Arbitration CAS 2021/A/8318 Club Deportes Tolima S.A. v. FC Honka, award of 11 August 2022

Panel: Mr Francesco Macri (Italy), Sole Arbitrator

Football
Request for training compensation in an employment-related dispute regarding a breach of contract
Scope of the appeal and scope of review of the CAS

CAS power to review an appealed decision cannot be wider than the one of the judicial body that issued such decision. Therefore, if a dispute before the first instance body was registered as an employment-related dispute against a player, with the appellant club solely asking for compensation regarding an alleged breach of contract without just cause, the appellant club is not legitimated to change the subject of the dispute before the CAS, waiving its request for relief regarding compensation for breach of contract without just cause and moving to another request for training compensation where the parties could be only the clubs (and not the player).

I. PARTIES

1. Club Deportes Tolima S.A. (the "Appellant" or "Tolima") is a professional football club with its registered office in Armenia, Quindío, Colombia. Tolima is registered with the Colombian Football Federation (the "FCF"), which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

2. Football Club Honka Espoo (the "Respondent" or "Honka") is a professional football club with its registered office in Espoo, Finland. Honka is registered with the Football Association of Finland (the "SPL"), which in turn is affiliated to FIFA.

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

II. FACTUAL BACKGROUND

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

A. Background Facts

4. On 10 March 2017, the Appellant and the Colombian player, J. (the "Player"), born on 6 June 2002, signed a settlement agreement according to which the Appellant acquired the totality of the Player's federative and economic rights in consideration of the total amount of COP 100,000,000. The agreement was signed by the Player, the Appellant, and the Player's parents, considering that he was a minor at that time.

5. On 1 July 2017, the Appellant and the Player concluded an employment contract ("CONTRATO DE TRABAJO A TERMINO FIJO") valid from the date of signature until 30 June 2020. Considering that the Player was fifteen years old, the first employment contract was concluded for three years only and countersigned by his parents.

6. On 19 May 2020, the Player's representatives lodged a claim before the Colombian Ministry of Labour against the Appellant, assuming that a second employment contract later submitted by the Appellant and allegedly signed by the latter and the Player was null and void.

7. On 20 May 2020, the Player (through his legal representatives) notified the Appellant of the termination of their employment relationship. In this respect, the Player informed that he had not received any offer from the Appellant to extend their employment relationship and remained open to further negotiations. The same information was provided to the Colombian Comisión de Estatuto del Jugador, Division Mayor del Futbol Colombiano – Dimayor Tribunal Deportivo, Difutbol, Division aficionada del Futbol Colombiano and the Ministry of Sport of Colombia.

8. On 28 May 2020, the Appellant answered the Player's notice and pointed out that he was still under contract for three additional years. The Appellant also stated that it complied with all its labour duties and that the Player was an essential asset to its team.

9. On 3 June 2020, the Player (through his legal representatives) replied, informing that any additional agreement signed with the Appellant (i.e. the second employment contract) was illegal and that his employment relationship was only valid until 20 June 2020, namely the expiry date of the first employment contract signed by the Appellant and the Player.

10. On 6 June 2020, the Player turned 18 years old.

11. On 5 September 2020, the Player concluded an employment contract with the Honka valid from the date of signature until 20 November 2021, with an extension option until 30 November 2022.

12. On 1 February 2021, the second instance Colombian Criminal Court (i.e. *Juzgado Quinto Penal del Circuito Confunciones de Conocimiento Ibagué*) issued its decision. It stated the non-existence of an employment relationship between the Appellant and the Player for the period between 2020 and 2023.

B. Proceedings before the FIFA Dispute Resolution Chamber

13. On 23 February 2021, Tolima filed a claim against the Player and Honka before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting the total amount of EUR 2,000,000,00, as compensation for breach of an employment contract. The Appellant requested training compensation as part of the compensation for the Player's alleged breach of the employment contract.

14. Both the Player and Honka filed a statement of defence, objecting that the second employment contract was null and void since it was signed when the Player was a minor and without the written consent of his parents. The Respondents concluded that the Player *"was released from any obligation with the club as of 1 July 2020, being entitled to sign a contract with any other club; since the employment contract with Honka FC was only signed on 5 September 2020, the Player has not committed a breach of contract"*.

