Arbitration CAS 2010/A/2160 FK Crevna Zvezda v. Segundo Alejandro Castillo Nazareno, award of 2 March 2011

Panel: Mr Lars Hilliger (Denmark), Sole Arbitrator

Football
Contract of employment
Burden of proof regarding the payment of outstanding salaries
Discharge of the burden of proof

1. **According to the general legal principle of burden of proof provided by the Swiss Civil Code and to a well-established CAS jurisprudence, any party claiming a right on the basis of an alleged fact must carry the burden of proof, proving that the alleged fact is as claimed.**

2. **Account statements as well as an overview of the bonus amount accrued by a player produced by a club showing that the total amount transferred by the club to a player in the relevant period exceeded the amount of remuneration agreed upon between the parties might discharge the burden of proof of the club.**

FK Crevna Zvezda (the "Club" or the "Appellant") is a professional football club having its registered office in Serbia, which is affiliated to the Serbian Football Association. The Serbian Football Association is affiliated with Fédération Internationale de Football Association (FIFA).

Mr. Segundo Alejandro Castillo Nazareno (the "Player" or the "Respondent") is an Ecuadorian professional football player, born on 15 May 1982.

The elements set out below are a short summary of the main relevant facts, as established by the Sole Arbitrator on the basis of the written submission of the Appellant, the exhibits produced before him and the file received by FIFA regarding the case.

On 16 July 2007, the Parties concluded an employment contract ("the Contract") valid from 16 July 2007 until 31 July 2010.

The Contract's financial terms pertaining to the 2007/2008 season were stipulated in an annex to the Contract, by means of which the Club was obliged to pay to the Player a total amount of EUR 150,000 in Serbian Dinars (RSD).

At the end of the 2007/2008 season, the Player was loaned to the English professional football club Everton FC ("Everton").

On 21 January 2009, the Player lodged a claim with the FIFA Dispute Resolution Chamber (DRC) against the Club for alleged outstanding salaries amounting to EUR 62,500, according to the Player corresponding to 5 monthly salaries, i.e. March, April, May and June 2008, plus 5% interest per year. (Although the Respondent only claimed for the four months of March – June 2008, he appears to have calculated his claim based on five months' salary.) Furthermore, the Player requested the DRC to declare the Club liable for the termination of the Contract and requested that sporting sanctions be imposed on the Respondent.

According to the Player, he never received a copy of the Contract concluded with the Club. Furthermore, the Player asserted that he only received his salaries for January and February 2008, but that his salaries for the months of March, April, May and June 2008 remained outstanding, even though the Player rendered his services to the Club during these months before being loaned to Everton.

Finally, the Player asserted that the labour relationship between the Parties was terminated due to the Club's breach, and therefore the Club cannot request his return.

In its response to the claim to the DRC, the Club rejected the allegations of the Player, asserting that the Club had fully complied with its financial obligations according to the Contract.

Moreover, the Club stated that the Player did not present any evidence in order to prove his allegations.

Finally, the Club presented to the DRC a copy of the Contract and its respective annex. Furthermore, the Club presented the relevant receipts from the Serbian Tax Office, documenting the taxes paid by the Club to the Serbian Tax Office concerning the Player's earnings for the period from September 2007 to June 2008.

After having established the competence of the DRC and the applicable regulations the DRC entered into the substance of the matter and concluded that the remuneration for the months of March, April, May and June amounted to EUR 50,000.00.

The DRC then recalled the general legal principle of burden of proof, according to which any party claiming a right on the basis of an alleged fact carries the burden of proof. As a consequence, the DRC noted that the documentary evidence submitted by the Club only referred to the taxes paid by the Club to the Serbian Tax Office. According to the DRC, no documentary evidence had been submitted with regard to any payment made by the Club to the Player.

In view of the above, the DRC concluded that since the remuneration for the claimed period of time amounted to EUR 50,000.00 and since the Club had proved to have paid to the Serbian Tax Office the amount of EUR 16,034.00 in favour of the Player, the outstanding amount due by the Club to the Player was EUR 33,966.00.

On 10 December 2009, the FIFA DRC thus decided (the "Decision") that the Club had to pay the Player the total amount of EUR 33,966, plus 5% interest from 1 June 2008 within 30 days as from the date of notification of the decision.

On 7 July 2010, the Appellant filed its Statement of Appeal against the Decision and requested a stay of execution of the challenged Decision.

On 9 July 2010, the Appellant was informed by the CAS that according to CAS jurisprudence, a decision of a financial nature issued by FIFA is not enforceable when appealed against. Since being unenforceable, the appealed decision may not be stayed, an application in that respect – being moot – would, in principle, be dismissed. The Appellant was invited to inform the CAS Office within five days whether it maintained or withdrew its application for a stay.

On 16 July 2010, and in accordance with Article R51 of the Code, the Appellant filed its Appeal Brief. Since the Appeal Brief did not include any information regarding the request for a stay included in the Statement of Appeal the Sole arbitrator decided with reference to the letter of 9 July 2010 from the CAS office to deem the request for stay withdrawn.

