Arbitration CAS 2019/A/6578 Antalyaspor A.Ş. v. Mostapha El Kabir, award of 8 July 2020

Panel: Mr Fabio Iudica (Italy), Sole Arbitrator

Football
Termination of the employment contract with just cause by the player
Production of additional documents
Scope of review of the CAS and principle ne ultra petita
Duty to mitigate the damage

1. **As a general rule, according to Article R56 of the CAS Code, the Parties are required to submit all their evidence and arguments with the filing of the Appeal Brief and the Answer, after which they shall not be authorized to supplement their request or their arguments or to produce new exhibits, unless the parties agree otherwise or the CAS panel orders otherwise on the basis of exceptional circumstances. Moreover, according to Article R44.3 of the CAS Code which is also applicable to appeal proceedings through the reference contained in Article R57 (3), the CAS panel may at any time order, *inter alia*, the production of additional documents if it deems it appropriate to supplement the presentations of the parties.**

2. **Without prejudice to the provision of article R57 of the CAS Code, which confers the CAS the full power to review the facts and the law of the case, a CAS panel is nonetheless bound to the limits of the parties' motions, since the arbitral nature of the proceedings obliges the panel to decide all claims submitted by the Parties and, at the same time, prevents it from granting more than the Parties are asking by submitting their requests for relief to the CAS, according to the principle of *ne ultra petita*.**

3. **According to Swiss law and consistent with the long-established CAS jurisprudence a player has the duty to mitigate his damages. However, the circumstance that a player received a higher remuneration under his former contract than he will receive under his new contract is not in itself sufficient to mean automatically that the compensation payable from his former club has to be reduced in the event that the new contract does not pay the player just as well as the original contract did.**

I. INTRODUCTION

1. This appeal is brought by Antalyaspor A.S. against the decision rendered by the Dispute Resolution Chamber (the "DRC" or the "Chamber") of the Fédération Internationale de

Football Association ("FIFA") on 26 June 2019 (the "Appealed Decision"), regarding an employment-related dispute arisen with Mr Mostapha El Kabir.

II. PARTIES

2. Antalyaspor A.S. (the "Club" or the "Appellant") is a professional football club, based in Antalya, Turkey, competing in the Süper Lig of the Turkish Football Championship. It is a member of the Turkish Football Federation (the "TFF") which in turn is affiliated with FIFA.

3. Mostapha El Kabir (the "Player" or the "Respondent") is a professional football player of Dutch nationality, born on 5 October 1988 in Targuist, Morocco.

The Appellant and the Respondent are hereinafter jointly referred to as the "Parties".

III. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' oral and written submissions on the file and relevant documentation produced in this appeal. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning.

5. On 24 January 2017, the Club and the Player concluded an employment contract for three sporting seasons starting from 2016/2017 until 31 May 2019 (the "Employment Contract").

6. According to Article 3.2 of the Employment Contract, the Player was entitled to receive, *inter alia*, the following amounts:

a) Euro 375,000 for the sporting season 2016/2017, of which Euro 150,000 to be paid upon registration with the TFF and the residual amount in three monthly salaries of Euro 75,000 starting from March 2017;

b) Euro 750,000 for the sporting season 2017/2018, payable in 10 equal monthly salaries of Euro 75,000 starting from August 2017;

c) Euro 750,000 for the sporting season 2018/2019, payable in 10 equal monthly instalments starting from August 2018.

7. Under the same clause, the Parties also agreed that *"In case of non-payment of three consecutive payments, the Player can send a notice to the Club and give seven days for the payment. If the Club still does not pay by the end of the given seven days period the Player may unilaterally terminate the contract with just cause. Any termination of Player without respecting this procedure will be deemed unjust and the club will be entitled to compensation in accordance with FIFA RSTP art. 17".*

8. On an unspecified date after the conclusion of the Employment Contract, the Club and the Player signed an agreement with the Swedish club BK Hacken for the temporary transfer of the Player, valid as from 26 March 2018 until 31 May 2018 (the "Loan Agreement"), for a loan fee amounting to Euro 100,000.

9. Pursuant to Article 2, lit. b. of the Loan Agreement, *"Antalyaspor A.S. will pay to the Player 150.000,00 Euro on 30 March 2018, 75.000,00 Euro on 15 April 2018, 150-000,00 Euro on 31.05.2018 during the Loan Period. If Club Antalyaspor would pay this amounts, Player will have no remuneration from Antalyaspor for the period of 2017-2018 football season (i.e. till 31 May 2018)".*

10. Moreover, lit. c. of Article 2 reads as follows: *"The Player and the Club Antalyaspor herewith agree to suspend the employment agreement dated 24th January 2017 for the time period of the temporary transfer of the Player from 26th March 2018 to 31 of May 2018. Due to the suspension of the employment agreement, Club Antalyaspor has no obligations against the Player until 31 May 2018. Especially the Club Antalyaspor is not obliged to pay to the Player any remuneration, car, apartment and flight tickets as this obligation has to be fulfilled by BK HACKEN from 26/3-2018 during the lending period in accordance with the employment agreement between BK HACKEN and the Player".*

11. In addition, Article 3 of the Loan Agreement provided the following: *"IF the conditions set out in clauses 2, above shall not have all been deemed to have been satisfied with effect from 12:00 (CET) on 26 th of March 2018 then this Agreement shall become automatically null and void and of no effect and no party shall have any obligation to the other hereunder".*

12. On 2 May 2018, the Player sent a formal notice to the Club, putting the latter in default of paying the total amount of Euro 225,000, corresponding to the first instalment of Euro 150,000 due on 30 March 2018, as well as the second instalment of Euro 75,000, due on 15 April 2018, according to Article 2, lit. b of the Loan Agreement. Therefore, the Player requested payment of the relevant outstanding amount and default interest at 5%, within the deadline of 10 days, failing which he would file his claim with FIFA according to Article 12*bis*(3) of the FIFA Regulations on the status and transfer of players (the "FIFA RSTP")

13. In the absence of any payment or response by the Club, on 16 May 2018, the Player filed a first claim to the FIFA DRC requesting that the Club be ordered to pay the amount of Euro 225,000, as overdue payables according to the Loan Agreement, plus interests.

