Arbitration CAS 2014/A/3584 Elaziğspor Kulübü Derneği v. Hervé Germain Tum, award of 29 January 2015

Panel: Mr Manfred Nan (The Netherlands), President; Mr Rui Botica Santos (Portugal); Mr Mark Hovell (United Kingdom)

Football
Termination of a contract of employment by a player
Conditions justifying the unilateral termination of a contract with just cause
Notification of a warning
Contractual freedom of the parties regarding the definition of the contract's termination
Determination of the compensation for breach of contract and mitigation of damages

1. **According to the constant CAS jurisprudence, a player may terminate his contract with just cause if (i) he notified a warning to his employer (i.e. the club) and (b) if violations of the terms of an employment contract persist for a long time or should several violations be cumulated over a certain period of time (e.g. non-payment of the salary for three months).**

2. **The general principle enshrined in the Commentary to the FIFA Regulations does not mandatorily require a written notification to be made to the club of the player's intention to terminate the employment contract, but only requires a notification to be made, i.e. thus including an oral notification. As such a player's oral notification might comply with his duty to notify the employer before terminating the employment contract especially where the player's allegation is sustained by an undisputed witness' statement.**

3. **In principle, nothing prevents the parties from defining when and under which circumstances a party may terminate the employment contract with just cause, as long as the provision deviating from the general principles enshrined in the Commentary to the FIFA Regulations is mutual or to the benefit of the party willing to terminate the employment contract. Thus, a provision may entitle a player to unilaterally terminate the contract after the non-payment of <u>two</u> monthly salaries and not three as enshrined in the Commentary to the FIFA RSTP.**

4. **According to FIFA regulations, a club at the origin of the termination of an employment contract is liable to pay compensation for damages suffered by a player as a consequence of the early termination even it was the player who terminated the contract prematurely. FIFA regulations, notably article 17 and the principle of positive interest are applicable with respect to the determination of the compensation for damages. In this regard, well-established CAS jurisprudence provides that if the employee terminates the contract with just cause because the employer breaches the**

contract, the employee has a claim to compensation for the amount which he would have earned had the employment been terminated in compliance with the notice period or by expiry of the fixed term. According to this principle, it is fully justified to award the player the wages to be paid until the end of the employment contract, with deduction of which he has saved or earned elsewhere because of the (early) termination of the employment contract or could have earned elsewhere had he made reasonable efforts. Legally speaking, a club bears the burden of proving that a player failed to use all reasonable efforts and/or diligence to find a new club, and/or that the player received new offers but knowingly refused to mitigate his damages by declining the said offers.

I. PARTIES

1. Elaziğspor Kulübü Derneği (hereinafter: the "Appellant" or the "Club") is a football club with its registered office in Elâzığ, Turkey. The Club is registered with the Turkish Football Federation (hereinafter: the "TFF"), which in turn is affiliated to the Fédération Internationale de Football Association (hereinafter: "FIFA").

2. Mr Hervé Germain Tum (hereinafter: the "Respondent" or the "Player") is a professional football player of Cameroonian nationality.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the present appeals arbitration proceedings. This background is made 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.

4. On 26 June 2012, the Club and the Player concluded an employment contract (hereinafter: the "Employment Contract") for two football seasons, by means of which the Player would be registered for the Club from 1 July 2012 until 31 May 2014.

5. According to article V (1) of the Employment Contract the Player was entitled to a net salary of EUR 500,000 for each season.

6. Furthermore, the Employment Contract contains, *inter alia*, the following relevant terms:

"VI Special provisions regarding the termination

(…)

"b) In case of non-payment of "two consecutive salaries" or the "second season's advance payment" in full or in part, the PLAYER should notify the club in writing. If the CLUB should not pay the notified amount in 30 (thirty) days starting from the due date of the second unpaid salary or the due date of the second season's advance payment, then the PLAYER shall have the right to unilaterally terminate the CONTRACT with just cause.

In this case PLAYER shall be free to sign contracts with any other clubs in Turkey or abroad and the PLAYER shall have the right to keep any and all amounts received from the CLUB until the termination date. The right of the PLAYER to claim compensation for the period between the termination date and 31.05.2014 is reserved in accordance with the Art. VI/c of the CONTRACT.

c) In case of termination by the PLAYER due to the delay in payment by the CLUB, the PLAYER shall be entitled to receive as an indemnity due to the breach by the CLUB of its payment obligations, all the amounts established in this CONTRACT including the payments due before and after the termination date, with this situation being treated, as regards its consequences, as the same as that of the unilateral termination without just cause on the part of the CLUB. Being employed of the PLAYER by a new club between the termination date and the actual duration shall affect the amount of the compensation indicated in this clause and in this context the CLUB has his rights to claim the reduction, amortization and / or diminishing of this amount before the judicial bodies. This clause shall not burden the PLAYER to give his best or reasonable effort(s) to find a new club for the period between the termination date and the actual duration".