15. On 12 August 2021, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

> *"1. The claim of the Claimant, Deportes Tolima, is rejected.*
>
> *2. This decision is rendered without costs amount:*

16. On 30 August 2021, the grounds of the Appealed Decision were communicated to the Parties, providing, *inter alia*, as follows:

- *"*[…] t*he Dispute Resolution Chamber* [...] first *analysed whether it was competent to deal with the case at hand. […]. Taking into account the wording of art. 21 of the January 2021 edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: the Procedural Rules), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.* […] *and observed that in accordance with art. 24 par. 1 in combination with art. 22 lit. a) and b) of the Regulations on the Status and Transfer of Players (edition February 2021), the Dispute Resolution Chamber is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a Colombian player, a Colombian club and a Finnish club.*

- *[…] the Chamber firstly noted that the club, on its part, claimed that its contractual relationship with the player was renewed on 1 July 2021 and was valid until 30 June 2023, so that the Respondents should be jointly liable to the consequences of the premature termination. Alternatively, the DRC observed that the club maintained that its contractual relationship with the player was at least valid until the official end of the 2020 season, postponed to May 2021 due to the COVID pandemic* […]

- *On the other hand, the DRC was also observant that the Respondents categorically denied the renewal of the player's employment relationship with the club. In particular, the Chamber outlined that Respondents stressed that the second employment contract was forged (pre-dated) and signed with the player while he was still a minor. Consequently, the DRC took due note of the Respondents'*

argumentation in the sense that, by the time of the conclusion of the new employment agreement with FC Honka, the player was a free agent.

- *[…[the members of the Chamber turned their attention to the submissions and to the documentation brought forward by the parties* and *deemed that the club (tacitly) admitted that the second employment contract was predated and, in parallel, acted in bad faith while trying to force the player to accept the extension of their employment relationship for additional 3 years –in spite of his manifest intention to follow his career with FC Honka.*

- *In light of the above, the Chamber recalled the content of art. 12, par. 3 of the Procedural Rules and unanimously decided that the Respondents could establish that the second employment contract was signed by the parties before the date therein indicated. Likewise, the DRC considered that the documentation on file also corroborates with the Respondent's allegations that the second employment contract was concluded when the player was still a minor, without the written consent of his legal representatives.*

- *Finally, the DRC also wished to outline that the club's allegation regarding the automatic extension of the first employment contract could not be upheld. In this respect, the Chamber pointed out that, even if the second employment contract was to be considered (quod non), the wording of clause 2 of the first employment contract was clear to establish that it was only valid until 20 June 2020, without further exemptions. In addition, the Chamber highlighted that the player had expressly formalized that his relationship with the club was terminated on 20 June 2020. Therefore, in accordance with the DRC, if the parties intended to extend their employment relationship until the official end of the season, they should have agreed to that in written – as expressly encouraged by the COVID-19 Guidelines issued by FIFA.*

- *Consequently, the Chamber unanimously decided that the second employment contract is null and void. It follows that the player was a free agent when signing for FC Honka and thus, in the absence of any valid contract executed between the player and the club, no compensation shall be awarded to the latter".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 20 September 2021, Tolima filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Player and Honka, with respect to the Appealed Decision, in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (edition 2020) (the "CAS Code"). In this submission, Tolima requested the appointment of a Sole Arbitrator.

18. On 4 November 2021, within the extended deadline previously agreed by the Parties, Tolima filed its Appeal Brief in accordance with Article R51 CAS Code. In its submissions, the Appellant expressly waived its claim for compensation for breach of contract towards the Player, and it maintained a request for a training compensation towards Honka.

19. On 14 December 2021, in accordance with Article R54 CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

Sole Arbitrator: Mr Francesco Macrì, Attorney-at-Law in Piacenza, Italy.

20. On 7 February 2021, the CAS Court Office informed the Parties that the Respondent did not file its Answer within the extended time.

21. By separate communications on 7 and 10 February 2021, the Parties informed the CAS Court Office that they prefer the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

22. On 7 February 2021, the Respondent sent a correspondence stating the following:

"The decision given by the FIFA is well-founded and has taken into account all the key issues in this matter. Furthermore, there is no new evidence in this stage, which would give rise to the amendment of a previous decision. […] Fc Honka still agrees 100% with the FIFA decision in its entirety and hopes that CAS will take the same position in its decision".

Thereafter, the Appellant objected to the admissibility of such correspondence.

23. On 15 February 2021, the CAS Court Office informed the Parties that the Sole Arbitrator deemed himself well-informed to decide the case based solely on the Parties' written submissions. A communication from the Respondent, dated 7 February 2021, was also admitted into the case file, being it a mere statement on the case, not containing any procedural or substantial request.

