Arbitration CAS 2017/A/5312 José Carlos Ferreira Alves v. Al Ahli Saudi Club, award of 23 April 2018

Panel: Mr Manfred Nan (The Netherlands), Sole Arbitrator

Football
Contract of employment between a club and a coach
Validity of a clause of the contract of employment providing the terms of the extended contract
Failure of the club to prove the lack of extension of the employment contract
Just cause to terminate the contract by the coach
Compensation for damages

1. **A provision of a contract of employment providing for the automatic renewal of the contract, that does not prevent the parties with the possibility to renegotiate the terms of the extended contract prior to committing themselves to an extension, that is not of a unilateral nature since either party has the power to decide not to extend the contract and whose wording is clear, shall be considered valid. According to article 18 of the Swiss Code of Obligations ("SCO"), when assessing the form and terms of a contract, there is no need to look behind express contractual wording unless uncertainty exists due to inexact expressions or designations.**

2. **The burden of proof regarding a fact alleged by a party lies with that party. The allegation that a club timely and validly informed a coach that it did not wish to extend the employment contract lies with the club. The employment contract does not require the notification to be made in writing. An oral notification is therefore not impossible *per se*. However there is no valid extension of the contract where (i) there is no proof that the club made it clear to the coach that the employment contract would not be extended, (ii) said allegation was denied by a credible testimony of the coach, and finally (iii) the notification from the club not to extend the contract was sent after the entry into force of the extension of the contract and did not comply with the deadline provided in the contract.**

3. **In determining whether an employment contract has been terminated with just cause, one has to resort to Article 337(1) and (2) SCO. Although the FIFA Regulations on the Status and Transfer of Players (RSTP) are not directly applicable, the test to be applied is identical, for also when examining whether there has been a "just cause" in the sense of the FIFA RSTP, CAS panels have resorted to Article 337(2) SCO in determining whether an employment contract could validly be terminated prematurely. Because it remained undisputed that by not providing the coach with flights tickets the club did not comply with its contractual obligations and, importantly, also because the club informed the coach by email that his employment contract had been terminated, the coach could objectively understand that the club**

would not comply with its obligations under the extended employment contract and therefore come to the conclusion that the situation did not reasonably permit an expectation that the employment relationship between the parties be continued. Although the coach could have been more active than sending only one email to the club if he was truly fully dedicated to continuing his professional career with the club, the coach's inactivity does not stand in the way of concluding that the coach at the relevant moment in time had a good reason to terminate his employment contract. Notwithstanding the coach's contributory negligence, the coach had just cause to terminate the employment contract prematurely.

4. If the employment contract does not contain a liquidated damages clause, therefore, according to Article 337(b)(1) SCO, the coach's damages in principle consist of the full remuneration he was entitled to receive from the club under the extended employment contract. Yet according to Article 44 para. 1 SCO, compensation may be reduced if there are circumstances attributable to the injured party that helped to give rise to or increase the damage. The inactivity of the coach shall be taken into account in awarding compensation.

I. PARTIES

1. Mr José Carlos Ferreira Alves (the "Appellant" or the "Coach") is a professional football coach of Portuguese nationality.

2. Al Ahli Saudi Club (the "Respondent" or the "Club") is a professional football club with its registered office in Jeddah, Saudi Arabia. The Club is registered with the Saudi Arabian Football Federation (the "SAFF"), which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

II. FACTUAL BACKGROUND

A. Background facts

3. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the parties, the hearing and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

4. On 28 July 2012, the Coach and the Club entered into an employment contract (the "Employment Contract") for two sporting seasons, valid as from 28 July 2012 until 27 July 2014. The Employment Contract contains, *inter alia*, the following relevant terms:

*"**Third Article**:*

The period of this contract is (2 years) started from 28/07/2012 and expires on 27/07/2014 and is it [sic] automatically renewed for one or more similar periods, unless one party notifies the other of his intention not to renew it and that is before one month from the original period of contract, and the notice should be in written and delivered by hand or by email or any agreed and acceptable means.

***Fourth Article**:*

Against the services assigned to the [Coach], the [Club] grants the [Coach] a monthly salary of (4.000 Dollars) paid as the end of each Gregorian month.

The [Club] shall also pay to the [Coach] the following allowances and incentives:

1- 1-Housing furnished by Al-Ahli, (will get it after the family of Olympic coach come in Jeddah)>

2-Transportation: he will get a full insured car.

[…]

***Fifth Article**:*

The [Coach] is entitled for an annual fully advanced paid vacation of (30 days) if the [Club] was willing to renew the contract, which is paid in the end of each sport season, and the [Coach] should specify time of vacation, and the [Club] has the right to postpone it fully or partially according to work requirements.

***Sixth Article**:*

The [Coach] shall be entitled annually to two air tickets for him and two for his wife and two tickets for 2 children IF they come to KSA ONLY – Jeddah to his home country when he avails of his annual leave. The [Coach] shall not be entitled to claim ticket value in cash when he does not avail of his annual leave or postpone it".

5. According to the Club, a meeting took place between the Club and the Coach on 14 May 2014 from which it followed that there was no desire from either of the parties to continue with the employment relationship. The Club further contends that the Coach returned the keys of the house and the car that had been provided to him by the Club.

6. On 15 May 2014, the Coach left Saudi Arabia for his summer vacations.

7. On 26 June 2014, Mr Ahmed Bamaodah, on behalf of the Club, sent an email to several persons requesting them to inform him of any overdue payments. The Coach was not listed among the recipients of this email.

