Arbitration CAS 2018/A/5807 Fenerbahce Futbol AS v. Gregory van der Wiel, award of 13 February 2019

Panel: Prof. Luigi Fumagalli (Italy), President; Mr José María Cruz (Spain); Prof. Ulrich Haas (Germany)

Football
Contractual penalties imposed upon a player for violation of the club's disciplinary regulations
Waiver of appeal to the CAS
Admission of a non-timely filed answer (to an appeal)
Set-off of fines against incomes
Legal qualification of a fine
Criteria for the reduction of an excessive fine

1. **Parties to a dispute are in principle free to settle it by a contract precluding further litigation. If litigation is brought, notwithstanding such settlement, an arbitration tribunal is entitled to raise the matter *ex officio* and invite the parties to discuss the issue of the admissibility of a claim contractually settled.**

2. **Deadlines are important for the conduct of the arbitration and must be strictly respected. However, exercising its discretion, a CAS panel may admit, based on the specific circumstances of a case, a party's answer (to an appeal) filed one day after the expiry of its time limit to do so.**

3. **Where parties to a contract allowed a set-off between fines and any amount due by a club to player, as a matter of principle, any such set-off should not nullify entirely an employee's right to a basic salary, or be applied in an abusive way. An employer may also withhold a part of an employee's salary if such is customary or is fixed by a standard or collective employment agreement, and sets limits to a set-off. Such fundamental rule is aimed at the protection of an employee against abusive practices by an employer.**

4. **A fine that a contract allows a party to levy on another party can be considered a contractual penalty under Swiss law. Accordingly, the parties are free to determine its amount but a court may reduce at its discretion penalties that it considers excessive.**

5. **In the absence of indication in Swiss law as to what is an excessive fine, it is for CAS panels to establish it, with regard to the merits of a case and all the relevant circumstances. The reasonableness of a fine can be assessed based on (i) a creditor's interest in the performance of the obligation and in the sanctioning of the default, (ii) the gravity of a debtor's fault, from an objective and a subjective standpoints, and (iii) the parties' financial situation. Arbitrators shall generally weigh up the different interests at stake with regard to the amount of the penalty.**

I. THE PARTIES

1. Fenerbahce Futbol AS (the "Club" or the "Appellant") is a professional football club with seat in Istanbul, Turkey. The Appellant is affiliated to the Turkish Football Federation (*Türkiye Futbol Federasyonu* – "TFF"), which is a member of the Fédération International de Football Association ("FIFA"), the world governing body of international football.

2. Mr Gregory van der Wiel (the "Player" or the "Respondent") is a Dutch professional football player born on 13 February 1988.

3. The Club and the Player are hereinafter referred to as the "Parties".

II. BACKGROUND FACTS

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain his reasoning.

5. On 4 July 2016, the Parties entered into an employment agreement (the "Employment Agreement"), under which the Player was to provide his services as a football player to the Club for 4 seasons, in the period between 4 July 2016 and 31 May 2020.

6. The Employment Agreement contained, *inter alia*, the following provisions:

   i. the Player for the season 2016/2017 was to receive (Article 6.a):

      - a salary of EUR 2,250,000 net of taxes, in 10 monthly payments of EUR 225,000 each for the period between August 2016 and May 2017, due on the 25th day of each month;

      - an attendance fee of EUR 15,000 net of taxes for every official match (defined to be the matches of the Turkish League, the UEFA Champions League and the UEFA Europa League);

      - a sign-on fee of EUR 1,750,000 net of taxes, due on 1 August 2016;

   ii. the Player had the following obligations (Article 5):

      "d) The Player is obliged to attend the training sessions and training camps, to be determined by the Club (including place and dates) and he shall strictly abide by the related instructions of the Authorized Person, he shall participate in every competition both friendly and official games and/or he shall be ready to attend. The Player is obliged to attend scheduled programs, to be

determined by the Club or the Authorized Person.

e) The Player is obliged to take care of his health and physical fitness in maximum meaning and he shall attend the medical examinations, to be set by the Club and Administrators at the related medical institutions and staff determined by the Club as well, he is obliged to follow medical instructions of the related health authorities as described above. Nevertheless, the Player has a right to determine the medical institutions and medical staff to be examined. The player has the right to choose his own surgeon and after-surgery recovery training but only after the consult with the Club medical stuff. The Player will bear any cost differences between the Club's choice and the Player's choice and have his own risk and responsibility.

The liability of medical examinations and operations performed by the medical institutions and/or medical stuff appointed by either the Player or the Club belongs to the Player under the abovementioned determination right. Should the Club has an objection against the medical examinations and operations performed by the medical institutions and/or medical stuff appointed the Player, a medical institution designated by the Club shall act as arbitrator. Diagnosis and treatment program determined by this medical institution shall be final and the Parties shall not have the right to object to them.

(…)

h) The Player is obliged to obey Regulations of the Club, to be determined/will be determined and may be altered by the Club at any time. The Player hereby accepts to obey disciplinary sanctions, to be applied by the Club against himself in case any contrary actions against the said disciplinary instructions. The Player gives his consent in advance to the Club for setting off the Player's finalized disciplinary sanctions from his salary.

i) The Player may feature interviews with media or may attend panels or TV programs with the explicit prior consent of the Club and/or the Authorized Persons provided always that he shall always take due care and pay due diligence to the sportive and moral values of the Club, his personal life and career, and hold the Club in particular the Football Team harmless against any illicit assault, as the case may be.

(…)

m) In case that the Player is in breach of his obligations above and such breach also constitutes as the violation of the Disciplinary Regulations of the Club the following shall apply:

- *The Club shall fine the Player the penal set forth in the Disciplinary Regulations.*

- *The Club reserves its right to the following penalty in addition to the fulfilment.*

Penalty sum is %10 of the salary of the Player determined in the season in question. The Player agrees that he shall fully pay this penal sum in cash and at once to the Club upon receipt of the Club's written request and that the Club shall be entitled to set off and compensate for

this sum from or out of the receivables (e.g. his salary or bonuses) the Player may have with the Club".

7. On 11 August 2016, the Player signed a delivery receipt of the *"Fenerbahçe Futbol A.S. Professional Football Team 2016-2017 Season Disciplinary Regulations"* (the "Disciplinary Regulations").

8. Such Disciplinary Regulations included the following provisions:

Article 5 *"In General"*

"Players, Coaching Staff and members of Medical Team shall endeavour their best efforts so that the above mentioned persons act in compliance worthily with the dignity, reputation, name and the greatness resulting from history of the Club and shall be responsible for the acts and affairs of the aforementioned persons against to the said obligation".

Article 6 *"Rules to be Obliged at Training/Camp Facilities"*

"6.1.a Players shall act in compliance with the program designated by the Coaching Staff and shall unexceptionally conform to the hours specified in the program. Players shall not leave the facilities before receiving the program of the following day, to be designated by the Coaching Staff. After the training, the players are obliged to comply with the care and regeneration program set forth/designated by the Coaching Staff".

Article 9 *"Rules to be Obeyed Regarding Player's Health"*

"9.3 Players are obliged to notify their all kind of illnesses and injuries to the Coaching Staff and team doctor immediately".