14. On 25 May 2018, the Player sent a second warning letter to the Club, urging the latter to pay the relevant outstanding amount within a further time limit of 7 days as of notification of the relevant default notice, failing which, he would terminate the Employment Contract with just cause.

15. On 4 June 2018, the Player sent a termination letter to the Club, making reference to the Club's persistent failure to pay the relevant amount of Euro 225,000 after notification of the two warning letters dated 2 May 2018 and, respectively, 25 May 2018. The Player further claimed payment of the third instalment of Euro 150,000 which became due on 31 May 2018. Therefore, the Player informed the Club that he terminated the Employment Contract with alleged just cause following the failure by the Club to pay the global amount of Euro 375,000.

IV. THE PROCEEDINGS BEFORE THE FIFA DRC

16. On 19 June 2018, the Player completed his first claim with the FIFA DRC requesting payment of the total outstanding amount of Euro 375,000, consisting in the three instalments due under the Loan Agreement and namely, Euro 150,000 due on 30 March 2018, Euro 75,000 due on 15 April 2018 and Euro 150,000 due on 31 May 2018.

17. The Player argued that when the Loan Agreement was concluded (*i.e.* 26 March 2018), the Club was already in default of payment of the Player's salaries for January, February and March 2018, for a total amount of Euro 225,000, which the Club undertook to pay in two instalments under the Loan Agreement (*i.e.* euro 150,000 on 30 March 2018 and Euro 75,000 on 15 April 2018). On the other hand, the second instalment set forth under the Loan Agreement corresponded to the salaries for April and May 2018, for a total amount of Euro 150,000, payable on 31 May 2018.

18. The Player also maintained that, according to the Loan Agreement, in the event of failure by the Club to pay the amount agreed between the Parties under Article 2 lit. b, the Club's obligation to pay the Player's salaries for the sporting season 2017/2018 until 31 May 2018 in accordance with the Employment Contract would be renewed.

19. Therefore, since the Club failed to pay three consecutive salaries due in accordance with the Employment Contract, the Player granted the latter a seven-day time limit after notification of his second warning letter on 25 May 2018 in order for the Club to remedy its default, according to Article 3.2 of the Employment Contract.

20. Notwithstanding the above, and despite the notification of two letters of formal notice, the Club persisted in the non-payment of the relevant outstanding amount and also failed to pay the third instalment due under the Loan Agreement on 31 May 2018, and, as a consequence, the Player terminated the Employment Contract with just cause on 4 June 2018.

21. Finally, the Player requested the FIFA DRC to order the Club to pay the total amount of Euro 375,000 corresponding to five monthly salaries from January to May 2018, plus 5% interest *p.a.* from each due date, as well as compensation for breach of contract in the amount of Euro 750,000, corresponding to the remaining value of the Employment Contract, plus 5% interest *p.a.* as from 4 June 2018.

22. In its reply, the Club first objected that the instalment due on 31 May 2018 does not correspond to the Player's salaries for April and May 2018 as claimed by the Player, since it was agreed between the Parties that the Employment Contract was suspended for the period between 26 March 2018 and 31 May 2018 under the Loan Agreement and therefore, the Club had no obligations towards the Player in that period.

23. Besides, the Player terminated the Employment Contract on 4 June 2018 without just cause as he failed to grant to the Club a deadline of at least 15 days in order to comply with its financial obligations, in accordance with Article 14*bis* of FIFA RSTP which had come into force on 1 June 2018 and was therefore applicable.

24. In any case, the Club argued that the compensation for breach of contract requested by the Player was excessive and should have been reduced by the alternative salaries earned by the Player under the employment contract signed after termination of the Employment Contract. In this regard, the Club argued that, according to some hearsay information, the Player had signed a new contract with MKE Ankaragücü for a supposed annual remuneration of Euro 200,000 and assumed that this amount was misleading since the Player had presumably dissimulated the real value of the new contract in order to escape from his duty of mitigation of damages. In this context, the Club requested the FIFA DRC to order the Player to produce copy of the relevant employment contract signed with MKE Ankaragücü as well as copy of the agreement signed between MKE Ankaragücü and the intermediary allegedly involved in the negotiations for the transfer of the Player.

25. In conclusion, the Club requested the FIFA DRC to reject the Player's claim.

26. In his rejoinder, the Player insisted that he had just cause to terminate the Employment Contract in accordance with the FIFA RSTP and the specific provision set forth under Article 3.2 of the Employment Contract; he also recognized having signed a new employment contract with MKE Ankaragücü for 10 monthly salaries of Euro 20,000 starting from August 2018 until May 2019 and submitted copy thereof. Accordingly, the Player amended his request for compensation to a final amount of Euro 550,000. On the other side, he denied having been represented by any intermediary during negotiations of his transfer.

27. In its last submissions, the Club replied that since the Employment Contract was suspended during the Loan Agreement, the Player's unilateral termination based on Article 3.2 of the said contract was unlawful. In fact, the Player should have respected the condition set forth under Article 14bis of the FIFA RSTP requesting 15 days, at least, of prior notice. With regard to the employment contract signed by the Player with MKE Ankaragücü, the Club alleged that an intermediary was involved in the relevant negotiations and that supposedly, the Player tried to hide his real remuneration with the new club by having part of his salaries paid to his agent in order to lower the impact of his duty of mitigation. In this context, the Club submitted copy of an agreement signed between MKE Ankaragücü and Pro Sport Management in the person of Mr Kenan Mert allegedly acting as the Player's agent in the negotiations for the Player's transfer (the "Protocol") whereby the agent was entitled to receive a commission fee of Euro 400,000, which is exactly twice the amount of the Players' remuneration resulting from the employment contract signed with the new club.