8. On 1 July 2014, the Coach sent an email to several persons, including Mr Bamaodah, informing them, *inter alia*, as follows:

"According to our settlement dated from the 15th May 2014 (and not in June as I send in last email), I am waiting for the plane ticket that will allow me to present myself for work. Without the referred plane ticket I won't be able to be there, as expected".

9. On 2 July 2014, Mr Bamaodah sent an email to the Coach, informing him as follows:

"I sent to email in 26-5-14 that your contract was trminated,,plz [sic] send to me your iban number because I want to send to you the bouns [sic] of U21 for the last year".

10. On 7 July 2014, the Coach sent an email to several persons, including Mr Bamaodah, informing them as follows:

"As requested, I send the details of my bank account to transfer my bonus of U21 on the last season. […]".

B. Proceedings before the Single Judge of FIFA's Players' Status Committee

11. On 27 January 2015, the Coach lodged a claim with the Single Judge of the Players' Status Committee of FIFA (the "Single Judge") against the Club, requesting payment of USD 99,600, plus interest at a rate of 5% *p.a.* In particular, the Coach argued that the Employment Contract was automatically renewed for an additional period of two years and that it was terminated by the Club without just cause, claiming:

- USD 3,600 as outstanding remuneration corresponding to 27 days of the month of July 2014;
- USD 96,000 as compensation for breach of contract by the Club corresponding to 24 monthly salaries in the amount of USD 4,000 each, from 28 July 2014 until 27 July 2016.

12. The Club requested the Coach's claim to be dismissed.

13. On 8 May 2017, the Single Judge rendered his decision (the "Appealed Decision") with the following operative part:

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

2. The [Club] has to pay to the [Coach] within 30 days as from the date of notification of this decision, the amount of USD 3,600 as outstanding remuneration plus interest at a rate of 5% per year from 18 March 2015 until the date of effective payment.

3. If the aforementioned sum, plus interest, is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

4. Any further claims lodged by the [Coach] are rejected.

5. The final costs of the proceedings in the amount of CHF 7,000 are to be paid by the [Coach] to FIFA. Taking into account that the latter has already paid the amount of CHF 2,000 as advance of procedural costs at the beginning of the present proceedings, the [Coach] should pay to FIFA the remaining amount of CHF 5,000, within 30 days as from the date of notification of this decision, to the following bank account with reference to the case […].

6. The [Coach] is directed to inform the [Club] immediately and directly of the account number to which the remittance under point 2. above is to be made and to notify the Single Judge of the Players' Status Committee of every payment received".

14. On 22 August 2017, the grounds of the Appealed Decision were communicated to the parties determining, inter alia, the following:

"[…] [T]he Single Judge took note that it remained undisputed that, on 28 July 2012, the [Coach] *and the* [Club] *concluded the* [Employment Contract] *which was valid from the date of its signing until 27 July 2014.*

In this regard, the Single Judge acknowledged that article three of the [Employment Contract] *foresaw a possibility to automatically renew the contract for "one or more similar periods".*

At this stage, the Single Judge pointed out that the parties had antagonistic positions in relation to the validity of the contract.

On the one hand, the [Coach] *argued that the* [Employment Contract] *was automatically renewed for a new period of two years and that it was terminated by the* [Club] *without just cause. On the other hand, the Single Judge acknowledged that the* [Club] *argued having terminated the* [Employment Contract] *on 26 June 2014 by sending an email to the coaching staff.*

In continuation, the Single Judge went on to establish whether the [Employment Contract] *was renewed automatically on 28 July 2014 for two more years, as alleged by the* [Coach] *and contested by the* [Club].

To start with, the Single Judge took note that the email dated 26 June 2014 enclosed by the [Club] *did not have the* [Coach] *among the recipients. Therefore, the Single Judge concluded that the* [Coach] *was not informed about the contractual termination alleged by the* [Club].

Notwithstanding the above, the Single Judge deemed appropriate to recall article three of the [Employment Contract] *which reads "The period of this contract is (2 years) started from 28/07/2012 until expires on 27/07/2014 and is it automatically renewed for one or more similar periods, unless one party notifies the other of his intention not to renew it and that is before one month from the original period of contract, and the notice should be in written and delivered by hand or by email or any agreed and acceptable means".*

In this context, the Single Judge stated that as a general rule the period of validity of a contract is a crucial element for the parties involved in a contractual relationship. Therefore, the wording of a contract with regard, in particular, to its period of validity should be clear and precise.

In addition, the Single Judge deemed that, in principle, contracts which provide for an automatic renewal without granting the parties the possibility to renegotiate its terms are questionable. Indeed the parties to a contract should, in principle, always have the possibility to discuss the terms of their labour relationship at any point in time. In this regard, in the Single Judge view, article three of the [Employment Contract] *effectively banned the parties of such possibility. In other words, automatic renewal clauses should always allow the parties to discuss or negotiate new conditions since they are compromising themselves for a new contractual term.*

With the aforementioned principles in mind and referring to the contracts at basis of this dispute, the Single Judge underlined that the wording of its article three is neither clear nor precise since it apparently gives the possibility to renew its validity automatically without any limit in time.

In view of the foregoing and considering the above-mentioned, the Single Judge concluded that article three of the [Employment Contract] *cannot be considered as a valid clause since it did not offer the parties the possibility of consultation of new conditions and it was applicable endlessly. In this context, the Single Judge felt comforted with his conclusion considering that the* [Club] *clearly and unequivocally expressed its intention not to continue*

with the labour relationship, in spite of the conflicting positions between the parties or when this will was exactly communicated to the [Coach].