Article 10 *"Courses of Conduct to be Obeyed on Leaves of Absence and Social Events"*

"10.2 Players, Coaching Staff and members of the Medical Team are not allowed to leave the city without permission from the Board of the Club. This is even valid for the off days".

Article 12 *"Relations with Press"*

"A. Relations with Mass Media

A.1. Players, Coaching Staff and members of Medical Team may hold any announcements and interviews only subject to the prior written approval of Fenerbahçe Corporate Communication Department (hereinafter to be referred to as "CCD") in their relations with national or international print, video, audio and/or Internet media. CCD is entitled to demand that such announcements and interviews take place under its organization/supervision".

"B. Interview Criteria

B.1. Players, Coaching Staff and members of the Medical Team may not give interviews to either national or international print, video, audio and Internet online media without the supervision of CCD as a general rule".

Article 14 *"Authority and the Procedure to Impose Disciplinary Penalties"*

"14.2 Board of the Club has the authority to impose pecuniary penalty. Before exercising its authority, Board may require a report from the coaching staff and when deemed necessary it may require a verbal statement and/or an additional report.

14.3 Board of the Club has the authority to exclude from the squad. Before exercising its authority, Board may require a report from the coaching staff and when deemed necessary it may require a verbal statement and/or an additional report.

14.4 Penalties can be raised by the Board of the Club in case of repetition of offences regulated hereby".

Article 16 *"Disciplinary Offences that are not Specified in these Regulations"*

"Actions contrary to the purpose and the principle stated in the Article 5 of these regulations and the essential principles of the disciplinary law and penal law may also be punished with the decision of the Board of the Club even though they are not explicitly regulated herein".

9. In addition, the Disciplinary Regulations provided for the following *"Pecuniary Penalties"*:

For the Offences stated in Article 5: excluding repetition, pecuniary penalties of minimum 25,000 and maximum 150,000.- Euro and penalty of exclusion from the squad, additionally or separately.

For the Offences stated in Article 6: written warning or pecuniary penalty of minimum 1,000 and maximum 50,000.- Euro may be imposed.

6.1.a Not complying with the training program determined by the coaching staff.

(…)

in case of absence from the training 50,000.- Euro

(…)

For the Offences stated in Article 10: excluding repetition, written warning or pecuniary penalty of minimum 2,500.- Euro and maximum 50,000.- Euro and penalty of exclusion from the squad, additionally or separately.

(…)

10.2 Travelling out of the city without informing the Board of the Club 25,000.- Euro

For the Offences stated in Article 12: excluding repetition, written warning or pecuniary penalty of minimum 20,000.- Euro and maximum 50,000.- Euro and penalty of exclusion from the squad, additionally or separately.

(…)

in case of violation of the Clause B 20,000.- Euro".

10. In November/December 2016, the Board of the Club adopted the following disciplinary measures towards the Player:

Date	Resolution	Measure	Violation	Reason
18 Nov 2016	No 463	EUR 25,000	Article 10.2	Leaving the city without permission on 13 November 2016
		EUR 50,000	Article 6.1.a	Not attending the training of 14 November 2016
16 Dec 2016	No 464	Exclusion from the squad (provisional)	Not mentioned in the resolution	Absence at the match of 15 December 2016
21 Dec 2016	No 466	EUR 150,000	Not mentioned in the resolution	Absence at the match of 15 December 2016, noting that the explanations given by the Player on 19 December 2016 following the Club's request of 16 December 2016 could not be accepted
27 Dec 2016	No 467	EUR 20,000	Article 12.B.1	TV interview given without the Club's consent

11. On 9 March 2017, the Player sent to the Club a *"Warning Letter"*, requesting *"for payment outstanding credits amount of 256.494,44 EUR"*, due as follows:

"- 6.494,44 EUR attendance payment that was due on December 2016.

- *225.000 EUR guarantee payment that was due on 25 January 2017.*

- *25.000 EUR guarantee payment that was due on 25 February 2017".*

12. On 14 March 2017, the Club answered the Player's letter, indicating that that it did not owe him any money and had fulfilled its monetary obligations under the Employment Agreement. More specifically, the Club contended that it had paid the amount claimed by the Player as attendance fee, as well as the amount of EUR 205,000 as salary due on 25 February 2017. For the remaining portion of the amount claimed, the Club referred to the penalties imposed on the Player to

justify the deduction of EUR 245,000 from the Player's salary.

13. On 12 April 2017, the Player lodged a claim with FIFA against the Club requesting the payment of EUR 245,000, plus interest at 5% *p.a.*, corresponding to EUR 225,000, as outstanding salary due 25 January 2017, plus EUR 20,000, as part of the salary due on 25 February 2017.

14. On 24 August 2017, the Parties entered into a Settlement Agreement (the "Settlement Agreement"), whereby the Employment Agreement was terminated and the Club undertook to pay to the Player an indemnification *"solely relating to the premature termination"* of the Employment Agreement. In fact, the Settlement Agreement contained the following provision with respect to the claim filed with FIFA by the Player against the Club:

> *"2.5 (…) The Parties hereby acknowledge that this proceeding is on-going and agree and declare that they shall bear all the consequences of the award concerning this proceeding before FIFA DRC and that their Contract termination arrangements have no influence on their positions in any FIFA proceedings".*

15. On 8 March 2018, the Dispute Resolution Chamber of FIFA (the "DRC") issued the operative part of a decision (the "Decision") on the Player's claim, holding as follows:

> *"1. The claim of Claimant, Gregory van der Wiel, is accepted.*
>
> *2. The Respondent, Fenerbahce Fütbol AS, has to pay to the Claimant, within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of EUR 245,000, plus 5% interest p.a. until the date of effective payment as follows:*
>
> *a. 5% p.a. as of 26 January 2017 on the amount of EUR 225,000;*
>
> *b. 5% p.a. as of 26 February 2017 on the amount of EUR 20,000.*
>
> *3. In the event that the amount due to the Claimant in accordance with the above-mentioned number 2. is not paid by the Respondent within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> *4. The Claimant is directed to inform the Respondent 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".*

16. On 28 June 2018, the grounds of the Decision were issued. They read, in the pertinent portions, as follows:

> *"6. (…) the members of the Chamber noted that the player alleged that in March 2017, the club failed to pay him an amount of EUR 245,000, consisting of the full salary for the month of January 2017 in the amount of EUR 225,000, as well as a part of the salary for the month of February 2017 in the amount of EUR 20,000.*

7. Furthermore, the Chamber took note that the player, on 9 March 2017, had requested the club to pay him his outstanding remuneration, however that he received a reply from the club, in which it stated that several fines were imposed on him, because of alleged misbehaviour, the application of which the player fully rejects. Based on the foregoing circumstances, the player requested FIFA to be awarded the payment of EUR 245,000 as outstanding remuneration.

8. Equally, the members of the Chamber took note of the reply of the club, which confirmed that it imposed three fines, in the total amount of EUR 245,000, on the player, because the player missed a training and a match of the club and travelled out of the city without permission of the club. Furthermore, according to the club, the player gave an interview without the club's permission. As a result of these circumstances, the club argued that it could validly impose the fines on the player, as the behaviour of the player was not in line with the club's internal Disciplinary Regulations.