24. On 16 February 2021, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed by the Parties. By signing the Order of Procedure, the Parties confirmed their agreement that this case be decided on the sole basis of their written submissions. Furthermore, the Parties also confirmed that their right to be heard had been fully respected by the Sole Arbitrator.

25. The Sole Arbitrator confirms that it carefully heard and took into account in its decision all the submissions, evidence, and arguments presented by the Parties, even if they have not explicitly been summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

26. The Appellant's submissions, in essence, may be summarised as follows:

- All the criteria for the requested training compensation, according to Article. 1.2, Annexe 4 of FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), were fulfilled.

- The Player was registered with Tolima as an amateur football player from 14 June 2017 to 1 July 2020, i.e., from fifteen to eighteen years old.

- The Player signed his first professional contract with Honka, a Finnish club that falls under the category III UEFA, according to FIFA circulars no. 1249 of 2010 and no. 1726 of 2020.

- According to Art. 4 of FIFA RSTP, the teams that train players from twelve to twenty-one years old are entitled to receive a training compensation from the club with which that player is registered as a professional for the first time. That compensation shall be calculated *"on a pro rata basis according to the period of training that the payer spent with [the] club"*.

- The table provided by the Appellant illustrates that the amount due by Honka corresponds to EUR 80.547,95, and this claim is *"without prejudice to any obligation to pay compensation for breach of contract",* according to Art. 1.2 of Annexe 4 of FIFA RSTP.

- On this basis, the Appellant submitted the following prayers for relief in its Appeal Brief:

  "To order FC Honka to the following:

  a. Pay the amount of € 80.547,95 for training compensation plus 5% interest since October 5th, 2020.

  b. Pay the costs of this arbitration procedure.

  c. Pay a discretionary contribution toward the fees and expenses of the Appellant equivalent to CHF 5,000 based on article 64.5 of the Code".

B. The Respondent

27. The Respondent did not file its Answer within the provided deadline. On 7 February 2021, it communicated the following: *"The decision given by the FIFA is well-founded and has taken into account all the key issues in this matter. Furthermore, there is no new evidence in this stage, which would give rise to the amendment of a previous decision. […] Fc Honka still agrees 100% with the FIFA decision in its entirety and hopes that CAS will take the same position in its decision".*

V. JURISDICTION

28. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) FIFA Statutes (2020 Edition), as it determines that *"[a]ppeals 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 receipt of the decision in question"*, and Article R47 CAS Code. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by both Parties.

29. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

30. The appeal was filed within the deadline set by Article 58(1) FIFA Statutes, i.e., on 20 September 2021, and it complied with all other requirements of Article R48 CAS Code, including the CAS Court Office fee payment.

31. It follows that the appeal is admissible.

VII. APPLICABLE LAW

32. Article R58 CAS Code provides as follows:

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

33. Article 57(2) FIFA Statutes provides the following:

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

34. Since the Parties did not object to referring their dispute to the FIFA DRC, the Sole Arbitrator finds that the Parties accepted the applicability of Article 57(2) FIFA Statutes. Under this provision, the regulations of FIFA are primarily applicable (as to the date when the claim was lodged, FIFA RSTP February 2021 edition applies); if necessary, additionally, Swiss law.

VIII. MERITS

A. The Main Issues

35. The main issue to be resolved by the Sole Arbitrator is:

i. Does the Appellant's request for relief fall under the de novo review scope according to Article R57 of the CAS Code?

36. According to Article R57 para.1 of the Code, the Sole Arbitrator has *"full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*. As stated in CAS jurisprudence, the CAS appeals arbitration procedure thus entails a de novo review of the merits of the case and is not confined to merely ruling whether the appealed decision is to be upheld. It is the role of the Sole Arbitrator to establish the merits of the case discussed before the first instance judicial body independently.

37. In its Statement of Appeal, Tolima submitted that *"the DRC completely omitted to rule on the claim for compensation for training. The lawsuit made a claim for compensation for training that is separate from the claim for unilateral termination of the contract. The Appealed Decision did not even rule on this issue, which makes this appeal admissible"* Furthermore, Tolima complained that the FIFA DRC dismissed its arguments in favour of the alleged contractual extension. In its Statement of Appeal, Tolima indicated the Player as First Respondent and Honka as Second Respondent.

38. The Sole Arbitrator observes that, when filing its Appeal Brief, the Appellant waived its request for compensation for breach of contract without just cause towards the Player and Honka, maintaining a request for training compensation towards the latter. Consequently, that part of the Appealed Decision regarding the dismissal of compensation for breach of contract became final and binding.