    According to the Club, such document was able to prove that *"the Claimant have rerouted his receivables through his agent, Pro Sport Management FZE (Kenan Mert)"*.

28. On 5 March 2019, the Player signed a new employment contract with the club Mellan Kalmar FF for the period starting from the date of signing until 15 July 2019 for a monthly salary of 10,000 SEK (Swedish Krona), plus a signing fee of 700,000 SEK.

29. On 26 June 2019, the FIFA DRC rendered the Appealed Decision, by which the Player's claim was partially accepted, as follows:

- *"The Respondent, Antalyaspor, 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 375,000 plus 5% interest p.a. until the date of effective payment as follows:*

  5% p.a. as of 1 February 2018 on the amount of EUR 75,000;

  5% p.a. as of 1 March 2018 on the amount of EUR 75,000;

  5% p.a. as of 1 April 2018 on the amount of EUR 75,000;

  5% p.a. as of 1 May 2018 on the amount of EUR 75,000;

  5% p.a. as of 1 June 2018 on the amount of EUR 75,000

- *The Respondent has to pay to the Claimant, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 541,180 plus 5% interest p.a. on said amount as from 16 May 2018 until the date of effective payment.*

- *In the event that the amounts due to the Claimant in accordance with the above-mentioned numbers 2. And 3. Are not paid by the Respondent within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

- *Any further claim lodged by the Claimant is rejected.*

- *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".*

30. The grounds of the Appealed Decision were served by facsimile to the Parties on 24 October 2019.

V. GROUNDS OF THE APPEALED DECISION

31. The grounds of the Appealed Decision can be summarized as follows:

32. Firstly, the DRC considered that, in principle, it was competent to deal with the present dispute based on the provision of Article 24 (1) in combination with Article 22 lit. b of the FIFA RSTP and that the 2018 edition of the FIFA RSTP were applicable to the substance of the matter, considering that the relevant claim was lodged in front of FIFA on 16 May 2018.

33. With regard to the merits and with reference to the unilateral termination of the Employment Contract by the Player, the Chamber considered that according to Article 2 lit. b. of the Loan Agreement, the Club undertook to pay the Player the total amount of Euro 375,000 in three separate instalments, and that the same provision specified that in the event that the Club fulfilled the said financial obligation, the Player would not be entitled to receive remuneration from the Club for the sporting season 2017/2018.

34. In fact, the DRC observed that under the Loan Agreement, the Parties agreed to suspend the Employment Contract from 26 March 208 until 31 May 2018.

35. In view of the opposing arguments of the Parties, the DRC highlighted that the underlying issue was to determine whether the Employment Contract had been terminated by the Player with just cause and, subsequently, to determine the relevant consequences thereof.

36. With regard to the termination letter, in relation to the compliance with the applicable FIFA Regulations, which was contested by the Club, the Chamber considered that at the time when the claim was filed by the Player, on 16 May 2018, Article 14*bis* of the FIFA RSTP, providing for the 15 days default notice, was not in force. Moreover, the Chamber considered that by the means of his default notices, the Player granted the Club 17 days in total to remedy its default. As a consequence, the Club's argument on the relevant point was rejected.

37. Then, the DRC observed that it was uncontested that the Player's salaries of January and February 2018 had remained unpaid and that none of the payments envisaged in the Loan Agreement had been performed by the Club.

38. In such framework, the DRC pointed out that according to Article 2 lit. b. of the Loan Agreement, the Club's financial obligations towards the Player were suspended *"provided that the Respondent paid the Claimant the amounts indicated in the loan agreement which – not casually – corresponded to the salaries the latter would have been entitled to under the employment contract for the period between January and May 2018"*.

39. As a consequence, at the time when the Player terminated the Employment Contract, the total amount of Euro 375,000, corresponding to the Player's salaries as from January until May 2018, was outstanding, resulting in the Club's infringement of its obligations towards the Player who, therefore, had just cause to terminate the Employment Contract on 4 June 2018.

40. With regard to the consequences of the Club's breach, the Chamber first established that the Player was entitled to receive the amount of Euro 375,000 as overdue payables, plus 5% interest *p.a.* as of the day after each due date until the date of effective payment.

41. Secondly, in compliance with Article 17 (1) of the FIFA RSTP, the DRC decided that the Club had to pay compensation for breach of contract. With this respect, in the absence of a compensation clause in the Employment Contract, and considering the criteria provided under Article 17 of FIFA RSTP, the Chamber took into account the amount of remuneration payable to the Player under the Employment Contract as from the date of termination until the original date of expiry, *i.e.* 31 May 2019, as the basis for such calculation, corresponding to Euro 750,000.

42. In continuation, and in accordance with FIFA constant practice in connection with the general obligation to mitigate one's damages, the DRC deducted the alternative salaries payable to the Player under the employment contract signed by the latter with MKE Ankaragücü, amounting to Euro 200,000 and, respectively, with Mellan Kalmar FF, amounting to SEK 700,000 plus a monthly salary of SEK 10,000.

43. As a result, the DRC decided that the Player was entitled to receive an overall amount of Euro 541,180 as compensation for breach of contract, plus 5% interest *p.a.* starting from 16 May 2018, as the date on which the claim was lodged, until the date of effective payment.

VI. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

44. On 13 November 2019, the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Respondent with respect to the Appealed Decision, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration, 2019 edition (the "CAS Code"). The Appellant requested that the present case be submitted to a Sole Arbitrator.

45. On 21 November 2019, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present arbitration proceedings.

46. In accordance with Article R51 of the CAS Code, the Appellant filed its Appeal Brief on 25 November 2019.

47. On 10 December 2019, the CAS Court Office informed the Parties that the Appellant had paid the entire advance of costs of the present arbitration proceedings. On the same day, the Parties were also informed that Mr Fabio Iudica, Attorney-at-law in Milan, Italy, had been appointed as a Sole Arbitrator in the present procedure.