9. In this respect, taking into account the claim of the player as well as the reply of the club, the members of the Chamber acknowledged that the underlying issue in this dispute was to determine whether the [club] *validly imposed the aforementioned fines on the player and would be entitled to offset their amount against the player's remuneration.*

10. Entering into the substance of the matter, the Chamber analysed the fines imposed on the player, and started with the fine of EUR 75,000 imposed on the player on 18 November 2016, due to the alleged fact that the player left Istanbul (Turkey) without permission of the club on 13 November 2016 and his consequent absence from a training session on 14 November 2016. In this respect, the Chamber first of all noted that from the information on file, it appears that the club did not request the player to present his defence as to the imposed fine, however that it unilaterally imposed the fine on the player, who thus was not in the position to defend himself. Furthermore, the Chamber emphasised that a fine amounting to the total amount of EUR 75,000 for missing just one training session and travelling out of the city without permission of the club is manifestly excessive and disproportionate and cannot be upheld. Hence, the Chamber was unanimous in its conclusion that the fine of EUR 75,000, imposed on the player on 18 November 2016 must be disregarded, due to the fact that its imposition did not follow a due process of law and that its amount is manifestly disproportionate in comparison with the alleged offense.

(…)

22[!]*. Further, as to the fine of EUR 150,000 imposed on the player on 21 December 2016, for not providing a valid reason for his absence in a match played by the club on 15 December 2016, the Chamber noted on the one hand that said fine was only imposed by the club on the player after it had requested him to present a statement of defence and after it subsequently rejected the explanation put forward by the player.*

23. On the other hand, the members of the Chamber noted that said fine of EUR 150,000 was based on article 5 of the club's internal Disciplinary Regulations, which contains a rather broad description of circumstances and actions that allows the club to impose fines in a range between EUR 25,000 and EUR 150,000 on its players. In this respect, the members of the Chamber noted that the abovementioned article does not hold a clear reference that in case the player misses a match of the club,

a fine can be imposed on the player. What is more, the article only contains general guidelines for the players' behaviour, consisting of 'acting in compliance with the dignity, reputation, name and greatness resulting from the history of the club'. Moreover, it appeared to the members of the Chamber that the club decided to immediately impose the maximum fine of EUR 150,000 on the player, whereas the minimum amount corresponded to EUR 25,000.

24. *Based on the foregoing, the Chamber was of the opinion that there was no clear regulatory basis for imposing the maximum fine of EUR 150,000 on the player for missing only one match. In this respect, the Chamber pointed out that the unspecific wording of art. 5 of the contract is open to a broad range of personal interpretations of what should be considered as a violation to "the dignity, reputation, name and greatness resulting from the history of the club", while stipulating though severe consequences for such, finally leaving it to the discretion of the club to spontaneously define the situations in which a player should be fined. In addition, the Chamber emphasised that a fine amounting to the total amount of EUR 150,000, i.e. 66% of the player's monthly salary, for missing one match is manifestly excessive and disproportionate and cannot be upheld. Hence, the Chamber decided that also the fine of EUR 150,000, imposed on the player on 21 December 2016, cannot be taken into account.*

25. *Finally, the Chamber turned its attention to the fine of EUR 20,000 imposed on the player on 27 December 2016, due to the alleged fact that the player had given an interview on 23 December 2016 without prior permission of the club. In this respect, from the information on file, the Chamber concluded that the player was not requested to present his defence as to the imposed fine, and that the fine was unilaterally imposed on him. Also in relation to this fine, the player was thus not granted the right by the club to submit a defence as to his alleged misbehaviour. Furthermore, the Chamber emphasised that a fine amounting to the total amount of EUR 20,000 for giving an interview is excessive and disproportionate and cannot be upheld. Hence, the Chamber was unanimous in its conclusion that the fine of EUR 20,000, imposed on the player on 27 December 2016, must be disregarded.*

26. *In addition to the foregoing circumstances, the Chamber deemed it vital to point out that the imposition of fines, or any other available financial sanction in general, shall not be used by clubs as a means to set off outstanding financial obligations towards players.*

27. *In conclusion, the Chamber determined that the club could not set-off its debt towards the player by means of the various fines imposed on him and that thus the amount of EUR 245,000 is due to the player as per the contract.*

28. *For all the above reasons, the Chamber decided to accept the player's claim and determined that the club must pay to the player the total amount of EUR 245,000 as outstanding remuneration.*

29. *In addition, taking into account the player's request and in line with the Chamber's longstanding jurisprudence, the Chamber decided that the club must pay to the player interest of 5% p.a. as of 26 January 2017 on the amount of EUR 225,000, as well as 5% p.a. as of 26 February 2017 on the amount of EUR 20,000".*

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 2 July 2018, the Club filed with the Court of Arbitration for Sport ("CAS") a statement of appeal pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code") to challenge the Decision. The Club appointed Mr José María Cruz, Sevilla, Spain, as an arbitrator.

18. On 4 July 2018, the CAS Court Office informed FIFA of the appeal against the Decision.

19. On 10 July 2018, the Respondent appointed Prof. Ulrich Haas, Zurich, Switzerland, as an arbitrator.

20. On 13 July 2018, FIFA informed the CAS Court Office that it renounced its right to intervene in the arbitration.

21. On 31 August 2018, the Club filed its appeal brief pursuant to Article R51 of the Code, together with 14 exhibits.

22. On 6 September 2018, pursuant to Article R54 of the Code, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the Parties that the Panel to hear the dispute between the Parties had been appointed as follows: Prof. Luigi Fumagalli, Milan, Italy, President; Mr José María Cruz, Sevilla, Spain, and Prof. Ulrich Haas, Zurich, Switzerland, Arbitrators.

23. On 25 September 2018, the Player filed his answer pursuant to Article R55 of the Code, together with 5 exhibits.

24. On 26 September 2018, the CAS Court Office noted that the Player's answer had been filed on 25 September 2018, while the deadline for such filing had expired on 24 September 2018. It therefore requested the Appellant to state whether it consented to the admissibility of the Player's answer, and informed the Parties that in case of objection a decision would be taken by the Panel.

25. On 2 October 2018, the Club indicated that it did not consent to the admissibility of the Player's answer.

26. On 3 October 2018, the Player insisted that the answer be admitted; while the Club confirmed its opposition.

27. On 4 October 2018, the Parties were informed that the Panel had decided to admit in the file the Player's answer, and that the reasons for such decision would be given in the final award. At the same time, by separate letter, FIFA was requested to provide the file of the case heard by the DRC.

28. On 10 October 2018, FIFA lodged the DRC case file.

29. On 30 October 2018, the Parties were informed that a hearing in the present dispute would be

held in Lausanne on 10 January 2019.

30. On 30 October 2018, the CAS Court Office issued, on behalf of the President of the Panel, an order of procedure (the "Order of Procedure"), which was signed by the Parties on the same 30 October 2018.

31. On 10 January 2019, a hearing was held in Lausanne, at the CAS offices. The Panel was assisted at the hearing by Mr Fabien Cagneux, CAS counsel. The following persons attended the hearing:

    i. for the Appellant: Mr Juan de Dios Crespo Pérez and Mr Paolo Torchetti, counsel;

    ii. for the Respondent: the Player himself by video-link, and Mr Patrice van Oostaijen, counsel.

