Arbitration CAS 2010/A/2168 Club Gaziantepspor v. Dino Lamberti, award of 29 November 2010

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

Football
Contract between a player's agent and a football club
Obligations submitted to conditions
Ne ultra petita *principle*

1. **Article 156 of the Swiss Code of Obligations is based on the general principle preventing the abuse of rights (*"Nemo auditur propriam turpitudinem allegans"*). If a condition is agreed and if its occurrence depends, to a certain extent, on the will of one of the parties on which the contract imposes obligations, this party does not have in principle an entire freedom to refuse this occurrence and to be freed, in that way, of its contractual obligations. It shall, on the contrary, act in a loyal way and according to the rules of good faith; in case of violation of these requirements, the condition is deemed to be accomplished.**

2. **Although a panel has the power and the duty to examine the whole case and to decide whether the given decision is just and appropriate, it is not allowed to go beyond the limits set by the appeal. If a party does not appeal the given decision, but only requests to *"uphold the challenged decision"*, the panel has no opportunity to grant more than was granted by the previous authority.**

The Club Gaziantepspor ("the Appellant" or "the Club") is a professional football club currently playing in the Turkish Spor Toto Süper Lig, which is the highest football league in Turkey. The Appellant is affiliated with the Turkish Football Association, which in turn is a member of the Fédération Internationale de Football Association (FIFA).

Mr Dino Lamberti ("the Respondent" or "the Agent") is a players' agent licensed by the Swiss Football Association, which in turn is a member of FIFA.

The Appellant and the Agent signed an agreement dated 22 June 2006 ("the Agreement"), by means of which the Club recognized a commission to the Agent for *"securing the engagement"* of the player Önder Cengel ("the Player").

The Agreement contained the following relevant clauses:

"WHEREAS

(1) The Agent secured the engagement of the player Önder Cengel to the Club.

(2) The Parties now set out below the terms upon which the Club will pay the commission to the Agent for the services rendered.

WHEREBY IT IS AGREED AS FOLLOWS:

1. The Club shall pay the Agent the sum of CHF 200.000,= within (5) five working days after receiving of the ITC of the player.

2. The Club shall pay the Agent during (3) three years an amount corresponding to 10% of the annual net salary due to the player Önder Cengel. The payments are due on 1 July 2006, 1 July 2007 and 1 July 2008. These payments are valid if and only if the player is in the squad of the team".

The Appellant and the Player concluded an employment contract valid from 1 July 2006 until 30 June 2009. According to this employment contract, the Player was entitled to receive a net salary of CHF 900,000 to be paid as follows:

- CHF 250,000 during the season 2006/2007;
- CHF 300,000 during the season 2007/2008;
- CHF 350,000 during the season 2008/2009.

On 9 November 2006, the Agent lodged a claim with FIFA's Single Judge of the Players' Status Committee (the "Single Judge") against the Appellant for breach of contract requesting compensation of CHF 295,000.00 corresponding to the value of the Agreement, alleging that the Appellant did not pay the commission he was entitled to under the Agreement. In particular, the Agent claimed:

- CHF 200,000 corresponding to the lump sum payment supposed to be made within five working days after the receipt of the Player's ITC, plus 5% interest from 1 July 2006 until the day of payment;
- CHF 25,000 corresponding to 10% of the Player's wage from the season 2006/2007, plus 5% interest from 1 July 2006 until the day of the payment;
- CHF 30,000 corresponding to 10% of the Player's wage from the season 2007/2008, plus 5% interest from 1 July 2007 until the day of the payment;
- CHF 35,000 corresponding to 10% of the Player's wage from the season 2008/2009, plus 5% interest from 1 July 2008 until the day of the payment;
- CHF 5,000 for legal expenses.

In spite of having been invited to do so on several occasions by FIFA, the Appellant never responded or took position in the proceedings before the Single Judge.

On 5 March 2010, the Single Judge decided to partially accept the claim of the Agent to an amount of CHF 245,000.