Therefore, the Single Judge decided that said clause is invalid and therefore cannot serve as basis for the [Employment Contract] *to be extended.*

As a consequence, the Single Judge decided that the contractual relationship between the parties naturally ended on 27 July 2014 and therefore the request of the [Coach] *for compensation (i.e. USD 96,000) should be rejected.*

In continuation, the Single Judge acknowledged that the [Coach] *requested the amount of USD 3,600 as outstanding salary corresponding to 27 days of July 2014.*

In this regard, the Single Judge referred to the content of article four of the [Employment Contract]*, pursuant to which the parties agreed on a monthly salary amounting to USD 4,000.*

Equally, the Single Judge noted that the [Club] *did not contest the* [Coach's] *request for 27 days of salary related to the month of July 2014.*

Consequently, the Single Judge concluded that the [Coach] *was entitled to receive from the* [Club] *the amount of USD 3,600 as outstanding salary related to the month of July 2014.*

In addition, the Single Judge took note that the [Coach*] had requested a 5% annual interest since the reception of his claim by the* [Club]*, i.e. on 18 March 2015 over the relevant outstanding amount, which the Single Judge saw no reason not to grant.*

In view of all the above-mentioned considerations, the Single Judge decided that the claim of the [Coach] is partially accepted and that the [Club] *has to pay to the [Coach] the amount of USD 3,600 as outstanding salary plus a 5% annual interest from 18 March 2015 until the date of effective payment.*

[…]".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 7 September 2017, the Coach filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision in accordance with Article R47 and R48 of the 2017 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In this submission, the Coach requested the CAS Court Office to assign the arbitration to a sole arbitrator.

16. On 17 September 2017, the Club informed the CAS Court Office that it considered it necessary that the present proceedings be submitted to a panel composed of three arbitrators.

17. On 18 September 2017, the Coach filed its Appeal Brief, in accordance with Article R51 of the CAS Code. This document contained a statement of facts and legal arguments. The Coach challenged the Appealed Decision, submitting the following requests for relief:

> *"a) The CAS must overturn the appealed decision passed by the Single Judge of the Player's Status Committee on May 8th 2017, case mdo/15-00447 and pass a new decision with the following findings:*

(i) The Respondent did not send a termination notice to the Appellant, notifying the intention not to renew the contract;

(ii) The Agreement was renewed for the period of 2 years, between 27.06.2014 and 28.07.2016;

(iii) The Respondent hampered, without just cause, the right of the Appellant to return to his job;

(iv) The Respondent, Al Ahli Saudi Club, must be convicted to pay to the Appellant, Coach José Carlos Ferreira Alves, the amount of USD 99.600,00 (ninety-nine thousand six hundred American dollar), free of any taxes, plus 5% interest per year from the date of reception of this claim at FIFA's PSC until the effective date of payment.

b) The CAS must convict the Respondent to pay the total costs of the proceedings".

18. On 19 September 2017, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present arbitration proceedings (cf. Article R41.3 of the CAS Code).

19. On 21 September 2017, upon being invited to express its position in this respect by the CAS Court Office, the Club indicated that it did not intend to pay its share of the advance of costs.

20. On 26 September 2017, the CAS Court Office informed the parties that, in view of the parties' disagreement regarding the number of arbitrators and pursuant to Article R50 of the CAS Code, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide on the number of arbitrators.

21. On 28 September 2017, the CAS Court Office informed the parties that, pursuant to Article R50 of the CAS Code, the President of the CAS Appeals Arbitration Division had decided to submit the case to a Sole Arbitrator.

22. On 20 October 2017, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

Mr Manfred Nan, Attorney-at-Law in Arnhem, the Netherlands

23. On 24 November 2017, the Club filed its Answer, pursuant to Article R55 of the CAS Code, requesting CAS to decide the following:

"1. To reject the appeal and to uphold the Challenged Decision;

2. To establish that no compensation is due to the Appellant;

3. To condemn the Appellant to the payment in favour of the Respondent of the legal expenses incurred;

4. To establish that the costs of the arbitration procedure shall be borne by the Appellant".

24. On 4 December 2017, upon being invited to express their views in this respect by the CAS Court Office, the Coach indicated that he did not deem it necessary for a hearing to be

held, whereas the Club indicated that it preferred a hearing to be held. The Coach also objected against certain statements put forward by the Club in its Answer.

25. On 6 December 2017, the Club objected to the Coach's comments in his letter dated 4 December 2017 and requested the Sole Arbitrator to disregard these comments pursuant to Article R56 of the CAS Code.

26. On 14 December 2017, the CAS Court Office, on behalf of the Sole Arbitrator, advised the parties that the Sole Arbitrator deemed a hearing necessary in accordance with Article R57 of the CAS Code. The parties were advised that the Coach was requested to attend the hearing in person and that the Club was requested to make Mr Bamaodah available for examination at the hearing.

27. On 19 December 2017, upon request of the Sole Arbitrator pursuant to Article R57 of the CAS Code, FIFA produced a copy of its file related to the matter.

28. On 21 December 2017, the CAS Court Office, on behalf of the Sole Arbitrator, informed the parties that the unsolicited comments made by the Coach in his letter dated 4 December 2017 were declared inadmissible, pursuant to Article R56 of the CAS Code and that the reasons for such decision would be indicated at the hearing or in the award.