32. At the opening of the hearing, the Parties confirmed that they had no objections to the appointment of the Panel. The Parties, then, made submissions in support of their respective cases. The Player rendered declarations *inter alia* with respect to the events which led to the imposition of the fines by the Club. At the conclusion of the hearing, the Parties expressly stated that their right to be heard and to be treated equally in the CAS arbitration proceedings had been fully respected.

IV. THE POSITION OF THE PARTIES

33. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Panel confirms, however, that it has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Position of the Appellant

34. In its statement of appeal, the Club requested the CAS:

> *"1. To accept this appeal where the Decision is set aside and making the following findings:*
>
> *a. the Player was derelict in fulfilling his obligations with respect to his employment contract with the Club; and*
>
> *b. the Club was correct in imposing the cumulative fines of €245,000.*
>
> *2. Independently of the decision to be issued, (…):*
>
> *a. to fix a sum of 25,000 CHF to be paid by the Respondent to the Appellant, to help the payment of its legal fees and costs.*
>
> *b. to order the Respondent to pay the whole CAS administration costs and the Arbitrators' fees".*

35. Such requests were supplemented by the Club in the appeal brief in the following terms:

> *"The Appellant herein respectfully requests the Panel:*
>
> *1. To accept this appeal where the Decision is set aside and making the following findings:*
>
> *i. the Player was derelict in fulfilling his obligations with respect to his employment contract with the Club; and*
>
> *ii. the Club was correct in imposing the cumulative fines of EUR 245,000.*
>
> *2. Alternatively, in the hypothetical and improbable case the Panel considers that the economic sanctions imposed on the Player were too harsh, the Club requests the Panel to set aside the appealed decision and adopt an award in the sense of establishing the amount the Panel would consider more appropriate for the undeniable breaches of his obligation taking into consideration the severity of the Respondent's contractual violations, and in any case it shall not be less than 150.000 EUR.*
>
> *3. Independently of the decision to be issued, the Appellant requests the Panel:*
>
> *i. to fix a sum of EUR 25,000 to be paid by the Respondent to the Appellant, to help the payment of its legal fees and costs.*
>
> *ii. to order the Respondent to pay the whole CAS administration costs and the Arbitrators' fees".*

36. In support of its request that the Decision be set aside, or at least modified, the Appellant, in essence, disputes the DRC's finding to disregard the fines imposed on the Player and in that respect submits that:

i. *"the Player violated the terms of the Contract and committed disciplinary violations"*;

ii. the fines imposed on the Player were *"justified"*; and

iii. the *"proportionality"* principle was respected.

37. As to the first point, the Appellant underlines that the Player had been informed of the contents of the Disciplinary Regulations, which had been submitted also to the TFF. In addition, by signing the Employment Agreement, the Player also accepted them. As a result, the Player was bound by the Disciplinary Regulations. However, the Player breached:

- Article 10.2 of the Disciplinary Regulations, when on 13 December 2016 he went abroad without the prior permission of the Club;

- Article 5.d of the Employment Agreement and Article 6.1.a of the Disciplinary

Regulations, when, as a result of his trip abroad, he did not attend the training session of 14 November 2016;

- Article 5.d of the Employment Agreement and implicitly Article 10.2 of the Disciplinary Regulations, when he missed an official match played by the Club, for which he was scheduled to be fielded, without any prior notification to the Club;

- Article 12.B.1 of the Disciplinary Regulations, when on 23 December 2016 he gave an interview for a TV program without the prior consent of the Club.

38. As to the second point, the Appellant notes that the Disciplinary Regulations give the Board of the Club the discretion to impose sanctions for disciplinary infringements. The Board followed the rules and complied with the due process requirements when applying the sanctions: the sanctions imposed on the Player were justified by the severity of the contractual violations and were in line with the Disciplinary Regulations. Moreover, the Player never challenged or opposed in any way the imposition of the fines, which were duly notified. Therefore, he accepted the fines for the infringements of the Employment Agreement and the Disciplinary Regulations. In fact:

i. the first fine in the total amount of EUR 75,000 was justified by two violations committed by the Player, namely leaving the city without permission and missing a training session without excuse. The unauthorized absence from work constitutes a severe breach and could lead, in case of repetition, to a termination with just cause. The Disciplinary Regulations provide in this case for the imposition of a fine between EUR 25,000 and EUR 50,000. Therefore, a fine of 30% of the monthly salary (as the Player received EUR 1.75 million just 2 months before, and EUR 225,000 every month) cannot be considered to be excessive. Contrary to the statement of the DRC, due process was complied with, since the infringement of the Player was purely an objective infraction of his contractual duties: he simply left the city without permission and missed the training on the subsequent day. As a result, due to the objective infringement of the Disciplinary Regulations, it was not necessary to request the Player to submit his defence. In addition, the Player never contested the decision of the Board issuing the fine of EUR 75,000. Thus, implicitly, he accepted it;

ii. the second fine of EUR 150,000 was issued when the Player missed an official match. Pursuant to Article 5 of the Disciplinary Regulations, in that case, the Club may sanction the Player with a fine between EUR 25,000 and EUR 150,000. The fine imposed has a clear regulatory basis, was adopted after hearing the Player and was not excessive:

   - Article 5.d of the Employment Agreement provides for the Player's obligation to participate in, or be ready to attend, every game, both friendly and official, played by the Club. Although the absence from an official game is not explicitly mentioned in the sanctions' catalogue of the Disciplinary Regulations, it is undoubtedly included in their Article 16, concerning *"Disciplinary Offences that are not specified in these regulations"*, and it goes without saying that missing an official

game, although being nominated in the squad, violates essential principles of disciplinary law. In fact, being ready to attend an official match – unless out due to an injury or yellow/red card – is the most crucial aspect a professional football player has to adhere to. In terms of an applicable sanction, Article 16 refers to Article 5 of the Disciplinary Regulations. Therefore, the Board had a discretion to sanction the Player with a fine between EUR 25,000 and EUR 150,000;

- the Player was given the opportunity to state in writing the reasons of his absence and therefore could defend himself. The Player justified his absence with a letter dated 19 December 2016 as follows:

  "The reason I did not got to game in Diyarbakir because I was not totally fit. I had some problems with my groin and an injured player never have to travel with the team. Also, I did not go because I did not feel safe to go to that place. Because of PKK who lives there and the recent bombing in Besiktas. My mother and my girlfriend did not want me to go either. I was really worried about my safety there";

- the application of the most severe and highest possible fine was justified. In fact:

  - the Player was included in the squad for the match and the coaching staff planned to field him in the starting eleven. He then had to be replaced at the very last moment by a much younger and less talented player;