The relevant paragraphs of the decision of the Single Judge read as follows:

> *"(…)*
>
> *10. In this regard and with the aim of establishing the amount to be paid to the Claimant, the Single Judge noted that at the moment of lodging his claim on 9 November 2006, the Claimant was owed by the Respondent the amount of CHF 200,000 as an outstanding lump sum payment. In this respect and in view that the Respondent did not contest such allegations made by the Claimant (cf. points 8 and 9), the Single Judge decided to award to the Claimant the amount of CHF 200,000.*
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> *11. Additionally and with respect to the payment of a commission to be calculated based on a percentage of the annual net salary of the player (i.e. 10% of the salary paid to the player in the 2006/2007, 2007/2008 and 2008/2009 seasons), in accordance with the common practice in relation to the values of commissions paid to player's agents for their services, the Single Judge considered that the agreed percentage of 10% was excessive and should therefore be reduced to an amount that better suites the common practice. Furthermore, the Single Judge noted that such percentages were to be paid to the Claimant only if the player was on the squad of the team, fact that was not proven by the Claimant.*
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> *12. In conclusion, the Single Judge decided to reduce the abovementioned agreed percentage (i.e. commission to be calculated on 10% of the annual net salary of the player) to 5%, and consequently, the Single Judge determined that the Respondent must also pay the following amounts as commission to the Claimant:*
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> *- For the 2006/2007 season: CHF 12,500 (i.e. 5% of CHF 250,000);*
>
> *- For the 2007/2008 season: CHF 15,000(i.e. 5% of CHF 300,000); and*
>
> *- For the 2008/2009 season: CHF 17,500 (i.e. 5% of CHF 350,000).*
>
> *13. Furthermore, the Single Judge held that the Claimant's claim for the reimbursement of the legal expenses amounting to CHF 5,000 had to be rejected in the light of art. 15 par. 3 of the Procedural Rules, which states that no procedural compensation shall be awarded in proceedings of the Players Status Committee.*
>
> *14. Additionally and in view of the Claimant's request with regard to the payment of interests, the Single Judge decided to impose a default interest rate of 5% per year on the owed CHF 200,000 and EUR 12,500 as of 1 July 2006, until the effective date of payment".*

Based on the above mentioned reasons, the Single Judge decided the following**:**

> *"1. The claim of the Claimant, players' agent DinoLamberti, is partially accepted.*
>
> *2. The Respondent, Club Gaziantepspor, has to pay to the Claimant, players' agent Dino Lamberti, the following amounts:*
>
> *2.1 CHF 200,000, as well as 5% interest per year on the said amounts as from 1 July 2006 until the date of effective payment, within 30 days as from the date of notification of this decision;*
>
> *2.2 CHF 12,500, as well as 5% interest per year on the said amounts as from 1 July 2006 until the date of effective payment, within 30 days as from the date of notification of this decision;*
>
> *2.3 CHF 15,000, within 30 days as of the notification of this decision; and,*
>
> *2.4 CHF 17,500, within 30 days as of the notification of this decision.*

3. if the sums stipulated in points 2.3 and 2.4 above are not paid within the aforementioned deadline, an interest rate of 5% per year will apply on such sums as of the expiry of the fixed time limit (…).

(…)

6. The costs of the proceedings in the amount of CHF 15,000 are to be paid by the Respondent, Club Gaziantepspor, within 30 days as from the notification of the present decision (…)".

By facsimile dated 21 June 2010, FIFA notified the grounds of the decision of the Single Judge to the parties.

By letter dated 12 July 2010, the Appellant filed its Statement of Appeal, together with 5 exhibits, against the decision of the Single Judge with the Court of Arbitration for Sport (CAS) in Lausanne, followed by an Appeal Brief dated 22 July 2010, together with 3 exhibits.

The Agent filed its Answer on 22 September 2010, with 2 exhibits.

FIFA renounced to its right to intervene in the present arbitration procedure.

Both parties agreed that the dispute should be decided by a Sole Arbitrator.

Pursuant to Article R56 of the Code of Sports-related Arbitration (the "Code"), the Sole Arbitrator decided to reject the Appellant's request for additional submissions in the absence of exceptional circumstances.