48. On 25 December 2019, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.

49. On 30 December 2019, the CAS Court Office invited the Parties to state whether they preferred a hearing to be held in the present matter or for the Sole Arbitrator to render a decision based solely on the Parties written submissions. On the same day, the Respondent informed the CAS Court Office that he preferred that a hearing be held in the present matter.

50. On 3 January 2020, the Appellant also informed the CAS Court Office of its preference for a hearing to be held.

51. On 8 January 2020, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing in the present case.

52. On 13 January 2020, after consultation with the Appellant and the Respondent, the CAS Court Office informed the Parties that a hearing would be held on 24 February 2020 in Lausanne, Switzerland.

53. On 22 January 2020, the CAS Court Office forwarded the Order of Procedure to the Parties which was returned in duly signed copy by both the Appellant and the Respondent on 23 January 2020.

54. On 24 February 2020, a hearing took place at the Office of the CAS Anti-Doping Division in Lausanne, Switzerland.

55. At the hearing, besides the Sole Arbitrator and Mr Fabien Cagneux, Counsel to the CAS, the following persons were present:

For the Appellant: Mr Sait Kemal Kapulluoğlu and Mr Ismet Bumin Kapulluoğlu, Counsel.

For the Respondent: Mr Mostapha El Kabir, in person, Mr Nihat Güzman and Mr Mumim Adigüzel, Counsel.

56. At the outset of the hearing, the Parties confirmed that they had no objections in respect to the composition of the Arbitral Tribunal and that the Sole Arbitrator has jurisdiction over the present dispute. In their opening statements, the Parties reiterated the arguments already put forward in their respective written submissions.

57. With regard to the Appellant's argument in relation to the Protocol, the Respondent insisted that he was not represented by any agent in the negotiations of his employment contract with MKE Ankaragücü and that the Protocol has remained alien to him; in support of its allegations, the Appellant referred to some alleged verifiable information that could demonstrate the link between the Respondent and the agent in relation to the facts of the case and requested the Sole Arbitrator to be authorized to the relevant production.

58. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their rights to be heard and to be treated equally had been duly respected.

59. On the same day, after conclusion of the hearing, on behalf of the Sole Arbitrator, the CAS Court Office invited the Appellant to submit the supplementary documents mentioned during the hearing within the next five days and to elaborate on the exceptional circumstances for the admissibility of said documents.

60. On 28 February 2020, the Appellant submitted 6 documents and relevant justification for late submission (exceptional circumstances), in connection with the relationship between the Respondent and pro Sport Management in the person of Mr Kenan Mert, allegedly acting as the Player's intermediary in the negotiation of the employment contract with MKE Ankaragücü.

61. On the same day, the CAS Court Office invited the Respondent to submit his comments to the admissibility of the documents presented by the Appellant, within the next five days.

62. On 2 March 2020, the Respondent filed his position objecting to the admissibility of the Appellant's late submissions according to Article R56 of the CAS Code and requested the Sole Arbitrator to exclude them from the file.

63. On 3 March 2020, the CAS Court Office informed the Parties that the Sole Arbitrator, after having considered the respective positions of the latter, had decided to admit the Appellant's

exhibit n. 5 and 6 to the file, and to exclude exhibits n. 1, 2, 3 and 4 and that the grounds of such decision would be provided with the final arbitral award.

VII. SUBMISSIONS OF THE PARTIES

64. The following outline is a summary of the Parties' arguments and submissions which the Sole Arbitrator considers relevant to decide the present dispute and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator has nonetheless carefully considered all the submissions made by the Parties, even if no explicit reference has been made in the following summary. The Parties' written and oral submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. The Appellant's Submissions and Requests for Relief

65. The Appellant's submissions in its Statement of Appeal and in its Appeal Brief may be summarized as follows.

66. First of all, the Appellant contested the rightfulness of the Player's termination letter based on the following reasons.

67. During the period between 26 March 2018 and 31 May 2018, when the Loan Agreement was in force between the Parties, the Employment Contract was suspended. As a result, the Club had no obligations towards the Player in the relevant period. Likewise, the Player could not rely on Article 3(2) of the Employment Contract to establish a just cause for termination. Therefore, the 7-day deadline set forth under said Article 3(2) was also not applicable and, as a consequence, the termination letter sent by the Player on that assumption, is completely unwarranted. Moreover, since Article 14*bis* of the FIFA RSTP was in force at that time, the Player should have respected the minimum 15-day prior notice before terminating the Employment Contract. In this regard, when assessing whether Article 14*bis* was applicable to the present matter, the DRC wrongly assumed that the Player's claim was lodged on 16 May 2018, since the date of filing is indeed 18 June 2018 and, in any case, the date of the termination letter is 4 June 2018. Therefore, contrary to what was established by the FIFA DRC in the Appealed Decision, when the Player terminated the Employment Contract, Article 14*bis* of the FIFA RSTP was already in force. Therefore, the Player did not meet the necessary requirement for the termination of the Employment Contract with just cause.

68. Besides the foregoing, the compensation for breach of contract awarded by the Appealed Decision is excessive in view of the Player's duty of mitigation.

69. In this respect, the Club emphasized that the amount of remuneration set forth under the employment agreement signed by the Player with MKE Ankaragücü (*i.e.* Euro 200,000 for the sporting season 2018/2019) was extremely low in comparison to the monies to which the Player was entitled under the Employment Agreement. On this point, the Club alleged that the conditions resulting from the relevant contract were deceptive and that the Player has tried

to conceal his real remuneration by allocating part of his salaries under the Protocol in the form of the Player's agent fee, in order to minimise his duty of mitigation.