  - the Player decided not to attend the match without permission and without a valid explanation. Only after a Club's request, he decided to explain the reasons that took him to behave in such a way. The arguments brought by the Player, however, were incorrect and demonstrate his lack of engagement. The alleged injury was just a false excuse not to travel with the team. Indeed, if the Player felt injured and not able to play a match, he had to notify the coaching staff and the team doctor immediately, as stated in Article 9.3 of the Disciplinary Regulations. By disobeying this obligation, the Player violated his contractual duty once more. This offence was included in the final fine of EUR 150,000. In respect of the safety concerns pointed out by the Player's mother and girlfriend, the *"recent bombing"*, however shocking, was of no excuse to decide unilaterally not to travel with the rest of the squad. If that was a real concern for the Player, the Club could have presented him the security measures taken in respect of the match. Instead, the Player simply decided not to travel with the squad and not to notify the Club of his absence;

  - the sporting results and the financial income of the Club depend largely on the sporting results. Thus, the unauthorized absence not only significantly disturbed the match preparation, but also jeopardized the sporting ambitions and the economic revenues of the Club;

- the conduct of the Player shows nothing less than lack of commitment and discipline;

- this was the second time the Board had to sanction the Player in less than a month and both occasions regarded the Player's breaches of his most basic duties, *i.e.* showing up in training sessions and matches;

- the severity of the violations committed by the Player forced the Board to sanction him not only for further deterrence regarding his future behaviour, but also to prevent other players from infringing their main obligations;

iii. the third fine of EUR 20,000 was applied because the Player gave an interview for the TV program named *"Spor Gecesi"* aired on NTV Spor on 23 December 2016 without the prior consent of the Club. Pursuant to Article 12.B.1 of the Disciplinary Regulations, the corresponding sanction is EUR 20,000. The Player violated in an objective way his contractual duties: it was the Player's free will to give an interview; he was surely not forced by anyone to do so. In view of the foregoing, there was absolutely no need to request a submission of defence by the Player. A sanction corresponding to the 10% of the monthly salary, meaning 3 days of work, cannot be considered disproportionate from any point of view.

39. As to the third point, the Appellant underlines that the fines are not disproportionate and correspond to the seriousness of the violations of the contractual obligations the Player committed:

i. the Player, when signing the Employment Agreement, acknowledged the Disciplinary Regulations of the Club, thus, submitting himself to the disciplinary regime thereby established. Moreover, the Player accepted the possibility that the Club impose penalties of 10% of his salary in the season in question (Article 5.m of the Employment Agreement);

ii. for the purpose of the fines, a reference to 10% of the yearly salary is not decisive. In fact, when calculating the percentage of the fine in terms of the monthly salary, the sign-on fee of EUR 1,750,000 paid on 1 August 2016 and the attendance fees of EUR 15,000 for every official match have also to be taken into account. Therefore, the basic salary of the Player was EUR 4,000,000, plus attendance fees. Considering the number of official matches played, his salary turned to be EUR 4,240,000 EUR. As a result, the total value of the fines imposed equals 5.78% of the Player's yearly salary, *i.e.* almost half of the maximum amount established in the Employment Agreement;

iii. the Player was one of the most valuable players of the squad, with a lot of experience, and therefore also should have figured as a role model for younger players.

40. Finally, the Appellant submits that even if the fines imposed were considered as disproportionate, their simple disregard would be unlawful. The fines issued by the Club, in

fact, have to be qualified as liquidated damages, and liquidated damages shall be reduced, pursuant to Article 163 (3) of the Swiss Code of Obligations (the "CO"), if they are excessively high, and not simply disregarded. As a result, it is crystal clear that the DRC's complete denial of the fines imposed on the Player is illicit. In conclusion, according to the Appellant, in the unlikely event the Panel assesses the fines imposed as disproportionate, it should alternatively determine the appropriate sanction on the Player pursuant to Article 163 (3) of the CO.

B. The Position of the Respondent

41. In his answer, the Respondent requested the CAS:

> *"To reject the appeal and requests for relief of the Appellant in its entirety.*
>
> *To decide that the (motivated) decision of the FIFA Dispute Resolution Chamber dated 8 March 2018 will be confirmed in its entirety.*
>
> *To award the Respondent with a contribution to its legal fees of EUR 10,000.-.*
>
> *To order the Appellant to pay the entire CAS administration costs and arbitrators' fees".*

42. In summary, according to the Respondent, the Appellant's contentions have to be dismissed: the Club should pay the amount due, without any deduction. In fact, the fines imposed in the total amount of EUR 245,000 must be disregarded in their entirety, not only because of the lack of clear regulatory basis, but also taking into account the restrictive approach to be adopted in respect of setting-off fines again salary, as well as the fact that the Respondent was not given any opportunity for defence prior to the imposition of the fines. In addition, the Appellant has not demonstrated that the events that led to the imposition of the fines actually justified any of them. At the same time, not only there is no ground for the fines, but also that there is no ground for any reduction, as they should not have been applied at all.

43. By way of preliminary remarks, the Respondent first draws the Panel's attention to some points relating to the background of the case, indicated to be relevant for a correct understanding of the dispute:

i. *"during the employment relationship there was a recurring pattern of consequent non-payments of salaries and exclusions of the Respondent from training".* As shown by the relevant correspondence exchanged in June-July 2017, the Respondent was forced to train alone, without a ball and in accordance with *"ridiculous training schemes"*; he was denied permission to leave the training facilities in between training sessions and to leave the city, while almost all other team members were not subject to this restriction. Each time, the Player was forced to have his lawyer summon the Club in order to obtain compliance with its contractual obligations;

ii. it is a player's fundamental right not only to obtain timely payment of his salary, but also to have access to training facilities and to train;

iii. the fines have to be considered in this framework and were imposed to force the Respondent to step out of his contract with the Club;

iv. the Appellant has the burden to show, with conclusive evidence, that the fines were validly imposed and justified: it is in fact the Respondent's position that all the situations which led to the imposition of fines occurred with valid reasons, and the Appellant has not demonstrated the contrary;

v. the fact that the Appellant challenged the Decision notwithstanding the provision set by the Settlement Agreement (Article 2.5) shows the Appellant's bad faith and the Appellant's disrespect of the contractual obligations towards the Respondent.

44. The Respondent, then, underlines some elements of fact:

i. the Disciplinary Regulations were not attached to the Employment Agreement and were not provided to the Player. Therefore, the Respondent objects to the applicability of those Disciplinary Regulations;

ii. the Player got injured in October 2016, and, since then, the relations between the Parties *"became strained"*;

iii. as to the events which led to the fines, it is to be noted:

- with respect to the first fine, that on 12 November 2016 the Player, in the same way as other players of the Club and as done on other occasions, left the city for the weekend, as during it no matches or training were scheduled. He returned to Turkey on the Sunday 13 November 2016, but he had to spend the night at the airport, trying to help his girlfriend who had been denied access to Turkey by the immigration officers. He therefore informed the Club of this situation and that he was going to miss the training scheduled for Monday morning. Indeed, the Player had been in constant contact with the Club in order to be assisted in finding a solution to the immigration issue. The Club, therefore, was aware of the situation, but still decided to apply a fine without any prior notice;

- with respect to the second fine, that the Player got a small injury and informed the Club; in addition, the match, which the Player missed, was to be played in a very dangerous place, and the Respondent felt extremely unsafe to play it, and informed the Club of his concerns. In addition, the match was against a second division club and all first eleven players had been given a day off;

- with respect to the third fine, that the TV interview related to a criminal affair of which the Player had been a victim. It was given to help the police and during it nothing was said about any misbehaviour of the Appellant;

iv. the Player objected to all fines. However, this did not help and the Club continued to harass him, by making late payments, forcing him to train alone or by making him follow a *"ridiculous"* training scheme, as it happened during the preparation for the season 2017/2018, when his attorneys had to intervene.