On 15 October 2010, the CAS Court Office issued, on behalf of the Sole Arbitrator, an Order of Procedure which confirmed amongst others that CAS has jurisdiction to rule on this matter, that the applicable law would be determined in accordance with Article R58 of the Code and that no hearing would be held, the parties confirming that their right to be heard has been respected within the framework of the present procedure, accordingly confirming their satisfaction with the Sole Arbitrator drafting the award on the basis of the parties' written submissions. The parties signed and returned such Order of Procedure to the CAS Court Office.

LAW

Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from Articles 62 and 63 of the FIFA Statutes and Article R47 of the Code. Moreover, it is confirmed by the signature of the Order of Procedure by the parties.

2. It follows that the CAS has jurisdiction to decide the present dispute.

3. Pursuant to Article R57 of the Code, the Sole Arbitrator has full power to review the facts and the law. Therefore, the Sole Arbitrator has the power and the duty to examine the whole case and to decide whether the appealed decision is just and appropriate.

Applicable Law

4. Article R58 of the Code reads as follows:

"The Panel shall decide the dispute according to the applicable regulations and rules of law chosen by the parties or, in the absence of the such a choice, according to the law of the country in which the federation / association of 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".

5. Moreover, Article 62 para. 2 of the FIFA Statutes provides as follows:

"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".

6. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FIFA shall govern primarily, whereby Swiss law shall apply in the event the interpretation or construction of the FIFA rules and regulations is required.

Admissibility of the appeal

7. The appeal was filed within the deadline provided by Article 63 para 1 of the FIFA Statutes and stated in the decision of the Single Judge, *i.e.* within 21 days after notification of such decision. Furthermore, it complied with all other requirements of Article R48 of the Code.

8. It follows that the appeal is admissible.

Discussion

9. The Sole Arbitrator recalls that the Appellant and the Agent signed an agreement dated 22 June 2006, by means of which the Club recognized a commission to the Agent for *"securing the engagement"* of the player Önder Cengel.

10. The Agreement contained the following relevant clauses:

"(…)

1. The Club shall pay the Agent the sum of CHF 200,000 within (5) five working days after receiving of the ITC of the player.

2. The Club shall pay the Agent during (3) three years an amount corresponding to 10% of the annual net salary due to the player Önder Cengel. The payments are due on 1 July 2006, 1 July 2007 and 1 July 2008. These payments are valid if and only if the player is in the squad of the team".

11. The main questions to be considered by the Sole Arbitrator are the following:

a) Is the Agent entitled to the lump sum payment stipulated in clause 1 of the Agreement?

b) Is the Agent entitled to the payments mentioned in clause 2 of the Agreement?

c) Are there reasons for the Sole Arbitrator to differentiate with respect to the decision rendered by the Single Judge as to the excessiveness of the Agent's percentage mentioned in clause 2 of the Agreement?

A. Is the Agent entitled to the lump sum payment stipulated in clause 1 of the Agreement?

12. Clause 1 of the Agreement provides that the Club shall pay to the Agent the sum of CHF 200,000 within five working days following the receipt of the ITC of the Player. The Sole Arbitrator observes that although the file does not contain any document with regard to the issuance of the ITC, both parties agree that the conditions of clause 1 of the Agreement are met.

13. It results that the Agent is entitled to the lump sum payment of CHF 200,000 for securing the engagement of the Player to the Club.

B. Is the Agent entitled to the payments mentioned in clause 2 of the Agreement?

14. Clause 2 of the Agreement provides that:

a. the Club shall pay the Agent during three years an amount corresponding to 10% of the annual net salary due to the Player;

b. the payments are due on 1 July 2006, 1 July 2007 and 1 July 2008;

c. these payments are valid if and only if the Player is in the squad of the team.