70. In fact, the Protocol shows that Pro Sport Management had the authorization to act in representation of the Player for his transfer to MKE Ankaragücü; that the Protocol itself was an integral part of the employment contract signed between the player and MKE Ankaragücü; that according to Article 5 (d), the total amount of Euro 400,000 paid to the agent by the Club also includes the part of the fee (*i.e.* Euro 200,000) which was due to the agent by the Player, for his transfer: *"The amount (i.e. EUR 200.000-) to be paid to the agent by the Club due to art. 5(d) is to be paid on behalf of the Player. As this amount is equal to the total remuneration of the Player for the season 2018/2019 there should be no doubt that this is an additional payment to be made by the Club to the Player on top of the remuneration determined with the employment contract"*. Therefore, it results that *"the amounts stipulated under the Protocol also are the Player's remuneration"*. In support of its arguments, the Club also stressed that it is completely unusual and unreasonable for an agent's fee to even double the amount of remuneration payable to the player that he represents in a negotiation, as it appears to be in the present case. As a consequence, the Appellant maintained that the total amount of Euro 600,000 (Euro 200,000 under the employment contact and Euro 400,000 under the Protocol) should be considered when assessing the amount of compensation payable to the Player.

71. The Club argued that the FIFA DRC completely failed to take into consideration the arguments above as it appears from the reasoning in the Appealed Decision, which constitutes a violation of its right to a fair trial.

72. In any event, should the Sole Arbitrator rejects the allegations of bad faith of the Player, the facts of the case at least show that, when signing the employment contract with MKE Ankaragücü, the Player freely decided to accept a drastic reduction of its remuneration and, therefore, he cannot take advantage of the financial loss suffered after the early termination of the Employment Contract, to the detriment of the Club, since he failed to comply with his duty to mitigate damages, also in accordance with FIFA and CAS jurisprudence (FIFA case No. 06-00085/plo, Wanchope v. Al Gharafa; CAS 2006/A/1123 & 1124).

73. Finally, the Club maintained that the compensation in the amount of Euro 541,180 is unacceptable and also, that the starting date of the interest on the amount of compensation should be 4 June 2018, as the date when the Employment Contract was terminated by the Player.

74. The Appellant submitted the following requests for relief:

"a. to set aside the challenged decision of the FIFA Dispute Resolution Chamber in its entirety,

b. to rule that the termination of the Respondent as termination without just cause,

c. to condemn that the Respondent is not entitled to any compensation for the premature termination of the employment agreement between the Parties,

d. to condemn the Respondent to pay the Appellant the legal fees and other expenses in connection with the proceedings".

B. The Respondent's Submissions and Requests for Relief

75. The position of the Respondent is set forth in his Answer and can be summarized as follows.

76. With respect to the termination of the Employment Contract, the Player maintained as follows:

By the end of March 2018, the Club was in default of payment of the Player's salaries for January, February and March 2018, for a total amount of Euro 225,000 and had also imposed the Player to train alone. In this context, the Parties signed the Loan Agreement on 26 March 2018, whereby it was also agreed that the Club settle the outstanding payments, as well as the salaries for April and May 2018 which were still not overdue at the time of signing, according to the following deadlines:

- Euro 150,000 on 30 March 2018;
- Euro 75,000 on 15 April 2018;
- Euro 150,000 on 31 May 2018.

Therefore, according to the Respondent, *"Hence, for the season 2017/2018 totally 5 months salaries of 75.000EURx5=375,000 would be paid to the player and if Antalyaspor A.Ş. paid 575.000EUR to the player, the player would have NO remuneration from the season 2017/2018 from Antalyaspor A.Ş. until May 2018".*

Indeed, under the Loan Agreement, the Parties agreed on a different payment schedule than the one stipulated under the Employment Contract: *"the Parties only changed due dates of monthly salaries on the employment contract by means of the loan agreement"* and also, the Club was exempted from any obligation relating to other benefits and allowances such as bonuses, car, apartment, air tickets, etc.

Therefore, in case of failure by the Club to comply with the payment plan set forth under the Loan Agreement, the financial obligations stipulated under the Employment Contract would come back into force.

77. The Appellant failed to comply with the terms of the Loan Agreement, and, as a result, its obligations under the Employment Contract were automatically reinstated.

78. The Respondent also insisted that the Club was notified two default notices and, nevertheless, persisted in its breach notwithstanding the overall time limit of 17 days granted by the Player to remedy its breach; besides, the time limit of 7 days granted to the Club with the second default letter was appropriate and in accordance with Article 3.2 of the Employment Contract. Therefore, the Employment Contract was terminated with just cause.

79. With regard to the amount of compensation awarded by the FIFA DRC, the Respondent rejected the Appellant's objections concerning the real amount of the alternative salaries earned by the Player after the termination of the Employment Agreement. In this respect, the Respondent insisted that he did not receive any other amount than the salaries stipulated under the employment contract signed with MKE Ankaragücü.

80. As to the Protocol, the Respondent objected that he was not a party to the relevant agreement, that he was not even aware of its existence and that, as it results from the Employment Agreement, that he was not represented by any agent, nor did he authorize the concerned intermediary to act on his behalf.

81. In conclusion, the Respondent submitted the following requests for relief:

"1. Arrange a hearing and the player will attend hearing as principal.

2. Applicant Antalyaspor A.Ş. unfair and baseless request should be rejected".

VIII. JURISDICTION

82. Article R47 of the CAS Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with 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 it prior to the appeal, in accordance with the statutes or regulations of that body.

83. In its Statement of Appeal, the Appellant relies on Articles 57 and 58(1) of the FIFA Statutes, in combination with Article R47 of the CAS Code as conferring jurisdiction to the CAS.

84. The jurisdiction of the CAS was not contested by the Respondent.

85. The signature of the Order of Procedure confirmed that the jurisdiction of the CAS in the present case was not disputed.