29. On 22 December 2017 and 8 January 2018 respectively, the Club and the Coach returned duly signed copies of the Order of Procedure with the CAS Court Office.

30. On 24 January 2018, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed not to have any objection as to the constitution and composition of the arbitral tribunal.

31. In addition to the Sole Arbitrator, Mr Daniele Boccucci, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

a) For the Coach:

1) Mr José Carlos Ferreira Alves, the Coach;
2) Mr João Carlos Silva, Counsel;
3) Mr Gonçalo Ribeiro, Counsel

b) For the Club:

1) Mr Gianpaolo Monteneri, Counsel;
2) Ms Anna Smirnova, Counsel

32. The Sole Arbitrator heard evidence from the Coach. The Respondent, the Appellant's Counsel and the Sole Arbitrator had the opportunity to examine and cross-examine the Coach. The Sole Arbitrator took note of the fact that, despite his explicit request to the Club to make Mr Bamaodah available for examination at the hearing, he regrettably did not attend the hearing.

33. The Sole Arbitrator informed the parties during the hearing that the unsolicited comments in the Coach's letter dated 4 December 2017 were declared inadmissible because these comments related to new arguments, which is not permitted under Article R56 of the CAS Code. The parties were however informed that the Coach would be allowed to address any issues arising from the Club's Answer during the hearing.

34. During the hearing, the Coach presented three new documents in order to rebut certain statements made by the Club in its Answer. The first document is an email dated 22 April 2014, sent by a representative of the Club to the Coach and several other persons, informing them that the *"Holidays start at 15 May and next season starts in 1 July"*. The second document is an *"Administrative Note"* dated 23 April 2014 addressed to *"All staffs of Academy and Prince Abdallah Al Faycal center of youth, junior and Olympic teams"*, informing them that *"End of work will be in end of day (Thursday) 15 / 05 / 2014, and the beginning of work will be on (Tuesday) 01 / 07 / 2014, so, hope everyone to stick to deadlines"*. Attached to the *"Administrative Note"* is a document from which it derives which materials are to be handed to which persons. The items listed are *"computers laptops"*, *"residencies card"*, *"cars"*, *"keys of office"*, *"keys of drawers dressing rooms"*, *"Keys of villas Sharbateli"*.

35. The Club objected to the admissibility of these documents.

36. Further to the disagreement between the parties about the admissibility of these documents, the Sole Arbitrator decided during the hearing that the three documents would be admitted to the case file and that the reasons therefore would be set out in the arbitral award.

37. The reason for admitting the documents is that the Sole Arbitrator found that, in accordance with Article R56 of the CAS Code, exceptional circumstances were present. These exceptional circumstances consisted of the fact that the Coach was not permitted to present such documents before as the Coach's letter dated 4 December 2017 had already been declared inadmissible, and that the documents were strictly aimed at corroborating his contestation of certain factual allegations put forward by the Club in its Answer to which the Coach had not yet been permitted to respond.

38. The parties had full opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

39. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

40. The Sole Arbitrator confirms that he carefully heard and took into account in his decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

41. The submissions of the Coach, in essence, may be summarised as follows:

- The Coach accepts the facts as reflected in the Appealed Decision, including the fact that no party notified the other party of the intent not to renew the Employment Contract. The Coach only challenges the Appealed Decision *de jure*. More specifically, the Coach maintains that the Single Judge could not find the automatic renewal clause invalid.
- The Coach further does not consider it to be true that the parties had *"antagonistic positions in relation to the validity of the contract"*. Neither of the parties argued that any clause of the Employment Contract did not correspond to their free will. Both parties intended to agree on the possibility of an automatic renewal of the Employment Contract. This arises from the elementary principles of freedom of contract, *bona fide*, and *pacta sunt servanda*. With reference to CAS jurisprudence, the Coach argues that the Single Judge should have given priority to contractual stability.
- The Single Judge's consideration that the automatic renewal clause *"did not offer the parties the possibility of consultation of new conditions and it was applicable endlessly"* is not correct.
- According to the Coach, the sole dispute between the parties in the proceedings before the Single Judge was that the Coach considered that the Employment Contract was automatically renewed, whereas the Club argued that it had terminated the Employment Contract timely by means of a notice sent to the Coach by email. The Coach argues that the Club did not send such notice, as a consequence whereof the Employment Contract was automatically extended.
- Since the Club did not send the Coach the flight tickets in order for him to resume his work with the Club and hired a new coach for the same position, the Coach submits that the contractual relationship became impossible.
- As a consequence thereof, the Coach claims to be entitled to an amount of compensation corresponding to the full remuneration under the Employment Contract (i.e. USD 96,000).
- The Coach also claims to be entitled to salary in an amount of USD 3,600 corresponding to 27 days of the month of July 2014.

B. The Respondent

42. The submissions of the Club, in essence, may be summarised as follows:

- The Club maintains that a meeting took place between the Club and the Coach on 14 May 2014 and that there was no desire from either of the parties to continue with the employment relationship. The Club further contends that the Coach returned the keys of the house and the car that had been provided to him by the Club.