15. The Sole Arbitrator observes that the Agreement contains the provision that the payments to the Agent – related to the annual net salary of the Player – are due on 1 July 2006, 1 July 2007 and 1 July 2008 and that these payments are conditional upon fulfilment of the fact that the Player was still in the squad of the team. It is obvious to the Sole Arbitrator that this provision means that the Agent is entitled to receive 10% of the annual net salary of the Player:

- for the season 2006/2007: on 1 July 2006, if the Player is registered for the Club on 1 July 2006;
- for the season 2007/2008: on 1 July 2007, if the Player is registered for the Club on 1 July 2007; and

- for the season 2008/2009: on 1 July 2008, if the Player is registered for the Club on 1 July 2008.

16. Furthermore, the Sole Arbitrator observes that both parties have argued that the employment contract between the Player and the Club has been terminated during the season 2006/2007. The Appellant argues that the employment contract between the Club and the Player has been mutually terminated by the parties on 2 January 2007. On the contrary, the Agent argues that the Player unilaterally terminated his employment contract with the Club on 14 February 2007 following the non-payment of his salaries by the Club.

17. As a consequence, the Sole Arbitrator establishes that on 1 July 2006, the Player was in the squad of the team, but he was not anymore on 1 July 2007 and 1 July 2008.

18. In light of the above, the Sole Arbitrator is of the opinion that the Agent is in principle (only) entitled to receive 10% of the annual net salary of the Player for the season 2006/2007, which amounts to CHF 25.000.

19. The argument of the Appellant that the Player was only *"in the squad of the Club"* for six months and therefore that the Agent should only be paid a remuneration for this six month period, is rejected by the Sole Arbitrator. The Agreement provides that the obligation for the Club to pay to the Agent the commission of 10% of the annual net salary of the Player for the season 2006/2007 arises if the Player is in the squad of the team on 1 July 2006. The fact that the Player left the Club during the season 2006/2007 is not relevant for this matter.

20. The next issue to be resolved is whether the Club has prevented the fulfilment of the condition in bad faith, as the employment contract between the Club and the Player was terminated during the 2006/2007 season. The Agent argues that the Appellant *"has provoked the fulfilment of the condition (i.e. the Player not being registered any longer for it) in bad faith, by disrespecting the employment commitments towards the Player, causing the unilateral termination of the employment contract by the Player"*. The Agent refers to a termination letter of the Player to the Club dated 14 February 2007 and to Article 154 CO, Article 156 CO and CAS case law (CAS 2009/A/1756).

21. On the other side, the Appellant argues that the employment contract between the Club and the Player has been mutually terminated and makes reference to an extract from the official web page of the Turkish Football Federation.

22. Amongst the provisions of Swiss law dealing with the obligations submitted to conditions is Article 156 CO, which reads as follows:

"A condition is deemed to be fulfilled if its occurrence has been prevented by one party acting in bad faith" (English translation of the official text of the Swiss Code of Obligations by the Swiss-American Chamber of Commerce, Zurich 2005).

23. Article 156 CO is based on the general principle preventing the abuse of rights (*"Nemo auditur propriam turpitudinem allegans"*). This principle is also expressed in other continental legislations (see Article 1178 of the French Civil Code, Article 1359 of the Italian Civil Code, Article 162

of the German Civil Code). According to Swiss authors, the application of Article 156 CO is submitted to the five following conditions (see PICHONNAZ P., *Commentaire romand du Code des obligations*, No. 5 ff ad Art. 156):

"- the existence of a condition;

- *the occurrence of this condition is prevented (for a condition precedent) or provoked (for a condition subsequent);*
- *a reprehensible behaviour of one of the parties to the contract or of a party entrusted with the benefit of the contract;*
- *the violation of the good faith principle by this party, on purpose or not;*
- *a reasonable link between the behaviour of the preventing party and the non-occurrence of the condition".*

24. According to the case law of the Swiss Supreme Court, if a condition is agreed and if its occurrence depends, to a certain extent, on the will of one of the parties on which the contract imposes obligations, this party does not have in principle an entire freedom to refuse this occurrence and to be freed, in that way, of its contractual obligations. It shall, on the contrary, act in a loyal way and according to the rules of good faith; in case of violation of these requirements, the condition is deemed to be accomplished, according to Article 156 CO (ATF 135 III 295, 302).