On 13 July 2010, FIFA renounced its right to request to intervene in the present arbitration.

On 22 July 2010, the Respondent informed the CAS office that he assumed the appeal to be withdrawn since he had not received the Appeal Brief.

On 3 August 2010, the CAS office informed the Parties that the Appeal Brief had been delivered to the Respondent on 22 July 2010 according to a DHL delivery report and that, pursuant to Article R55 of the Code, the Respondent should file his answer within twenty days of receipt of said Appeal Brief.

The CAS office never received an answer from the Respondent to the appeal.

On 19 August 2010, the Parties were invited to inform the CAS office whether their preference was for a hearing to be held or for the Panel to issue an award based on the parties' written submissions.

On 30 August 2010, the CAS informed the parties that the dispute would be referred to a Sole Arbitrator.

On 28 September 2010, the CAS advised the parties that Mr Lars Hilliger, attorney-at-law in Copenhagen, Denmark, had been appointed as Sole Arbitrator to decide the matter.

On 19 October 2010, the Appellant advised the CAS that its preference was for the Sole Arbitrator to issue an award based on its written submissions. On 1 November 2010, the Parties were informed that the Sole Arbitrator had decided not to hold a hearing in the case. Furthermore, the Respondent signed the Order of Procedure, which stated that pursuant to Article R57 of the Code, the Sole Arbitrator considered himself to be sufficiently well informed and had decided not to hold a hearing.

The Sole Arbitrator has received the file from FIFA regarding the case, which written material has been duly taken into consideration when deciding the case.

LAW

CAS Jurisdiction

1. According to Article 63, para. 1, of the FIFA Statutes, the Appellant has the right to appeal against the Decision to the CAS.

2. The jurisdiction of the CAS in the present case is not contested by the Respondent and was confirmed by the Respondent's signing the Order of Procedure.

3. It follows that the CAS has jurisdiction to decide upon the appeal that relates to the FIFA Dispute Resolution Chamber decision dated 10 December 2009 regarding the claim presented by Mr. Segundo Alejandro Castillo Nazareno against FK Crevna Zvezda.

4. Under Article R57 of the Code, the Sole Arbitrator has full power to review the facts and the law and, with reference to the same Article, the Sole Arbitrator decided not to hold a hearing but to decide the case based on the written material.

Applicable law

5. Article R58 of the Code of Sports-related Arbitration (the "Code") (2010-edition which is applicable to all procedures initiated by the CAS as from 1 January 2010 and therefore applicable to this case) 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 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".

6. Article 62, para. 2, of the FIFA Statutes provides that *"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*. The applicability of the FIFA regulations and, additionally, of Swiss law has not been disputed by any party.

7. Hence, the relevant questions at stake have to be assessed according to the various regulations of FIFA and, additionally, according to substantive Swiss law.

8. For the sake of good order, the Sole Arbitrator concluded that since the case was brought before the DRC before the 2009-edition of the FIFA Regulations on the Status and Transfer of Players

entered into force, the former edition of the FIFA Regulations on the Status and Transfer of Players (edition 2008) will be applicable to this case.

Admissibility

9. The Decision with its grounds was notified to the Parties on 18 June 2010, and the Statement of Appeal was filed by the Appellant on 7 July 2010, i.e. within 21 days from the receipt of the decision appealed against, which is the deadline provided by the FIFA Statutes and stated in the Decision issued by the FIFA DRC.

10. The Statement of Appeal furthermore complied with all the other requirements of article R48 of the Code.

11. It follows that the appeal is admissible.

12. Furthermore, for the avoidance of any doubt, the Sole Arbitrator notes that the appeal brief was filed on 16 July 2010 – within ten days following the expiry of the time limit for the appeal – and was delivered to the Respondent by DHL on 22 July 2010. Accordingly, the Respondent's argument that he assumed the appeal to be withdrawn since he had not received the appeal brief must fail.

Main issues

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

- Is the Respondent entitled to claim payment of the above amount from the Appellant pursuant to the Contract concluded between the Parties and the subsequent annex relating to the 2007/2008 season?
- And if the Respondent is entitled to claim payment of said amount from the Appellant,
  -- Who is to carry the burden of proof that payment has been made in accordance with the above, and
  -- Has this burden of proof been discharged by the party in question?

Merits

14. Based on the foregoing, and after taking into due consideration all evidence produced and all arguments made by the Parties, the Sole Arbitrator decides as follows on the main issues:

A. Is the Respondent entitled to claim payment of the above amount from the Appellant pursuant to the Contract concluded between the Parties and the subsequent annex relating to the 2007/2008 season?

15. Based on the content of Article 2 of the presented annex to the Contract and as this matter remains undisputed by the Parties, the Sole Arbitrator assumes that the Parties have agreed on an annual remuneration to the Respondent for the 2007/2008 season in the amount of EUR 150,000.00 to be paid in Serbian Dinars.