- With reference to the reasoning of the Single Judge in the Appealed Decision, the Club maintains that in furtherance of the legal effects of automatic extension clauses, the relevant provisions shall precisely establish the duration of the employment, determine in detail the terms of the parties' relationship and in any event provide for the legal entitlement of the parties to reconsider the conditions of their cooperation. In the present case these *essentialia negotii* were not complied with since the provision in question does not specify the remuneration to be paid in case of an extension. The wording of the extension clause also lacks clarity in respect of the particular duration of the contractual relationship following the renewal.
- The Club specifically requested the Sole Arbitrator to establish that *"1) the provision of the second part of the Third Article of the Contract cannot be considered as valid and effective in terms of legal effects of the renewal option, and therefore, 2) the period of the Contract lasted from 28 July 2012 until 27 July 2014, when following the expiry of its term the contractual relationship between the parties ceased to exist, and the Contract was never prolonged by either of the parties, since first of all, it was not the intention of the parties and secondly the essentialia negotii for an extension were anyway not given"*.
- Subsidiary, in case the Sole Arbitrator would consider the Third Article of the Employment Contract to be valid, the Club asserts that no compensation is due to the Coach, as it, at all times, acted in full compliance with the Employment Contract and correctly notified the Coach on the termination of the Employment Contract.
- The Club maintains that *"shortly before the departure of the* [Coach] *to Portugal, the* [Club] *and the* [Coach] *met. The conversation between the* [Coach] *and the* [Club] *was conducted in a friendly atmosphere; both from the side of the* [Coach] *and of the* [Club] *there was not any longer the desire to continue with the employment relationship; the parties therefore decided to definitively part at the end of the second year of the* [Employment Contract]. *The* [Club] *also informed the* [Coach] *that it was not necessary for him to return to the* [Club] *after the summer holidays. The* [Coach] *packed all his belongings he had in his house and before leaving for Portugal he returned to the* [Club] *the keys of the house and of the car. Therefore, by 15 May 2014, when the* [Coach] *left the* [Club] *for good for his home country, he was perfectly aware that the* [Club] *did not expect him to continue carrying out his obligations under the* [Employment Contract] *and that he was not returning to the* [Club]. […] *The* [Club] *therefore notified verbally to the* [Coach] *of its intention not to continue with the employment relationship* […]*"*.
- The Club maintains that the Coach's email dated 1 July 2014 came unexpectedly. Even assuming that the Employment Contract had been validly extended, which is denied, the Coach had to resume duty with the Club on 4 June 2014 at the latest. However, the Coach did not return and did not send any message to the Club explaining why he failed to do so. Only 27 days after the deadline to resume duty, the Coach sent the email asking for flight tickets.
- The Club argues that the Coach was perfectly aware that in accordance with the Sixth Article of the Employment Contract, the Club would reimburse the flight tickets to the coaching staff and did not arrange the tickets itself. It was therefore the Coach's responsibility to book the flight tickets himself.
- The Club denies having hired another assistant coach to replace the Coach.

- The Club maintains that in case the Employment Contract was validly extended, the Coach in any event avoided the Employment Contract by failing to return at the disposal of the Club. In other words, the Coach breached the Employment Contract without just cause and therefore lost any entitlement to compensation.

V. JURISDICTION

43. The jurisdiction of CAS, which is not disputed, derives from Article 58(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 CAS Code. The jurisdiction of CAS is not contested by the Club and 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 deadline of 21 days set by Article 58(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

46. It follows that the appeal is admissible.

VII. APPLICABLE LAW

47. The Coach did not file any position regarding the applicable law.

48. The Club argues that the regulations of FIFA, in particular the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") are applicable, and that Swiss law applies "complimentarily".

49. Article R58 of the CAS Code reads as follows:

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

50. Article 57(2) of the FIFA Statutes determines the following:

"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".

51. The Sole Arbitrator finds that the various regulations of FIFA are to be applied primarily and, subsidiarily, Swiss law should the need arise to fill a possible gap in the various regulations of FIFA. The FIFA RSTP are however not directly applicable to the matter at hand because these regulations solely govern the employment relationship between clubs and players and not between clubs and coaches.

VIII. MERITS

A. The Main Issues

52. The main issues to be resolved by the Sole Arbitrator are:

a. Is Article 3 of the Employment Contract a valid clause?

b. Was the Employment Contract validly extended?

c. If the Employment Contract was validly extended, which party terminated the Employment Contract prematurely?

d. Was there just cause for the early termination of the Employment Contract?

e. What are the financial consequences thereof?

a) Is Article 3 of the Employment Contract a valid clause?

53. Article 3 of the Employment Contract determines as follows:

"The period of this contract is (2 years) started from 28/07/2012 and expires on 27/07/2014 and is it automatically renewed for one or more similar periods, unless one party notifies the other of his intention not to renew it and that is before one month from the original period of contract, and the notice should be in written and delivered by hand or by email or any agreed and acceptable means".

54. The Sole Arbitrator observes that the Single Judge considered this clause to be invalid because i) the period of validity of the Employment Contract in case of extension was not clear and precise, and ii) because the clause effectively banned the parties from the possibility of discussing the terms of their extended employment relationship before the commencement of the new contractual term.

55. The Sole Arbitrator finds, first of all, that nothing prevented the parties from renegotiating the terms of the extended Employment Contract prior to committing themselves to an extension. If either of the parties was not satisfied to extend the Employment Contract under the same terms, both parties could have decided not to extend the Employment Contract. The requirement that parties must be enabled to discuss the terms of an extended employment relationship arguably makes sense for unilateral extension or termination options. However, the clause in question here is not of a unilateral nature, i.e. either party had the power to decide not to extend the Employment Contract. The Sole Arbitrator

therefore finds that the content of Article 3 of the Employment Contract is not invalid for this reason.