86. Accordingly, the Sole Arbitrator is satisfied that CAS has jurisdiction to hear the present case.

IX. ADMISSIBILITY OF THE APPEAL

87. Article R49 of the CAS Code provides the following:

88. *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

89. According to Article 58(1) of the FIFA Statutes *"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"*.

90. The Sole Arbitrator notes that FIFA DRC rendered the Appealed Decision on 26 June 2019 and that the grounds of the Appealed Decision were notified to the Parties on 24 October 2019. Considering that the Appellant filed its Statement of Appeal on 13 November 2019, *i.e.* within the deadline of 21 days set in the FIFA Statutes, the Sole Arbitrator is satisfied that the present appeal was filed timely and is therefore admissible.

X. APPLICABLE LAW

91. Article R58 of the CAS Code provides the following:

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

92. The Appellant relies on the application of the FIFA RSTP and, subsidiarily, of Swiss law, in accordance with Article 57(2) of the FIFA Statutes.

93. In consideration of the above and pursuant to Article R58 of the CAS Code, the Sole Arbitrator holds that the present dispute shall be decided principally according to FIFA RSTP, Edition 2018, with Swiss law applying subsidiarily.

XI. LEGAL ANALYSIS

A. Preliminary issue

94. Before entering into the substance of the matter, the Sole Arbitrator shall first turn his attention to the submissions and exhibits which were filed by the Appellant after the hearing.

95. As already mentioned above under the section dedicated to the CAS proceedings, such late submissions relates to the alleged relationship between the Respondent and Pro Sport Management (in the person of Mr Kenan Mert), in connection with the Protocol which was attached by the Appellant to its Appeal Brief under Exhibit n. 12.

96. In his Answer, the Respondent denied the involvement of any agent in the negotiations of his employment contract with MKE Ankaragücü and objected to the relevance of the Protocol in his regards, also claiming that he was not aware of the Protocol and the relevant stipulations therein. As a consequence, the Appellant maintained that the need to demonstrate the link between the Player and Pro Sport Management (Mr Kenan Mert) as well as the connection between the Protocol and the Player only arose with the Respondent's exceptions in the Answer, *i.e.* after the filing of its Appeal Brief.

97. The Sole Arbitrator observes that, as a general rule, according to Article R56 of the CAS Code, the Parties are required to submit all their evidence and arguments with the filing of the Appeal Brief and the Answer, after which they shall not be authorized to supplement their request or their arguments or to produce new exhibits, unless the parties agree otherwise or the panel orders otherwise on the basis of exceptional circumstances.

98. Moreover, according to Article R44.3 of the CAS Code which is also applicable to appeal proceedings through the reference contained in Article R57 (3), the panel may at any time order, *inter alia*, the production of additional documents if it deems it appropriate to supplement the presentations of the parties.

99. In this respect, the Sole Arbitrator notes that the new evidentiary request made by the Appellant aimed at corroborating the Appellant's argument already submitted with its Appeal Brief and did not introduce any new case or reasoning.

100. In this context, based on the Respondent's refusing to acknowledge the Protocol, and in accordance with Article R56, in combination with Article R44.3 of the CAS Code, on 24 February 2020, upon authorization by the Sole Arbitrator, the Appellant was invited to file supplementary evidence in strict connection with the issue relating to the alleged link between the Player and Pro Sport Management which has been disputed by the Respondent.

101. As already mentioned before, the Appellant submitted 6 new documents in order to substantiate the link between the Player and Mr Kenan Mert, as follows:

Exhibit 1, consisting in an Instagram post, dated 22 June 2018, whereby the name of Mr Kenan Mert is associated with the name of Mr Hasan Çetinkaya, another players' agent whom the Appellant alleges having worked with the Player in the past;

Exhibit 2, consisting in an abstract from a chart which the Appellant affirms being created and published by the TFF associating the Player to Pro Sport Management in relation to the transfer to MKE Ankaragücü;

Exhibit 3, consisting in the screen capture of the Player's profile on the website called Transfermarkt, showing the connection between the Player and HCM Sport Management;

Exhibit 4, consisting in the screen capture on Transfermarkt website of the profile of HCM Sports Management, allegedly headed by Mr Hasan Çetinkaya;

Exhibit 5, consisting in a letter dated 24 February 2020, with translation from Turkish to English, from MKE Ankaragücü to the Appellant's counsel, drafted on the company letterhead, containing information in connection with the conclusion of the employment contract with the Respondent, and relevant attachment;

Exhibit 6, consisting in the power of attorney granted by Mr Kenan Mert on behalf of Pro Sport Management, dated 13 March 2019 and the request for an order of payment on the same date, against MKE Ankaragücü, for the collection of Euro 155,000 plus interests, as

partial payment of a representative fee *"Resulting from the transfer of Football Player Mostapha El KABIR to M.K.E. Ankaragücü spor Kulübü"*.

102. The Sole Arbitrator believes that, from a formal point of view, except for Exhibits 5 and 6 above, the other documents submitted by the Appellant are incomplete or unofficial or uncertain as to their source and are therefore not reliable and appropriate in order to supplement the argument set forth by the Appellant against the exceptions raised by the Respondent.

103. Consequently, as already communicated to the Parties by the CAS Court Office letter dated 3 March 2020, Exhibits 1, 2, 3 and 4 filed by the Appellant on 28 February 2020 are excluded from the file and shall not be taken into consideration for the purpose of deciding the present case.

B. Merits

104. Addressing the merits of the case at issue, the Sole Arbitrator observes that the following facts are undisputed between the Parties: a) that the Employment Contract was unilaterally terminated by the Respondent by letter to the Club dated 4 June 2018; b) that when the Respondent terminated the Employment Contract, the Loan Agreement was in force, according to which the Club undertook to pay a total amount of Euro 375,000 to the Player in three instalments as follows: Euro 150,000 on 30 March 2018; Euro 75,000 on 15 April 2018; Euro 150,000 on 31 May 2018; c) that the Respondent notified the Appellant with two default letters on 2 and, respectively, 25 May 2018 requesting payment of the outstanding amount of Euro 225,000 payable under the Loan Agreement; d) that the first default notice granted the Club a time limit of 10 days to remedy its debt, while the time limit granted with the second letter of formal notice was determined in 7 days; e) that, after termination of the Employment Contract, the Player signed a new employment contract with MKE Ankaragücü from 16 July 2018 until 31 May 2019, which was early terminated, following which a second employment contract was signed with Mellan Kalmar FF valid as from 5 March 2019 until 15 July 2019.