45. On the merits, the Respondent rebuts all arguments advanced by the Appellant with respect to the fines.

46. In that connection, and by way of a general remark, the Respondent underlines that a restrictive approach is to be adopted with respect to setting-off fines against salary. As the CAS and DRC case law shows, a set-off is permitted only if this is explicitly permitted by the relevant disciplinary regulations and the player has given his clear consent. This has not happened in the case of the Player: the reference in the Disciplinary Regulations *"does not suffice from a legal point of view (…) to establish that the Respondent gave his clear consent"* and therefore *"to bind him"*. In addition, the Respondent stresses that the Club violated his right to be heard and that the Club had admitted to such violation when stating that *"there was no need to request the Respondent to submit its defence prior to the imposition of the fines"*.

47. With respect to the specific fines, the Respondent submits that they should be disregarded for the following reasons:

i. as to the first fine, there was a valid reason to leave the city and miss the training: he had the permission of the Club, as many other players of the team had, and the Appellant has not provided any evidence from which it can be derived that the Respondent left the city without written authorization. In addition, a minor offence, such as leaving the city without permission, does not justify a fine: the Player left the city during a day off, and did not miss any important event. In addition, the Club was informed of the reasons of the Player's absence prior to the start of the missed training session. Had the Player been given the opportunity to state his case before the imposition of the fine, he would have explained the reasons for his absence. In any case, contrary to the Appellant's contention, the Player objected to the fine: however, this was not done in writing;

ii. as to the second fine, it was not clear at all from the Disciplinary Regulations that the enormous amount imposed was applicable in the case the Respondent missed a match. Indeed, there is no legal basis in the Disciplinary Regulations that justifies a fine of EUR 150,000 and such amount is absolutely excessive and cannot be justified under all circumstances. In any event, there were valid reasons not to impose a fine, as the absence was justified by the small injury and the Player's safety concerns;

iii. as to the third fine, there is no evidence that the Player harmed the Appellant's reputation in that interview. Indeed, it was completely unrelated to the Club's behaviour, as the Player would have explained, if he had been given the opportunity to state his case before the imposition of the sanction.

48. Finally, the Respondent underlines that also the Appellant's alternative request for relief should be dismissed: since there was no ground for issuing the fines, equally there is no ground for their reduction.

V. JURISDICTION

49. The jurisdiction of CAS is not disputed and is based on Article R47 and Article 57 *et seq*. of the Statutes of FIFA.

50. Article R47 of the Code provides as follows:

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

51. The jurisdiction of CAS is contemplated by Article 57 *et seq*. of the Statutes of FIFA in the following terms:

> Article 57 *"Court of Arbitration for Sport (CAS)"*
>
> *"1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match Players.*
>
> *2. 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".*
>
> Article 58 *"Jurisdiction of CAS"*
>
> *"1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question.*
>
> *2. Recourse may only be made to CAS after all other internal channels have been exhausted".*

52. Therefore, CAS has jurisdiction to decide the appeal brought against it.

VI. ADMISSIBILITY

A. Timeliness of the Appeal to CAS

53. The admissibility of the appeal has not been disputed. In fact, the statement of appeal against the Decision was filed by the Club within the 21-day's deadline of the date of notification of its

grounds, in accordance with Article 58 para. 1 of the Statutes of FIFA, and complies with the formal requirements set by Article R48 of the Code. Accordingly, the appeal is admissible.

B. No waiver of the Appeal to CAS

54. Such conclusion is not contradicted by the Settlement Agreement entered into by the Parties. The Panel noted in fact Article 2.5 of the Settlement Agreement, which regarded the then pending claim before FIFA (*"The Parties hereby acknowledge that this proceeding is on-going and agree and declare that they shall bear all the consequences of the award concerning this proceeding before FIFA DRC and that their Contract termination arrangements have no influence on their positions in any FIFA proceedings"*), and underlines that the parties to a dispute are in principle free to settle it by a contract precluding further litigation: in such a case, if litigation is brought, notwithstanding the settlement, an arbitration tribunal would be entitled to raise the matter *ex officio* and invite the parties to discuss the issue of the admissibility of a claim contractually settled. In the case at hand, however, the Panel does not find the wording of Article 2.5 of the Settlement Agreement to be sufficiently clear to preclude the admissibility of a claim to CAS disputing the consequences of the findings of FIFA: indeed, the Panel did not receive any specific submission with regard to what the Parties actually intended when entering into Article 2.5 of the Settlement Agreement, which, therefore, cannot be considered to preclude the appeal brought by the Club against the Decision.

C. Timeliness of the Answer

55. An additional issue arose, in the course of the arbitration, with respect to the admissibility of the answer. As noted above (paras. 24-27), in fact, the Respondent's answer was filed on 25 September 2018, when the deadline for such filing had already expired (on 24 September 2018), and the Appellant objected to its admissibility.

56. On 4 October 2018, the Parties were informed that the Panel had decided to admit in the file the Player's answer. The Panel confirms in this award such decision. Indeed, the Panel underlines that deadlines are important for the conduct of the arbitration and must be strictly respected. However, the Panel finds, in the exercise of its discretion, that in the circumstances of the present case, on the one hand a one day delay was of no prejudice to the Appellant, which, on the other hand, was put in a position to be informed, well ahead of the hearing, of the Respondent's position on the disputed matter, and that the documents attached to the belated answer were already in the possession of the Appellant. In addition, the Appellant did not insist at the hearing on its objection to the admissibility of the answer and discussed on the merits also the points therein made by the Respondent. Accordingly, also the answer is admissible.

VII. APPLICABLE LAW

57. Article R58 of the Code provides as follows:

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

58. The Panel notes that Article 57 para. 2 of the FIFA Statutes provides the following:

"The provisions of the CAS Code of Sports related Arbitration shall apply to the proceedings. CAS shall apply the various regulations of FIFA and additionally Swiss law".

59. As a result, the relevant FIFA rules and regulations shall be applied primarily; Swiss law applies subsidiarily. In any case, the Panel notes that it was not directed to the application to the Employment Agreement of any specific different law.

VIII. MERITS

60. The object of the present dispute is the Decision, whereby the DRC ordered, *inter alia*, the Appellant to pay to the Respondent the amount of EUR 245,000, plus interest at 5% *p.a.* (i) from 26 January 2017 until the date of actual payment on the amount of EUR 225,000, and (ii) from 26 February 2017 until the date of actual payment on the amount of EUR 20,000. In the Decision, in fact, the DRC considered that the Appellant was not entitled to deduct that amount from the Respondent's salary. Such conclusion is disputed by the Appellant, which insists that *"the Player violated the terms of the Contract and committed disciplinary violations"*, that the fines imposed were *"justified"* and *"proportional"* to the violations, and that the amounts corresponding to the fines should be deducted from any payment due to the Player.