56. Furthermore, the Sole Arbitrator adheres with the views of the Single Judge in the sense that the wording of Article 3 of the Employment Contract is not entirely clear in stating for which period the employment relationship would be extended in case neither party indicated not to be willing to extend the employment relationship, as the clause refers to *"one or more similar periods"*. The Sole Arbitrator however finds that the wording of Article 3 of the Employment Contract is clear in the sense that an extension would be for *"one or more similar periods"*, and that the words *"similar periods"* clearly refer to the original 2-year term of the Employment Contract and that any extension would therefore be for a minimum period of 2 years.

57. Article 18 of the Swiss Code of Obligations ("SCO") determines as follows:

"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement".

58. The Sole Arbitrator finds that there is no need to look behind express contractual wording unless uncertainty exists due to "inexact expressions or designations". Therefore, the Sole Arbitrator finds that, unless the parties would agree otherwise, the extension of the Employment Contract would be for a minimum term of 2 years.

59. Furthermore, the Sole Arbitrator finds that in the absence of any agreement to the contrary between the parties, the terms of the extended Employment Contract would remain the same as during the initial term.

60. The Sole Arbitrator also deems it relevant that the Club at no point in time prior to the issuance of the Appealed Decision raised any argument based on which the content of Article 3 of the Employment Contract would have to be considered invalid.

61. To the contrary, the Sole Arbitrator notes that the Club originally argued in its submissions in the proceedings before the FIFA Players' Status Committee (the "FIFA PSC") that it had notified the Coach that it was not willing to extend the Employment Contract. The Sole Arbitrator finds that it may be inferred from such argument that the Club considered itself to be bound by the provision at issue at the relevant moment in time. The mere fact that it turned out that such email dated 26 June 2014 was not addressed to the Coach does not make this any different.

62. Consequently, the Sole Arbitrator finds that Article 3 of the Employment Contract is a valid clause.

b) Was the Employment Contract validly extended?

63. Having established that Article 3 of the Employment Contract is a valid clause, and in view of the fact that the validity of the Employment Contract is in principle extended for a period of two additional years unless either party would inform the other that it did not wish to extend the Employment Contract, the Sole Arbitrator is put to the task of assessing whether the Club timely and validly informed the Coach that it did not wish to extend the Employment Contract.

64. The Sole Arbitrator observes that the Club initially argued in the proceedings before the FIFA PSC that it notified the Coach in this respect by email dated 26 June 2014.

65. Although it appears that the Club no longer pursues this line of reasoning in the present appeal arbitration proceedings before CAS, the Sole Arbitrator finds that such argument should in any event be dismissed because the email dated 26 June 2014 was not addressed to the Coach and could therefore not serve as a valid notification.

66. In the present appeal arbitration proceedings before CAS, the Club rather maintains that a meeting between the Club and the Coach took place at the Club's premises on 14 May 2014 and that it was made clear by the Club during this meeting that the Coach's Employment Contract would not be extended.

67. The Sole Arbitrator observes that Article 3 of the Employment Contract does not require the notification to be made in writing, and that an oral notification is therefore not impossible *per se*.

68. The Coach however denies that such meeting ever took place.

69. It was in view of these diverging recollections of the parties concerning the meeting that allegedly took place on 14 May 2014 that the Sole Arbitrator deemed it necessary to hold a hearing and to request that the Coach and Mr Bamaodah be present, in order for them to testify about this meeting.

70. Whereas the Coach was present and credibly testified that such meeting never took place, but that he merely handed in the keys of his house and his car prior to the summer break, as was customary practice, counsel for the Club informed the Sole Arbitrator that Mr Bamaodah could unfortunately not make it to be present at the hearing without providing any specific reason for his absence.

71. The Sole Arbitrator finds that, since the Club claims that it had informed the Coach that the Employment Contract would not be extended and that this fact should lead to the legal consequence that the Employment Contract was not extended, the burden of proof in this respect lies with the Club.

72. The Sole Arbitrator notes that the Club's interpretation of the alleged meeting held on 14 May 2014 is not corroborated by any evidence. Among other factual circumstances that

remained unexplained, it was for example not clarified who attended this meeting on behalf of the Club. It is already for this reason alone that the Club's argument is to be dismissed.

73. Furthermore, the Sole Arbitrator finds that the testimony of the Coach during the hearing was credible insofar he maintained that no such meeting ever took place, but that he just handed in the keys of his house and his car, as was customary because he had done the same during the summer break in 2013.

74. Finally, the Sole Arbitrator finds the Club's argument that Mr Bamaodah's email dated 2 July 2014 was intended to serve as a notification in accordance with Article 3 of the Employment Contract is to be dismissed. The Sole Arbitrator finds that it could not reasonably have been the intention of the parties to permit such notification after the extension of the Employment Contract already entered into force. Rather, Article 3 of the Employment Contract is to be understood in the sense that such notification had to be communicated one month before the expiration of the original term of the Employment Contract at the latest.

75. Consequently, the Sole Arbitrator finds that the Employment Contract was validly extended for an additional two years under the same terms and conditions as applicable to the initial term of the Employment Contract.

c) If the Employment Contract was validly extended, which party terminated the Employment Contract prematurely?

76. The Sole Arbitrator observes that the Coach did not explicitly terminate the Employment Contract, but finds that the Coach implicitly did so by filing a claim against the Club before the FIFA PSC.

77. Indeed, the Coach maintains that the Club did not comply with its contractual obligations by failing to provide him with flight tickets for his return to the Club after the summer break, even after having reminded the Club of its duties in this respect, and by appointing another assistant coach to take over his activities.