105. The Sole Arbitrator also notes that the Appellant has never disproved its failure to comply with the payment of the amounts set forth under the Loan Agreement, for a total amount of Euro 375,000, although the Parties disagree on the nature of the relevant debt.

106. Even though it seems that the Appellant does not, in principle, object to the fact that the Player was entitled to receive the said amount under the Loan Agreement, on the other side, it argues that the relevant amount does not correspond to the Player's salaries since the Employment Contract was suspended between the Parties during the Loan Agreement and therefore, the Club had no obligations towards the Player deriving from the said Employment Contract.

107. On the contrary, the Respondent contends that the amount of Euro 375,000 actually corresponds to 5 instalments of his monthly salaries under the Employment Contract, from January to May 2018, amounting to Euro 75,000 each, 3 of which (*i.e.* the salary for January,

February and March 2018) were already in arrears when the Loan Agreement was concluded, while the salaries of April and May 2018 (Euro 150,000) were both rescheduled under the Loan Agreement for the deadline of 31 May 2018. In fact, the Respondent maintains that by means of the Loan Agreement, the Parties agreed on a new payment schedule of the Player's outstanding salaries at that moment, and also of the salaries for April and May 2018 which were still undue at the time when the Loan Agreement was signed.

108. What is therefore contested between the Parties first, is whether the failure by the Club to pay the amounts due under the Loan Agreement constitute just cause for the unilateral termination of the Employment Contract by the Player on 4 June 2018.

109. In this respect, the Sole Arbitrator recalls that, according to Article 2 lit. b) of the Loan Agreement, the Parties stipulated the following: *"Antalyaspor A.S. will pay to the Player 150.000,00 Euro on 30 March 2018, 75.000,00 Euro on 15 April 2018, 150.000,00 Euro on 31.05.2018 during the Loan period. If Club Antalyaspor would pay this amounts, Player will have no remuneration from Antalyaspor for the period of 2017-2018 football season (i.e. till 31 May 2018)"*.

110. The Sole Arbitrator believes that, although the phrasing of the clause above is not so accurate and could have been more appropriate from a legal point of view, the common intent of the Parties was clear in the sense of suspending the Club's obligations under the Employment Contract, on condition that the payments stipulated in the Loan Contract were fulfilled.

111. Such interpretation is compatible with the Respondent's position, which the Sole Arbitrator believes to be convincing, that by the Loan Agreement, the Parties had found a settlement agreement in relation to the arrears payment of the Player's salaries at that time and they had also rescheduled the forthcoming salaries for the month of April and May 2018: *"the Parties only changed due dates of monthly salaries on the employment contract by means of the loan agreement"*.

112. In this respect, the Sole Arbitrator emphasizes that the Club failed to demonstrate that the Player's salaries for January, February and March 2018 have been paid, nor did the Club ever contested the Player's claim with regard to the payment of the said salaries.

113. As a consequence, the Sole Arbitrator believes that the following facts have been established: a) that when the Loan Agreement was concluded, the Club was already in default of payment of three of the Player's salaries (January, February and March 2018); b) that the Parties rescheduled the payment of the Player's salaries from January until May 2018 under Article 2 lit b) of the Loan Agreement; and c) that the Parties agreed to suspend the Employment Contract provided that the Club complied with the new payment schedule.

114. Since the condition set forth under Article 2 lit. b) of the Loan Agreement was not met, due to the Appellant's failure to comply with the deadlines envisaged thereunder, the Club's financial obligations towards the Player according to the terms and conditions under the Employment Contract have come back into force.

115. In this context, when the Player sent his first formal notice on 2 May 2018, an amount of Euro 225,000 was outstanding, corresponding to the Player's salaries for January, February

and March 2018, and therefore the conditions were met for the application of Article 3.2 of the Employment Contract: *"In case of non-payment of three consecutive payments the Player can send a notice to the Club and give seven days for the payment. If the Club still does not pay by the end of the given seven days period the Player may unilaterally terminate the contract with just cause"*.

116. Besides the foregoing, the Sole Arbitrator also observes that the Player sent a second formal notice on 25 May 2018, due to the persistent failure by the Club, and granted the latter a further deadline of 10 days to remedy its default. Therefore, the Sole Arbitrator agrees with the FIFA DRC that the Respondent gave the Appellant an overall period of 17 days before terminating the Employment Contract.

117. In view of the above, the Appellant's argument that the termination letter dated 4 June 2018 did not respect the minimum deadline of 15 days required by Article 14*bis* of the FIFA RSTP (June Edition 2018) is rejected for the following reasons: a) at the time when the Player notified the first and the second formal notice, article 14*bis* of the FIFA RSTP, Edition June 2018, invoked by the Appellant was not yet in force; b) both the first and the second letter of formal notice were notified in accordance with Article 3.2 of the Employment Contract which had come back into force due to the Club's failure to comply with the payments under the Loan Agreement; c) in addition, the overall deadline granted to the Club with the Player's two letters of formal notice was even more favourable than the deadline required under Article 14*bis* of the FIFA RSTP which entered into force on 1 June 2018.

118. Furthermore, the facts of the case show that when the Player notified the Club with the termination letter on 4 June 2018, the Player's salaries for April and May 2018 have also became overdue, for a total of 5 monthly instalments, amounting to Euro 375,000.

119. Therefore, the Appellant is responsible of a severe breach of contract which has been repeated over time, thus creating the basis for termination with just cause of the Employment Contract, in accordance with both Articles 14 and 14*bis* of the FIFA Regulations.

120. In addition, the Club also failed to reply to the Player's letters of default, giving the latter no other chance than filing his claim before the FIFA DRC and ultimately terminating the Employment Contract.