7. On 10 January 2013, allegedly a meeting took place between the Player and the President of the Club and the Club's manager during which the Player complained that he had not received his salaries for October, November and December 2012 and notified them orally of his intention to terminate the contract in case of continued non-payment.

8. On 16 January 2013, the Player unilaterally terminated his Employment Contract with the Club by means of a termination letter.

9. On 1 February 2013, the Club acquired the services of Mr. Emir Kujovic from the Turkish football club Kayserispor on a salary of allegedly EUR 670,000.

10. On 1 February 2013, the Player signed an employment contract with the Turkish football club Göztepe Spor Kulübü, valid from 1 February 2013 until 31 May 2013 for a total remuneration of EUR 199,000 net.

B. Proceedings before the Dispute Resolution Chamber of FIFA

11. On 17 June 2013, the Player lodged a claim before the FIFA Dispute Resolution Chamber (hereinafter: "FIFA DRC") against the Club, claiming the total amount of EUR 571,000 (EUR 95,000 as outstanding salary plus 5% interest *per annum* as from the respective due dates and EUR 476,000 as compensation for breach of contract plus 5% interest *per annum* as from 17 January 2013).

12. In spite of having been invited by the FIFA DRC to do so, the Club failed to respond to the Player's claim.

13. On 31 October 2013, the FIFA DRC rendered its decision (hereinafter: the "Appealed Decision") with, *inter alia*, the following operative part:

> *"1. The claim of the* [Player] *is partially accepted.*
>
> *2. The* [Club] *has to pay to the* [Player] *within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of EUR 95,000 plus 5% interest until the date of effective payment as follows:*
>
> *a. 5% p.a. as of 31 October 2012 on the amount of EUR 30,000;*
> *b. 5% p.a. as of 1 December 2012 on the amount of EUR 30,000;*
> *c. 5% p. a. as of 31 December 2012 on the amount of EUR 35,000.*
>
> *3. The* [Club] *has to pay to the* [Player]*, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 476,000 plus 5% interest p.a. on said amount as from 31 October 2013 until the date of effective payment".*

14. On 1 April 2014, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *"[…] [T]he Chamber observed that the [Club] had failed to present its response to the claim of the [Player], despite having been invited to do so. In this way, so the Chamber deemed, the [Club] renounced its right of defence and, thus, accepted the allegations of the [Player].*
- *As a consequence of the preceding consideration, the Chamber established that in accordance with art. 9 par. 3 of the Procedural Rules, it shall take a decision upon the basis of the documents on file.*
- *Having taken into consideration the previous considerations, the Chamber decided that it could be established that the [Club] had seriously neglected its contractual obligations towards the [Player] in a continuous and constant manner, i.e. the [Club] had failed to remunerate the [Player] for a substantial period of time. Therefore, the Chamber considered that the [Club] was found to be in breach of the employment contract and that the breach was of such seriousness that, in line with the Chamber's long-standing and well-established jurisprudence, the [Player] had a just cause to unilaterally terminate the contractual relationship with the [Club] on 16 January 2013. For the sake of good order, the Chamber referred to the [Player's] argumentation in relation to art. VI lit. b of the contract and noted that the [Player] asserted that the lack of notification cannot affect the justification of the termination, because the notification was not stipulated as a mandatory obligation "but as a guidance he may follow- or not". In this respect, once more emphasizing that the [Club] had not contested this particular argument, the Chamber decided to accept the line of argumentation of the [Player].*
- *On account of the above, the Chamber established that the [Player] had terminated the employment contract with just cause on 16 January 2013 and that, consequently, the [Club] is to be held liable for the early termination of the employment contract with just cause by the [Player]".*