78. The Sole Arbitrator therefore finds that the burden of proof to establish that the extended Employment Contract was terminated with just cause lies with the Coach.

d) Was there just cause for the early termination of the Employment Contract?

79. In view of the fact that the Employment Contract was validly extended for another two years, both parties were obliged to comply with their duties arising from the Employment Contract.

80. The Coach argues that the Club failed to comply with its duties i) by failing to provide him with a flight ticket to return to the Club after the summer break; and ii) by hiring another assistant coach to take over his activities.

81. In determining whether an employment contract has been terminated with just cause, one has to resort to Article 337(1) and (2) SCO. This provision determines as follows:

> *"1. Both employer and employee may terminate the employment relationship with immediate effect at any time for good cause; the party doing so must give his reasons in writing at the other party's request.*
>
> *2. In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice".*

82. Although the FIFA RSTP are not directly applicable to the matter at hand, the Sole Arbitrator observes that the test to be applied is identical, for also when examining whether there has been a "just cause" in the sense of the FIFA RSTP, CAS panels have resorted to Article 337(2) SCO in determining whether an employment contract could validly be terminated prematurely. Indeed, the Sole Arbitrator notes that in, for instance, CAS 2006/A/1180, a CAS panel stated the following:

> *"The RSTP 2001 do not define when there is "just cause" to terminate a contract. In its established legal practice, CAS has therefore referred to Swiss law in order to determine the purport of the term "just cause". Pursuant to this, an employment contract which has been concluded for a fixed term, can only be terminated prior to expiry of the term of the contract if there are "valid reasons" or if the parties reach mutual agreement on the end of the contract (see also ATF 110 I 167; WYLER R., Droit du travail, Berne 2002, p. 323 and STAEHELIN/VISCHER, Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht, Teilband V 2c, Der Arbeitsvertrag, Art. 319-362 OR, Zurich 1996, marg. no. 17 ad Art. 334, p. 479). In this regard Art. 337 para. 2 of the Code of Obligations (CO) states – according to the translation into English by the Swiss-American Chamber of Commerce: "A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship". According to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446; ATF 2 February 2001, 4C.240/2000 no. 3 b aa). Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545). In other words, it may be deemed to be a case for applying the clausula rebus sic stantibus (ATF 5 May 2003, 4C.67/2003 no. 2). According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 5 May 2003, 4C.67/2003 no. 2; WYLER R., op. cit., p. 364 and TERCIER P., Les contrats spéciaux, Zurich et al. 2003, no. 3402, p. 496). Pursuant to the established case law of the Swiss Federal Supreme Court, early termination for valid reasons must, however, be restrictively admitted (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 127 III 351; WYLER R., op. cit., p. 364 and TERCIER P., op. cit., no. 3394, p. 495)"* (CAS 2006/A/1180, para. 25 of the abstract published on the CAS website).

83. The Sole Arbitrator fully adheres to this reasoning and turns his attention to assessing whether this threshold has been met in the case at hand.

84. The Sole Arbitrator finds that the Coach did not establish that the Club hired another assistant coach to take over his activities. This was contested by the Club, was not corroborated by any evidence.

85. The Sole Arbitrator however notes that the Coach requested the Club to be provided with flight tickets to return to the Club after the summer break by email dated 1 July 2014, which email effectively served as a formal notice to the Club. The Sole Arbitrator considered the Coach's testimony to be credible insofar he maintained that it was customary for the Club to book flight tickets directly. The Sole Arbitrator observes that it remained undisputed that the Club did not provide the Coach with flight tickets, even after the Coach specifically asked it to do so.

86. The Club's argument that, pursuant to Article 6 of the Employment Contract, the Coach had to purchase flight tickets himself, following which the Club would reimburse him for his expenses, is to be dismissed.

87. Article 6 of the Employment Contract determines as follows:

"The [Coach] shall be entitled annually to two air tickets for him and two for his wife and two tickets for 2 children IF they come to KSA ONLY – Jeddah to his home country when he avails of his annual leave. The [Coach] shall not be entitled to claim ticket value in cash when he does not avail of his annual leave or postpone it".

88. The Sole Arbitrator finds that it cannot be derived from Article 6 of the Employment Contract that the Coach should have purchased the flight tickets himself and that the Club would reimburse him later. The Sole Arbitrator therefore finds that it was in principle the Club's duty to provide the Coach with flight tickets.

89. Furthermore, as already mentioned *supra*, the Sole Arbitrator finds that the Coach convincingly testified that it was customary to hand in the keys of his house and car prior to leaving for summer vacation, as he had done the same during the summer break in 2013.

90. Because it remained undisputed that the Club did not provide the Coach with flight tickets, even after the Coach specifically reminded the Club to do so, and, importantly, also because Mr Bamaodah informed the Coach by email dated 2 July 2014 that his Employment Contract had been terminated, the Sole Arbitrator finds that the Coach could objectively understand that the Club would not comply with its obligations under the extended Employment Contract and therefore come to the conclusion that the situation did not reasonably permit *"an expectation that the employment relationship between the parties be continued"*, as alluded to in the jurisprudence of the Swiss Federal Tribunal above.

91. Moreover, since the Club was obliged to provide the Coach with flight tickets, the Club's argument that the Coach did not comply with his obligations under the Employment Contract by not timely resuming his duties with the Club, is to be dismissed.