61. The Panel will therefore examine each of the three fines which the Appellant imposed on the Respondent, in order to verify whether any amount is to be deducted on their basis from the Respondent's salary due under the Employment Agreement. It is in fact undisputed that, if not for the fines, the Player would be entitled to receive the amount claimed before FIFA and granted him by the Decision.

62. Before such examination, it appears however necessary to the Panel to make some preliminary observations.

63. First, the Panel finds that, contrary to the Respondent's indications, the Player was bound by the Disciplinary Regulations. In fact, the Employment Agreement makes express reference to those regulations (Articles 5.h and 5.m), and sets a number of obligations for the Player which are also reflected in the Disciplinary Regulations. In addition, on 11 August 2016 (para. 7 above), the Player received copy of those Disciplinary Regulations. Finally, the Panel notes that it is not exceptional for football clubs to have regulations imposing disciplinary obligations: the Player, therefore, having played in top European leagues, can be deemed to have been perfectly aware of their existence.

64. Second, the Panel remarks that the Employment Agreement (Article 5.m) expressly provides for fines, detailed in the Disciplinary Regulations, and specifically allows their set-off against any payment due by the Club to the Player. As a result, the Panel finds that a set-off was in principle accepted by the Player himself. The Panel, however, holds that, as a matter of principle, any such set-off should not nullify entirely an employee's right to a basic salary, or be applied in an abusive way. Indeed, the CO (at Article 323a, referred to in CAS 2007/A/1353 para. 52) provides that the employer may withhold a part of the salary, if so agreed upon, or if such is customary or is fixed by a standard or collective employment agreement, and (at Article 323b) sets limits to a set-off. The Panel finds such rule to be the expression of a general principle, of fundamental importance, as it is aimed at the protection of the employee against abusive practices by the employer, that holds the disciplinary power and might be tempted to exercise it precisely to devoid its obligation to pay a salary, and the employee's right to earn a living out of his/her work.

65. Third, the Panel notes that a "fine" that a contract allows a party to levy on the other in the event of breach can be considered a contractual penalty ("clause pénale" or "Konventionalstrafe") under Swiss law (Article 160 CO), *i.e.* under the law applicable to the merits of the dispute in this arbitration. As a result, such fines are subject to the provisions governing contractual penalties. In that regard, the Panel remarks that, in principle, under Swiss law, the parties are free to determine the amount of the contractual penalty (Article 163.1 CO). However, the court may reduce penalties that it considers excessive at its discretion (Article 163 (3) CO). The law, on the other hand, does not state clearly what an excessive penalty is, so that it is for the judge to establish, with regard to the merits of the case and all the relevant circumstances, whether the penalty is excessive and, if so, to what extent it should be reduced (ATF 82 II 142 consid. 3, *JdT* 1957 I 104).

66. The fines imposed by the Club on the Player shall be examined on such basis and separately.

A. The first fine

67. A first fine in the total amount of EUR 75,000 was imposed by the Board resolution No 463 of 18 November 2016 on the basis of two violations ascribed to the Player:

    i. a violation of Article 10.2 of the Disciplinary Regulations, for leaving the city without permission on 13 November 2016 (EUR 25,000); and

    ii. a violation of Article 6.1.a of the Disciplinary Regulations, for the absence from the training session of 14 November 2016 (EUR 50,000).

68. The DRC disregarded the fine so imposed essentially for two reasons (para. 10 of the Decision): (a) its imposition did not follow a due process of law; and (b) its amount is manifestly disproportionate in comparison with the alleged violations.

69. The Appellant challenges the findings in the Decision by submitting (a) that the *"objective"* nature of the infringements of his contractual duties committed by the Player (when he left the city

without permission and missed the training on the subsequent day) made it unnecessary to request the Player to submit his defence; (b) that a fine of 30% of the monthly salary (as the Player received EUR 1.75 million just 2 months before the fine was imposed, and EUR 225,000 every month) cannot be considered to be excessive, in light of the severity of the breach (unauthorized absence from work); and (c) that the Player implicitly accepted the fine of EUR 75,000, because he never contested the decision of the Board issuing it.

70. The Panel notes the following:

i. the Disciplinary Regulations provide in the event of breach of their Article 10.2 for the imposition of a fine of EUR 25,000 and in the event of breach of their Article 6.1.a of a fine of EUR 50,000. Such significant amounts were applied by the Club without giving any consideration to the circumstances of the case: for instance, the fact that the Player left the city over a weekend when no activity was planned; or that the Player missed the training session because he had remained at the airport to help his girlfriend solve immigration issues. Indeed, no mention of such elements, even to discard them, is made in the Board resolution which imposed the fine;

ii. the Club was aware of the circumstances which had induced the Player to remain at the airport, thus missing the training session. The Player during all that time was in constant contact with the officials of the club in order to get the immigration issued sorted out. There is no evidence on file that during the course of these constant contacts the club official deemed the Player's behaviour without just cause or not appropriate;

iii. the Player was not given the opportunity to state his case before the fine was imposed;

iv. the Player's statement that other players, and the Player himself on other occasions, used to travel home abroad when no activity was planned over a weekend remained unchallenged in this arbitration.

71. In light of the foregoing, the Panel finds that the fine of EUR 75,000, pursuant to the Board resolution No 463 of 18 November 2016, was imposed in an arbitrary way, and should therefore be discarded entirely, irrespective of any evaluation regarding the proportionality of its measure. Contrary to such conclusion, it is not possible to invoke an alleged implicit acceptance by the Player. Actually, the Player maintained in this arbitration that he disputed, even though only orally, the fine imposed. In any case, the mere absence of any challenge by the Player to the fine would be irrelevant, in the circumstances, as any waiver to his/her rights by an employee pending the employment relationship should not be taken lightly.

72. As a result, the amount of EUR 75,000 imposed by the Board resolution No 463 of 18 November 2016 shall not be deducted from the payments due by the Club to the Player. The Decision, consequently, is to be confirmed on this point.

B. The second fine

73. A second fine in the amount of EUR 150,000 was imposed by the Board resolution No 466 of 21 December 2016 under Articles 5 and 16 of the Disciplinary Regulations, for the absence at a match for which the Player had been called to appear.

74. The DRC disregarded the fine so imposed for two reasons (paras. 22-24 of the Decision): (a) the fine lacks clear regulatory basis; and (b) its amount is manifestly excessive and disproportionate.

75. The Appellant disputes the findings of the DRC and submits (a) that the regulatory basis for the fine is clear, as the infringement committed by the Player is covered by the Disciplinary Regulations at their Article 16, which refers for the measure of the sanction to Article 5; (b) that the fine was imposed after hearing the Player and considering the explanations given; and (c) that it cannot be considered to be excessive, in light of the severity of the breach and the circumstances of the case.

76. The Panel notes that the Club, when faced with the failure of the Player to answer the call to attend the match against Amed Sportif Faaliyetler which the Club was scheduled to play in Diyarbakir on 15 December 2016, followed a due procedure: on 16 December 2016, the Club notified the violation to the Player and invited him to submit his observations; on 19 December 2016, the Player provided a statement; on 21 December 2016, the Board issued its decision, dismissing the justifications offered by the Player. No issue, therefore, arises in this respect.