- *As to the consequences of the early termination, "[f]irst of all, the members of the Chamber concurred that the [Club] must fulfil its obligations as per employment contract in accordance with the general principle of "pacta sunt servanda". Consequently, the Chamber decided that the [Club] is liable to pay to the [Player] the remuneration that was outstanding at the time of the termination, i.e. the amount of EUR 95,000, consisting of the three monthly salaries of October, November and December 2012", with 5% interest per annum as from the respective due dates.*
- *Furthermore, as to the compensation for breach of contract in addition to any outstanding salaries, "the Chamber reasoned that the employment contract did contain a clause regarding compensation to be awarded to the player in case of breach of contract, however such clause cannot be considered by this Chamber, in line with its well-established jurisprudence, due to its lack of reciprocity, i.e. it does not provide for compensation in case of breach of contract by the player".*
- *On account of the above, the Chamber established that it had to assess the compensation due to the [Player] in accordance with the other criteria under art. 17 of the Regulations. In this respect, the Chamber pointed out that, at the time of the termination of the contractual relationship on 16 January 2013, the contract would run for another 17 months, in which the player would be entitled to 5 instalments of EUR 35,000 for the period as from January 2013 until May 2013 as well as to the amount of EUR 500,000 for the complete 2013/2014 season. Consequently, the Chamber concluded that the remaining value of the contract as from its early termination by the [Player] until the regular expiry of the contract amounted to EUR 675,000 and that such amount shall serve as the basis for the final determination of the amount of compensation for breach of contract.*
- *In continuation, the Chamber remarked that following the early termination of the contract at the basis of the present dispute the [Player] had found new employment with the Turkish Club, Göztepe, valid as from 1 February 2013 until 31 May 2013, in accordance with which he would be remunerated with a total amount of EUR 199,000. Consequently, in accordance with the constant practice of the Dispute Resolution Chamber and the general obligation of the [Player] to mitigate his damages, such remuneration under the new employment contract shall be taken into account in the calculation of the amount of compensation for breach of contract.*
- *In view of all the above, the Chamber decided that the [Club] must pay the amount of EUR 476,000 to the [Player], which is considered by the Chamber to be reasonable and justified amount as compensation for breach of contract.*
- *As a consequence, the DRC concluded that the [Club] is liable to pay the total amount of EUR 571,000 to the [Player], consisting of the amount of EUR 95,000 corresponding to the [Player's] outstanding remuneration at the time of the unilateral termination of the contract by the [Player] and the amount of EUR 476,000 corresponding to compensation for breach of contract.*
- *In relation to the [Player's] request for interest, the Chamber decided that the [Club] had to pay 5% interest on the amount of EUR 95,000 as from the respective due dates and on the amount of EUR 476,000 as from 31 October 2013".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 21 April 2014, the Club filed a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (hereinafter: the "CAS Code"), with the Court of

Arbitration for Sport. In this submission, the Club nominated Mr Rui Botica Santos, attorney-at-law in Lisbon, Portugal, as arbitrator.

16. On 2 May 2014, the Club filed its Appeal Brief, pursuant to Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments giving rise to the challenge of the Appealed Decision, submitting the following requests for relief:

"In view of all above factual and legal arguments, we hereby respectfully request the Panel;

1. to declare the Appeal admissible and founded.

2. to set aside the FIFA DRC decision and declare that no compensation shall be payable.

3. If the Panel is of the opinion that compensation should be paid, then we ask the amount to be reduced.

4. to condemn the respondent party the costs of the proceedings as well as the court office fee.

5. To condemn the respondent party to pay the legal costs which is fixed ex aequo et bono at CHF 10.000".

17. On 12 May 2014, the Player nominated Mr Mark Andrew Hovell, solicitor in Manchester, England, as arbitrator.

18. On 12 May 2014, FIFA renounced its right to request its possible intervention in the present appeals arbitration proceedings.

19. On 3 July 2014, the Player filed his Answer, pursuant to Article R55 of the CAS Code, whereby he requested CAS to decide the following:

"In view of the above, we hereby submit the following requests:

a. The Appeal shall be dismissed and the appealed decision shall be confirmed;

b. The procedural cost of CAS shall be borne by the Appellant;

c. The Respondent shall be awarded compensation by the Appellant for his legal expenses in the amount of CHF 15'000".

20. On 4 July 2014 respectively, the Club informed the CAS Court Office of its preference for a hearing to be held and the Player stated not to object to a hearing to be held.

21. On 24 July 2014, pursuant to Article R54 of the CAS Code, and on behalf of the 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 by:

- Mr Manfred Nan, attorney-at-law, Arnhem, the Netherlands, as President;

- Mr Rui Botica Santos, attorney-at-law, Lisbon, Portugal, and;
- Mr Mark Andrew Hovell, solicitor, Manchester, England, as arbitrators

22. On 5 August 2014, the CAS Court Office, on behalf of the Panel, requested the Club to file a translation of annex 1 to its Appeal Brief. Furthermore, the parties were invited to inform the CAS Court Office by 12 August 2014 whether they would be available for a hearing on 7 October 2014.

23. On 10 August 2014, the Player informed the CAS Court Office of his availability for a hearing on 7 October 2014.

24. On 15 August 2014, in the absence of any information being provided by the Club as to its availability for a hearing on 7 October 2014, the Club was exceptionally granted a last and ultimate time limit until 19 August 2014.

25. On 19 August 2014, the Club informed the CAS Court Office that it would not be available for a hearing on 7 October 2014, without however providing any documentary evidence in this respect.

26. On 20 August 2014, the CAS Court Office, on behalf of the Panel, invited the Club to provide any documents justifying its unavailability for a hearing on 7 October 2014 by 25 August 2014. In addition, in view of the Club's failure to provide the CAS Court Office with a translation of annex 1 to its Appeal Brief, the Club was granted a new deadline until 25 August 2014 to do so.