25. In the present case, the Sole Arbitrator is of the opinion that the Agreement imposed on the Appellant the obligation to make its best efforts in order to preserve the validity of the employment contract with the Player. As the existence of this employment contract was crucial to the entitlement of the agreed commission, it is obvious that the respect of the good faith principle implied the good performance of the contract with the Player.

26. However, the Sole Arbitrator has hesitation to consider that the Appellant did not respect the principle of good faith, causing the termination of the contract by the Player for just cause and, in turn, the loss of the Agent's commission fees for the seasons 2007/2008 and 2008/2009. In that respect, the Agent bears the burden of proof, but he only submitted a termination letter of the Player. In general, the party which asserts facts to support its rights has the burden of establishing them (see also Art. 8 of the Swiss Civil Code, ATF 123 III 60, ATF 130 III 417). In order to support his position, the Agent bears the onus of proof regarding his allegations that the Appellant did not respect the principle of good faith.

27. It would have been appropriate for the Agent to produce more specific and substantial documents to support his view that the Appellant has to be held responsible for a characterized breach of the employment contract because the Appellant has failed to respect its basic obligations towards the Player. Taking into account that the Appellant challenges the unilateral termination of the contract by the Player for just cause and submitted a document to support its position, the Sole Arbitrator has no other option than to consider that the Agent did not establish the existence of a reprehensible behaviour and a violation of the good faith principle by the Appellant.

28. Therefore, the Sole Arbitrator does consider that – contrary to the judgement in CAS 2009/A/1756, as mentioned by the Agent – not all conditions to the application of Article 156 CO are met.

29. As a result, the Sole Arbitrator is of the opinion that the Agent is in principle entitled to receive 10% of the annual net salary of the Player for the season 2006/2007, which amounts to CHF 25,000.

C. Are there reasons for the Sole Arbitrator to differentiate with respect to the decision rendered by the Single Judge as to the excessiveness of the Agent's percentage mentioned in clause 2 of the Agreement?

30. The Sole Arbitrator observes that the Single Judge considered that the agreed percentage of 10% of the annual net salary of the Player was excessive and should therefore be reduced to 5%. Although the Sole Arbitrator has the power and the duty to examine the whole case and to decide whether the given decision is just and appropriate, the Sole Arbitrator is not allowed to go beyond the limits set by the Appeal. Because the Agent did not appeal the Decision of the Single Judge, but requested to *"uphold the challenged decision",* the Sole Arbitrator has no opportunity to differentiate with respect to the reduction of the percentage as decided by the Single Judge.

31. In conclusion, the Sole Arbitrator finds, and so holds, that the Agent is entitled to receive 5% of the annual net salary of the Player for the season 2006/2007, which amounts to CHF 12,500.

Conclusion

32. Based on the foregoing and after taking into consideration all evidence produced and all arguments made, the Sole Arbitrator finds that the Agent is entitled to the lump sum of CHF 200,000 and the commission fee of CHF 12,500, both due from 1 July 2006, in execution of clauses 1 and 2 of the Agreement.

33. The Appeal is therefore partially upheld. The Appellant shall pay to the Agent an amount of CHF 212,500 with interest rate of 5% as from 1 July 2006.

The Court of Arbitration for Sport rules:

1. The Appeal filed on 12 July 2010 by Club Gaziantepspor against the decision issued on 5 March 2010 by the FIFA Single Judge of the Players' Status Committee is partially upheld.

2. The decision issued on 5 March 2010 by the FIFA Single Judge of the Players' Status Committee is reformed in the sense that Club Gaziantepspor is ordered to pay to Mr. Dino Lamberti CHF 212.500 (two hundred and twelve thousand and five hundred Swiss Francs).

3. Club Gaziantepspor is ordered to pay the amount of CHF 212.500 to Mr. Dino Lamberti, together with 5% interest as from 1 July 2006 within a deadline of 30 days of the date of the present award.

(…)

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