77. The Panel notes also that there was a sufficient contractual basis for the imposition of such fine:

    i. Article 16 of the Disciplinary Regulations specifically refers to actions constituting *"offences (…) not specified in these Regulations"*, and described either by reference to Article 5 of the Disciplinary Regulations as actions contrary to *"dignity, reputation, name and (…) greatness"* of the Club, or directly as actions contrary to *"the essential principles of disciplinary law"*;

    ii. it is an obvious duty of a player to attend the matches of his team, reflected also for the Player in the Employment Contract (Article 5.d). By not answering the call without due justification, the Player breached the Employment Contract by an action, at least, contrary to *"the essential principles of disciplinary law"*;

    iii. therefore, the possibility that a fine could be imposed on the basis of the Disciplinary Regulations was predictable from an objective point of view;

    iv. the Player was an experienced professional, and could expect that the Club take actions in the event of refusal to attend a game;

    v. the Player, when missing the match of 15 December 2016, had already received a fine (the first fine discussed above) and therefore his awareness of the disciplinary

obligations had been alerted.

78. In light of the foregoing, the Panel concludes that the Board had the discretion to apply a fine on the Player pursuant to Articles 5 and 16 of the Disciplinary Regulations, for the absence at a match for which he had been called to appear. Indeed, the Panel agrees that a violation under the Disciplinary Regulations was committed: the Player, in case he had physical problems or security concerns, had the obligation to contact the Club and discuss the matter with the Cub before the day of the match he was meant to attend, and could not unilaterally decide to ignore it.

79. The Disciplinary Regulations in the event of breach of their Article 5 provide for the imposition of a fine between EUR 25,000 and EUR 150,000. The Board decided to impose the maximum measure. The Panel finds such measure to be excessive in light of the principles applicable to contractual penalties (para. 65 above).

80. The Panel notes that, according to the Swiss case law and legal doctrine, a penalty is deemed to be excessive when it is not reasonable and exceeds patently the amount that would seem just and equitable (ATF 82 II 142 consid. 3, *JdT* 1957 I 104). Thus, the judge may reduce the penalty when it is unreasonable to an extent which cannot be justified. The following criteria to assess the reasonableness of the penalty can be taken into account (COUCHEPIN P., *La clause pénale*, Zürich, 2008, para. 844):

    i. the creditor's interest in the performance of the main obligation and in the sanctioning of default;

    ii. the gravity of the debtor's fault, from an objective and subjective standpoint;

    iii. the parties' financial situation, with the indication that the judge shall generally weigh up the different interests at stake with regard to the amount of the penalty (ATF 114 II 264 consid. 1a, *JdT* 1989 I 7).

81. In the case of the Player, the Panel notes that the Player, however breaching his contractual obligations to the Club, missed a match not of primary importance (a cup match not defined to be an Official Match under the Employment Agreement, from which the top players of the Club had been exempted), that the violation regarded a single match, and that (however not sufficient to justify the breach) the Player had some security concerns, the sincerity of which the Panel does not doubt.

82. In light of such circumstances, the Panel finds a fine of EUR 150,000, corresponding to two/thirds of a basis monthly salary, to be excessive in the circumstances of the case, and should therefore be reduced to a lower amount. In the determination of such amount, the Panel takes as a basis the attendance fee contemplated by the Employment Agreement (EUR 15,000 net per match: Article 6.a), and determines a fair measure of the fine for the infringement at stake to be equal to three times such attendance fee. Therefore, the Panel, in the exercise of its discretion under Article 163 of the CO, determines the penalty to be paid by the Player is EUR 45,000.

83. As a result, the amount of EUR 150,000 imposed by the Board resolution No 466 of 21 December 2016 shall be reduced to EUR 45,000 and, in that measure, it shall be deduced from the payments due by the Club to the Player. The Decision which found otherwise is to be modified on this point.

C. The third fine

84. A third fine in the amount of EUR 20,000 was imposed by the Board resolution No 467 of 27 December 2016 for a violation under Article 12.B.1 of the Disciplinary Regulations, for giving an interview on TV on 23 December 2016 without the prior consent of the Club.

85. The DRC disregarded this fine essentially for the same reasons considered with respect to the first fine: (a) its imposition did not follow a due process of law; and (b) its amount is manifestly disproportionate in comparison with the alleged violations (para. 25 of the Decision). As a result, also the basis of the challenge brought by the Appellant are the same: (a) the *"objective"* nature of the infringements of his contractual duties committed by the Player made it unnecessary to request the Player to submit his defence; (b) that a fine equal to 3 days of work cannot be considered to be excessive; and (c) that the Player implicitly accepted the fine, because he never contested it.

86. The Panel, in addition to the remarks above regarding the irrelevance of any failure by the Player to contest the fine, notes that it does not agree with the Club which imposed the fine, and holds that no material violation of Article 12.B.1 of the Disciplinary Regulations was committed by the Player. In fact, as it remained unchallenged in this arbitration, the Player's interview at stake regarded only some personal issues, without any involvement of the Club or of the Player's position as an employee of the Club. Therefore, no fine could be imposed on the Player.

87. As a result, the amount of EUR 20,000 imposed by the Board resolution No 467 of 27 December 2016 shall not be deducted from the payments due by the Club to the Player. The Decision is to be confirmed on this point.

IX. CONCLUSION

88. In light of the foregoing, the Panel finds that the appeal has to be partially upheld and the Decision modified, so that the Appellant is ordered to pay the amount of EUR 200,000, so determined after the deduction of contractual penalty of EUR 45,000 from the overall amount of EUR 245,000 due under the Employment Agreement.

89. The only remaining issue concerns interests. The DRC, while ordering the Club to pay the entire amount owed (EUR 245,000), applied 5% *p.a.* interest as of 26 January 2017 on the amount of EUR 225,000, and as of 26 February 2017 on the amount of EUR 20,000. The question in the case at hand is to determine how the reduction to EUR 200,000 of the amount due to the Player impacts on the issue of the interests owed.

90. The Panel notes in that respect that the debt of the Club to the Player arose (and remained unpaid) because the Club decided to set-off the fines it had imposed against (i) first the salary for January 2017, due on 25 January 2017, and (ii) then, for the balance, on the salary for February 2017, due on 25 February 2017. According to the present award, the Club was however entitled to set-off only EUR 45,000. Therefore, the Club had to pay EUR 180,000 by 25 January 2017 for the January 2017 salary and, by 25 February 2017, the entirety of the February 2017 salary. As a result, the Panel comes to the conclusion that the Club shall pay to the Player interest at 5% *p.a* as of 26 January 2017 on the amount of EUR 180,000, and 5% as of 26 February 2017 on the amount of EUR 20,000.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Fenerbahce Futbol AS on 2 July 2018 against the decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association on 8 March 2018 is partially upheld.

2. Fenerbahce Futbol AS is ordered to pay to Mr Gregory van der Wiel the amount of EUR 200,000, plus interest at 5% *p.a.* as from 26 January 2017 on the amount of EUR 180,000, as well as 5% interest as from 26 February 2017 on the amount of EUR 20,000.

3. (…).

4. (…).

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