16 On the basis of the statements made before the FIFA, it is further assumed that the Parties agree that this amount – irrespective of the provisions of the above Article – fell due for payment on a monthly basis in the amount of EUR 12,500.00 per month.

17. On the above basis and with reference to the statement of the Respondent about the number of months for which non-payment has been claimed, the Sole Arbitrator finds in accordance with the DRC assumptions of the Decision that the maximum amount the Respondent is entitled to receive from the Appellant pursuant to statements for the months of March, April, May and June is EUR 50,000.00 (four months of EUR 12,500.00).

B. Who is to carry the burden of proof that payment has been made in accordance with the above?

18. During proceedings, the Appellant has not contested that pursuant to the Contract concluded the Respondent is entitled to payment of EUR 50,000.00 gross for the four months in dispute.

19. It follows from Article 3 of the presented annex to the Contract that in connection with payment of the agreed remuneration to the Respondent, the Appellant must calculate and settle applicable taxes on behalf of the Respondent in accordance with applicable income tax law in the Republic of Serbia.

20. During proceedings, the Appellant submitted that it had already paid an amount corresponding to EUR 50,000.00 pursuant to agreement between the Parties, including having calculated and settled taxes on behalf of the Respondent in accordance with applicable rules.

21. In relation to this matter, the Sole Arbitrator agrees with the statement made by FIFA regarding the general legal principle of burden of proof, according to which any party claiming a right on the basis of an alleged fact must carry the burden of proof, proving that the alleged fact is as claimed.

22. The Sole Arbitrator notes that this is in line with article 8 of the Swiss Civil Code ("Swiss CC"), which stipulates:

Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit.

In loose translation:

Each party must, if the law does not provide for the contrary, prove the facts it alleges to derive its right.

23. As a result, the Sole Arbitrator reaffirms the principle established by CAS jurisprudence that *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (see also article 8 of the Swiss Civil Code, ATF 123 III 60, ATF 130 III 417). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (cf. CAS 2003/A/506, para. 54; CAS 2009/A/1810 & 1811, para. 46 and CAS 2009/A/1975, para. 71ff).

24. On that basis, it is thus up to the Appellant to document that – as claimed – payment was made in accordance with the agreement between the Parties for the months of March, April, May and June of 2008.

C. Has this burden of proof been discharged by the party in question?

25. Subsequently, the question remains whether, based on the written documentation produced, the Appellant can be considered as having discharged the burden of proof to the effect that payment was made in accordance with the agreement between the Parties.

26. The Appellant presented FIFA with copies of a Tax Form on Calculated and Paid Taxes on Income of Athletes and Sports Experts and for Other Income which – according to the Appellant – document payment of taxes on behalf of the Respondent in the total amount of EUR 16,034.00 for the four months of 2008 in dispute.

27. Subsequently, the Appellant presented the CAS with copies of the Appellant's and what must be assumed to be the Respondent's personal bank accounts, allegedly proving that the salaries for March, April, May and June 2008 were actually paid by the Appellant to the Respondent.

28. On the basis of a thorough review of the material presented by the Appellant, the Sole Arbitrator establishes that the Appellant has proven payment of a total amount of 14,078,403.00 Serbian Dinars, corresponding to EUR 174,329.00, to the Respondent in the period from 24 July 2007 to 29 July 2008 (This figure of EUR 174,329.00 includes a bonus payment of EUR 18,942.24, which is not considered a salary payment).

29. Moreover, the Sole Arbitrator is satisfied that the payments correspond in terms of dates between the transfers thus proven from the account of the Appellant to the account of the Respondent and tax payments presented before FIFA to the Serbian Tax Office.

30. In addition to the account statements produced, the Appellant has produced an overview of the bonus amount accrued by the Respondent, which – based on statements made by the Respondent – the Respondent should allegedly be entitled to have paid out in addition to the remuneration for the 2007/2008 season agreed in the annex.

31. Taking into account that the total amount transferred by the Appellant to the Respondent in the period from 24 July 2007 to 29 July 2008 exceeded the amount of remuneration agreed upon between the Parties for the 2007/2008 season including the bonus amount stated by the Appellant, and taking into account that following the Appellant's presentation of this documentation, the Respondent has not submitted any objections nor disputed the authenticity or accuracy of any of the documents produced, the Sole Arbitrator concludes that the Appellant must be considered as having discharged its burden of proof to the effect that payment was made in accordance with the agreement between the Parties, including, to be specific, for the months of March, April, May and June of 2008.

32. The Respondent is thus not entitled to claim any additional payment from the Appellant.

33. Accordingly, the appeal is upheld and the decision of the FIFA Dispute Resolution Chamber is set aside.

The Court of Arbitration for Sport rules:

1. The appeal filed on 7 July 2010 by FK Crvena Zvezda against Mr. Segundo Alejandro Castillo Nazareno regarding the decision issued on 10 December 2009 by the FIFA Dispute Resolution Chamber is upheld.

2. The decision issued on 10 December 2009 by the FIFA Dispute Resolution Chamber is set aside.

(…)

5. All further and other claims for relief are dismissed.