUB 914,041 were paid; the Respondent did not challenge this assertion. Therefore, if the Contract had not been breached, the total amount that the Player would have received is RUB 20,540,959.

58. From this amount, the Sole Arbitrator considers pertinent to deduct the amount he earned at his new club. In his new club, the Player receives a salary of PLN 5,000 per month. The contract started on 1 July 2015; which means that his total remuneration under his new employment contract until May 2017 (when the Contract was supposed to expire) is PLN 115,000 (PLN 5,000 x 23).

59. Moreover, in accordance with the information given by the Player during this procedure, it was proven that the Respondent also received from his new club a match award for the year 2015/2016 of PLN 42'759. This match award was paid net; that means that the taxes would have to be added to this match award. We have assumed that the monthly deduction amounts to PLN 5,000 minus PLN 3,639 (the net monthly payment). If we apply the equal amount of the match award of PLN 31,210, then we have a gross match award of PLN 42,759. The whole remuneration of the player was PLN 157,759 (total salary-remuneration of PLN 115,000; match award of PLN 42,759).

60. The remuneration is owed in Russian rubles, we must define the value in rubles. The decisive date of the exchange rate is the date when the Appealed Decision was rendered, i.e. 18 August 2016. The RUB/PLN exchange rate on 18 August 2016 was 0.065 (1 RUB versus 1 PLN). If we apply such exchange rate, the amount of the deduction would be RUB 2,470,061.

61. After deduction of RUB 2,470,061, a final amount of RUB 18,070,898 (RUB 20,540,959 minus RUB 2,470,061) is owed by the Appellant, which means that the FIFA decision challenged is upheld in a large proportion. Furthermore, the Appellant is required to pay interest of 5 percent on this amount as determined in the Appealed Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Football Club Torpedo on 8 December 2016 against the decision rendered on 18 August 2016 by the Dispute Resolution Chamber of FIFA is partially upheld.

2. The item 3 of the decision of 18 August 2016 rendered by the FIFA DRC is amended as follows:

   Football Club Torpedo is ordered to pay to Mr Adam Kokoszka compensation for breach of contract in the amount of RUB 18,070,898 within 30 days as from the date of notification of the decision rendered on 18 August 2016 by the FIFA DRC.

3. (…).

4. (…).

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