39. The main issue to be solved is if the Sole Arbitrator could/should review the Appealed Decision only in respect of the requested training compensation.

40. In this regard, the Sole Arbitrator firstly finds out that the dispute before FIFA was registered as *"regarding an employment-related dispute concerning the player J."*, where Tolima solely complained about an alleged Player's breach of contract without just cause and asked for compensation according to the criteria listed in its claim from *"i to v"*.

41. Namely, Tolima pointed out the parameters for the calculation of the due amount, that should had to be taken in account: *"Como consecuencia de lo anterior, que se condene al jugador J. y, solidariamente, al Club FOOTBALL CLUB HONKA ESPOO de Finlandia, a cubrir y/o pagar a favor del CLUB DEPORTES TOLIMA SA, la suma de DOS MILLONES DE EUROS (EUR 2,000.000), a título de indemnización por ruptura injustificada de contrato, estimada conforme a los criterios señalados en el artículo 17 numeral 1 del RSTJ de la FIFA, así […]"*. Those criteria were fully listed (freely translated) in the Appealed Decision as follows:

a. the residual value of the second employment contract amounting to COP 33,031,416;

b. the value of the new employment contract signed with FC Honka;

c. the expenses paid by the club amortised over the term of the contracts in the total amount of COP 141,830,885, broken down as follows:

(i) COP 34,930,885 corresponding to the salaries and transport allowances paid to the player during the first employment contract;

(ii) COP 6,900,000 corresponding to the "welfare payments" (in Spanish, prestaciones sociales) paid to the player during the first employment contract;

(iii) COP 100,000,000 corresponding to the acquisition of the player's federative and economic rights as per the settlement agreement.

d. the outstanding performance of the player and his involvement with the Colombian national team;

e. the transfer fee lost by the club, taking into consideration the amount earned with other players previously transferred to other parties;

f. the fact that the termination of the contract occurred during the protected period; and

g. the training compensation due to the club in the amount of EUR 80,444".

Based on the foregoing, Tolima further requested sporting sanctions to be imposed on Honka and on the Player in accordance with art. 17, para 4 of the RSTP.

42. It is worth noting that Tolima did not file other requests for relief alternatively or subsidiarily, out of the mentioned compensation for breach of contract without just cause. In that regard, the FIFA RSTP decided that the claim filed by Tolima was groundless and to be rejected.

43. Consequently, contrary to the Appellant's position, the Sole Arbitrator finds that Tolima did not file two separate requests for relief, one regarding the compensation for breach of contract and the other claiming training compensation, instead the latter was filed only as a part of the base of calculation of the first request.

44. This is further confirmed by the fact that every club that claims training compensation shall file its request under the TMS system (and Tolima did not) as provided by Article 20 and Annexe 3 and 4 of the FIFA RSTP:

"20 Training compensation

Training compensation shall be paid to a player's training club(s): (1) when a player is registered for the first time as a professional, and (2) each time a professional is transferred until the end of the calendar year of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract. The provisions concerning training compensation are set out in Annexe 4 of these regulations. The principles of training compensation shall not apply to women's football.

Annexe 3. Transfer Matching System.

Article 1 (Scope)

2. TMS is designed to clearly distinguish between the different payments in relation to international player transfers. All such payments must be entered in the system as this is the only way to be transparent about tracking the money being moved around in relation to these transfers. At the same time, the system will require associations to ensure that it is indeed a real player who is being transferred and not a fictitious player being used for illicit activities such as money-laundering.

5: The use of TMS is a mandatory step for all international transfers of professional and amateur players (both male and female) within the scope of eleven-a-side football, and any registration of such a player without the use of TMS will be deemed invalid [...]

6. Every international transfer within the scope of eleven-a-side football must be entered in TMS. If the player will be registered as an amateur by the new association, the transfer instruction shall be entered in TMS by the club(s) holding a TMS account, or, in the case of a club not holding a TMS account, by the association concerned.

Annexe 4. Training compensation

Article 3 (Responsibility to pay training compensation)

1. On registering as a professional for the first time, the club with which the player is registered is responsible for paying training compensation within 30 days of registration to every club with which the player has previously been registered (in accordance with the players' career history as provided in the player passport) and that has contributed to his training starting from the calendar year of his 12th birthday. The amount payable is calculated on a pro rata basis according to the period of training that the player spent with each club. In the case of subsequent transfers of the professional, training compensation will only be owed to his former club for the time he was effectively trained by that club.