121. In view of the foregoing, the Sole Arbitrator is satisfied that the Player had just cause to terminate the Employment Contract on 4 June 2018, due to the Appellant's failure to comply with its financial obligations.

122. Having established the foregoing, the Sole Arbitrator now turns his attention to the issue raised by the Club in relation to the amount of compensation awarded to the Player by the Appealed Decision, which has been contested by the Appellant as allegedly excessive in view of the Player's duty to mitigate his damages.

123. In fact, as already mentioned above in the previous sections, the Appellant claims that **a)** the Player has allegedly concealed the real alternative salaries earned after the termination of the Employment Contract under the contract with MKE Ankaragücü or, **b)** subsidiarily, that the

said alternative salaries, as well as the remuneration payable to the Player under the contract with Mellan Kalmar FF, are dramatically lower than the remuneration to which the Player was entitled under the Employment Contract, which fact shows, at least, that the Player voluntarily accepted such worse conditions and shall be responsible for this unfortunate choice.

124. On the other side, the Respondent objected that he was not a party to the Protocol, nor has he signed it; that he was not even aware of the stipulations under the Protocol; that he was not represented by any agent in the transfer to MKE Ankaragücü and that he did not give any authorization to Pro Sport Management to represent him in the relevant negotiations.

125. In light of the foregoing, the Sole Arbitrator observes that the Club submitted detailed argument on the point but failed to submit a specific request for relief in that sense.

126. In fact, the Appellant merely requested that the CAS set aside the Appealed Decision and establish that the Respondent had no just cause to terminate the Employment Contract and *"is not entitled to any compensation for the premature termination of the employment agreement between the Parties"*.

127. In this context, the Sole Arbitrator observes that, without prejudice to the provision of article R57 of the CAS Code, which confers the CAS the full power to review the facts and the law of the case, the Sole Arbitrator is nonetheless bound to the limits of the parties' motions, since the arbitral nature of the proceedings obliges the Sole Arbitrator to decide all claims submitted by the Parties and, at the same time, prevents him from granting more than the Parties are asking by submitting their requests for relief to the CAS, according to the principle of *ne ultra petita*.

128. As a consequence, and irrespective of the merits of the Appellant's argument on the relevant point, the Sole Arbitrator has no power to amend the amount of compensation granted by the Appealed Decision.

129. Notwithstanding the above, for the sake of accuracy, the Sole Arbitrator observes that, in any case, the Appellant has not discharged its burden of proof with respect to the allegations under letter **a)** and **b)** above.

130. In particular, with regard to point **a)**, in consideration of all the circumstances of the present case, and also taking into account the Respondent's position, none of the documents produced by the Appellant is suitable to prove that Euro 200,000 out of the total amount of Euro 400,000 apparently payable to the agent under the Protocol was actually a part of the Player's remuneration which has been deceitfully dissimulated in order to maximise the compensation for breach of contract, as maintained by the Appellant.

131. Even admitting that an agent was involved in the relevant negotiations on behalf of the Player (which fact is nonetheless denied by the Respondent), the fact that the correspondence regarding the Player's transfer was forwarded to Mr Hasan Cetinkaya upon indication of the Player's agent, according to MKE Ankaragücü's statement, or the fact that Mr Kenan Mert appointed an attorney in order to recover partial payment of the commission fee resulting

from the Protocol, according to the document submitted by the Appellant on 28 February 2020 under Exhibit n. 6, are not suitable to validly support the Appellant's allegation that part of the commission fee actually represented an additional share of the Player's remuneration. Likewise, in the absence of any threshold set forth in the applicable FIFA Regulations, the amount of the commission fee set forth in the Protocol, which the Appellant considered to be extremely high, merely constitutes an assumption in the context of the Appellant's argument and cannot achieve any probative value, in the absence of any other concurrent proof.

132. With regard to point **b)** the Sole Arbitrator recalls that, in application of the Player's duty to mitigate his damages according to Swiss law and consistent with the long-established CAS jurisprudence (CAS 2014/A/3706; CAS 2005/A/909-910-911; CAS 2005/A/801; CAS 2004/A/587 where CAS panels applied Article 337c (2) of the Swiss Code of Obligations), the remaining value of the Employment Contract shall be reduced by deduction of the alternative monies earned by the Player under the employment contract with MKE Ankaragücü and Mellan Kalmar FF.

133. However, with regard to Appellant's argument that the Player has not fulfilled his duty of mitigation by accepting extremely lower conditions in comparison with the remuneration earned under the Employment Contract, the Sole Arbitrator abides by the CAS case law and holds that the Appellant has failed to fulfil the burden of proof with respect to the Player's alleged violation:

"The duty to mitigate damages shall be regarded in accordance with the general principle of fairness, which implies that, after a breach by the club, the player must act in good faith and seek for other employment, showing diligence and seriousness, with the overall aim of limiting the damages deriving from the breach and avoiding that a possible breach committed by the club could turn into an unjust enrichment for him. The duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign a contract with worse financial conditions, in the absence of any valid reason to do so. However, the circumstance that a player received a higher remuneration under his former contract than he will receive under his new contract is not in itself sufficient to mean automatically that the compensation payable from his former club has to be reduced in the event that the new contract does not pay the player just as well as the original contract did" (see CAS 2018/A/6029; CAS 2016/A/4582; CAS 2016/A/4605).

134. In consideration of the final findings above, the Sole Arbitrator shall not address any other issue and all other motions or prayers for relief are dismissed.

135. In view of all the foregoing, the Sole Arbitrator has reached the conclusion that the appeal filed by the Club shall be entirely rejected and the Appealed Decision shall be confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Antalyaspor A.Ş. against the decision of the Dispute Resolution Chamber of FIFA on 26 June 2019 is dismissed.

2. The decision rendered by the Dispute Resolution Chamber of FIFA on 26 June 2019 is confirmed.

3. (…).

4. (…).

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