92. Although the Sole Arbitrator finds that the Coach could have been more active than sending only one email to the Club if he was truly fully dedicated to continuing his professional career with the Club, the Sole Arbitrator finds that the Coach's inactivity does not stand in the way of concluding that the Coach at the relevant moment in time had a good reason to terminate his Employment Contract. The Sole Arbitrator however finds that the Coach's inactivity cannot remain without consequences and finds that this should be taken into account in awarding an appropriate amount of compensation for breach of contract, as will be dealt with in more detail below.

93. Notwithstanding the Coach's contributory negligence, the Sole Arbitrator finds that the Coach had just cause to terminate the Employment Contract prematurely.

e) What are the financial consequences thereof?

94. Since the Coach terminated the Employment Contract with just cause, the Coach is in principle entitled to be compensated for his damages.

95. The Sole Arbitrator observes that the Employment Contract does not contain a liquidated damages clause.

96. Article 337(b)(1) SCO determines as follows:

"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".

97. Accordingly, the Coach's damages in principle consist of the full remuneration he was entitled to receive from the Club under the extended Employment Contract.

98. Indeed, the Coach claims an amount of USD 96,000 as compensation for breach of contract by the Club, corresponding to 24 monthly salaries in the amount of USD 4,000 each, from 28 July 2014 until 27 July 2016.

99. The Sole Arbitrator finds that this is indeed an appropriate starting point to determine the calculation of the damages due to be paid by the Club to the Coach.

100. The Coach testified that he did not have any alternative employment during the extended term of the Employment Contract, which remained uncontested by the Club.

101. The Sole Arbitrator therefore finds that the Coach in principle indeed incurred damages in a total amount of USD 96,000, as the Coach would have been paid this amount in case the Club would not have breached its obligations under the extended Employment Contract.

102. However, as indicated above, although entitled to terminate the extended Employment Contract prematurely, the Sole Arbitrator finds that the Coach did not show a lot of dedication to resume his career with the Club. Indeed, the Coach only sent one email to

the Club with the request to provide him with flight tickets on 1 July 2014. After that, the Coach remained silent until he lodged a claim with FIFA on 27 January 2015 (i.e. almost seven months after his last email). The Sole Arbitrator finds that the Coach could for instance have tried to set up a meeting with the Club in order to discuss the situation, or to repeatedly remind the Club of its payment obligations under the Employment Contract. The Coach's silence of nearly seven months may well have given the Club the impression that the Coach had no particular objection against the early termination and that he would not claim the remainder of his salary. The Sole Arbitrator finds that this behaviour exacerbated the position of the Club.

103. The Sole Arbitrator observes that Article 44(1) SCO determines as follows:

"Where the injured party consented to the action which caused the loss or damage or circumstances attributable to him helped give rise to or compound the loss or damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely".

104. The Sole Arbitrator observes that CAS jurisprudence determined the following in respect of the application of Article 44(1) SCO:

"[…] according to Article 44 para. 1 CO, compensation may be reduced if there are circumstances attributable to the injured party that helped to give rise to or increase the damage" (CAS 2014/A/3647-3648, §121 of the abstract published on the CAS website).

105. The Sole Arbitrator finds that the inactivity of the Coach shall be taken into account in awarding compensation and that as a consequence thereof the compensation for breach of contract to be paid by the Club to the Coach is to be reduced. Although realising that determining a percentage always appears arbitrary, the Sole Arbitrator considers it just and fair that the compensation for breach of contract in the amount of USD 96,000 shall be reduced with 25% to an amount of USD 72,000.

106. As to the *dies a quo* of the interest to be paid over this amount, the Sole Arbitrator notes that the Coach argues that the interest should start to accrue as from the date of receipt of his claim by the FIFA PSC.

107. The Sole Arbitrator however finds that, as was also decided by the Single Judge in the Appealed Decision, the date of notification of the Coach's claim to the Club is the relevant moment in time, as the Employment Contract was implicitly terminated by means of this document. Interest shall therefore start to accrue as from 18 March 2015 until the effective date of payment.

108. Consequently, the Sole Arbitrator finds that the Club shall pay compensation for breach of contract in an amount of USD 72,000 to the Coach, plus interest at a rate of 5% *per annum* as from 18 March 2015 until the effective date of payment.

B. Conclusion

109. Based on the foregoing, the Sole Arbitrator finds that:

i) Article 3 of the Employment Contract is a valid clause.

ii) The Employment Contract was validly extended for an additional two years under the same terms and conditions as applicable to the initial term of the Employment Contract.

ii) The Coach terminated the Employment Contract prematurely.

iii) The Coach had just cause to terminate the Employment Contract prematurely.

iv) The Club shall pay compensation for breach of contract in an amount of USD 72,000 to the Coach, plus interest at a rate of 5% *per annum* as from 18 March 2015 until the effective date of payment.

110. Any other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 7 September 2017 by Mr José Carlos Ferreira Alves against the decision issued on 8 May 2017 by the Single Judge of the Players' Status Committee of the *Fédération Internationale de Football Association* is partially upheld.

2. The decision issued on 8 May 2017 by the Single Judge of the Players' Status Committee of the *Fédération Internationale de Football Association* is confirmed, save for the fact that, in addition to the amount of USD 3,600 plus 5% interests *per annum* as from 18 March 2015 until the date of effective payment awarded to Mr José Carlos Ferreira Alves, Al Ahli Saudi Club is ordered to pay to Mr José Carlos Ferreira Alves also the amount of USD 72,000 (seventy two thousand United States Dollars), with interest at a rate of 5% (five per cent) *per annum* as from 18 March 2015 until the effective date of payment.

3. (…).

4. (…).

5. Any other and further motions or prayers for relief are dismissed.