Article 4 (Training costs)

1. In order to calculate the compensation due for training and education costs, associations are instructed to divide their clubs into a maximum of four categories in accordance with the clubs' financial investment in training players. The training costs are set for each category and correspond to the amount needed to train one player for one year multiplied by an average "player factor", which is the ratio of players who need to be trained to produce one professional player.

2. The training costs, which are established on a confederation basis for each category of club, as well as the categorisation of clubs for each association, are published on the FIFA website (www.FIFA.com). They are updated at the end of every calendar year. Associations are required to keep the data regarding the training category of their clubs inserted in TMS up to date at all times (cf. Annexe 3, article 5.1 paragraph 2)".

45. It is not in dispute that the Player was registered as an amateur with Tolima from 1 July 2017 to 1 July 2020, i.e., from fifteen to eighteen years old, before moving to Europe on a free transfer to sign his first contract as a professional with Honka. This is proved through the Player Passport, although such a certified period (i.e., 14 June 2017 to 30 June 2020) does not correspond to the one reported in the Agreement between Tolima and J. (i.e., 1 July 2017 to 30 June 2020).

46. Nevertheless, considering the above regulations, it appears self-evident that, to receive the training compensation for the Player's transfer, Tolima shall file the first request under the TMS system and not as a part of a broader claim with a different subject (the compensation for breach of contract without just cause). By the same token, the Appellant is not legitimated to change the subject of the dispute, moving from a request of compensation to another for training compensation where the parties could be only the clubs (and not the Player).

47. The Sole Arbitrator acknowledges that Tolima waived a part of the previous request, limiting the claim to training compensation from Honka. Still, his power to review the Appealed Decision cannot be wider than the one of the judicial body that issued such decision: *"Overall, the CAS Panels enjoy, in their capacity as appellate bodies, the same discretion as the previous instance. This means that some CAS Panels may freely use their power and substitute their appreciation to the previous instances (even without considering that this was manifestly erroneous), while other CAS Panels may be more deferent. Both possibilities are possible under the de novo character of review based on Article R57 CAS Code. Moreover, the different possibilities of the Panel based on Article R57 do not depend on whether the appeal is also directed against the body that issued the challenged decision. Evidently, such de novo review cannot be construed as being wider than the power of the body that issued the decision appealed against and the general limit of Article 190 paragraph 2 PILA (and in particular the principle of ne ultra petita) should be respected"* (MAVROMATI/REEB, The Code of the Arbitration for Sport, p. 509).

48. Accordingly, a CAS Panel stated: *"In the Arbitration before the CAS the Panel has 'full power to review all the facts and the law' (Article R57 of the CAS Code). This rule is understood to give the Panel the right to consider the subject matter of the dispute 'de novo', evaluating all of the facts and the application of the law and to issue a new decision. The Panel is not limited to assessing the correctness of the previous procedure and decision and even has the duty to make its independent determination of whether the Appellant's contentions are correct (CAS 2008/A/1574 para. 20, 30 and 31; CAS 2007/A/1394, para. 21, CAS 2009/A/1880-1881, para. 146). 71. However [...] the Panel has to rely on the findings of the first instance. It can only review the Decision if it has reasons to assume that the facts do not reflect the relevant elements of the case, the evidentiary proceedings before the first instance were incomplete or that the first instance drew erroneous legal conclusion from the facts estabilished through the evidentiary proceeding. As long as the first instance has exercised its discretion correctly the Panel will not intervene"* (CAS 2013/A/3227, para. 71; see also CAS 2010/A/2090, para. 7.21, 7.30 and 7.32).

49. Considering the above, the Sole Arbitrator points out that he is bound to assess whether the Appealed Decision is flawed under procedural or substantial reasons strictly related to the entire subject of the dispute of the first instance's proceedings.

50. In other words, the Sole Arbitrator would have had and has the power to admit or exclude some of the sums requested by the Appellant as overall compensation suffered due to the Player's alleged breach of contract. On the contrary, he does not have the power to rule on a different subject (training compensation) that should have been filed according to different FIFA procedural rules, not respected in the case at stake.

IX. CONCLUSION

51. As a consequence of all the foregoing, the Sole Arbitrator has no power to review the Tolima's request for training compensation, which was an issue outside the scope of the first instance procedure.

52. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 20 September 2021 by Club Deportes Tolima against the decision issued on 12 August 2021 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is rejected.

2. The decision rendered by the Dispute Resolution Chamber of FIFA on 12 August 2021 is confirmed.

3. (…).

4. (…).

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