27. On 25 August 2014, the Club informed the CAS Court Office that *"[t]he document evidencing the unavailability to the 07th of October i.e. a letter issued by court will be prepared on 28th of August 2014"* and that *"[t]he English translation will also be submitted to you also* [sic] *on 28th of August 2014 via e-mail"*.

28. On 29 August 2014, the CAS Court Office informed the parties that the Panel had decided to hold a conference call with the parties on 1 September 2014, at 9.00 am (CET), to find a suitable date for the hearing.

29. On 1 September 2014, a conference call was held that was not attended by the Club.

30. On 1 September 2014, the Club was invited to advise the CAS Court Office, by 4 September 2014, whether it would be available for a hearing on 8 October 2014 or 4 November 2014, with a preference of the Panel for 8 October 2014.

31. On 2 September 2014, the Club informed the CAS Court Office that *"[i]t is really impossible for us to be ready on 08th of October in means of transportation from Ankara to Lausanne after completing the business day on 7th in Ankara"* and therefore requested the hearing to be held on 4 November 2014.

32. On 3 September 2014, the parties were called to appear at the hearing which would be held on 4 November 2014. In addition, the parties were invited to inform the CAS Court Office with the names of the persons attending the hearing on or before 10 September 2014.

33. On 10 September 2014, the Player informed the CAS Court Office of the persons attending the hearing on his behalf.

34. On 11 September 2014, in the absence of any information having been received from the Club, the CAS Court Office granted the Club a new deadline until 16 September 2014.

35. On 15 September 2014, upon request of the President of the Panel and pursuant to article R57 of the CAS Code, FIFA provided the CAS Court Office with a copy of its file related to the present manner.

36. On 18 September 2014, in the absence of any information having been received from the Club, the CAS Court Office granted the Club a last and ultimate deadline until 23 September 2014, failing which the CAS Court Office would consider that the Club would only be represented by its Counsel.

37. On 25 September 2014, with reference to the Club's letter dated 25 August 2014 stating that an English translation of exhibit 1 to the Appeal Brief would be filed on 28 August 2014, the CAS Court Office, in the absence of having received such translation by said date, requested the Club to do so by 2 October 2014.

38. On 26 September 2014, both Parties were requested to sign and return a copy of the Order of Procedure by 3 October 2014.

39. On 3 October 2014, the Player returned a duly signed copy of the Order of Procedure to the CAS Court Office.

40. On 7 October 2014, in the absence of having received a signed copy of the Order of Procedure from the Club, the CAS Court Office requested it to sign and return the Order of Procedure by 10 October 2014. In addition, the CAS Court Office stated that *"[d]espite several reminders, the CAS Court Office received no communications"* regarding the English translation of annex 1 to the Appeal Brief.

41. On 15 October 2014, the CAS Court Office informed the parties that the Club did not return a signed copy of the Order of Procedure within the time limit granted.

42. On 22 October 2014, Counsel for the Club informed the CAS Court Office that *"[t]oday, we have made a meeting with the client Elazigspor Kulübü Derneği. Although the Club wanted a hearing to be held in the beginning of the CAS procedures, now the President stated that the Club is financially in stress and they do not have enough funds to cover our travel and accommodation costs of attending the 04 November dated hearing. By the will of our principle, Elazigspor Kulübü Derneği, I am sorry to inform you that we renounce our request of a hearing to be held"*, without however submitting any documentary evidence.

43. On 23 October 2014, the CAS Court Office invited the Player to provide his position on the Club's letter by 28 October 2014.

44. On 27 October 2014, the Club informed the CAS Court Office that *"[w]e have received your letter of 24 October, we have understood that the hearing has been cancelled and the Panel will proceed with the case*

and have time until 31 December for rendering their decision. We have also realized that so far we did not send the Order of Procedure. Will you be sending a new order of procedure or would you like us to sign the one you have sent?", enclosing a signed copy of the Order of Procedure thereto.

45. On 28 October 2014, the Player did not object to a cancellation of the hearing and an award being rendered on the basis of the written statements of the parties only.

46. On 29 October 2014, the CAS Court Office, on behalf of the Panel, advised the parties that the hearing scheduled for 4 November 2014 was cancelled and that the Panel would render its arbitral award solely based on the parties' written submissions. Furthermore, the Panel granted the Club a final and ultimate time limit to provide a translation into English of annex no. 1 to its Appeal Brief by 3 November 2014, which the Club failed to do.

47. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

48. The Club's submissions, in essence, may be summarized as follows:

- The Club confirms that it was to pay the Player EUR 500,000 for each season, but argues that it struggled financially in its first season in the Turkish Super League (the highest league in Turkey) and therefore could not fulfil its obligations in full.

- The Club does not deny that it failed to pay the Player's salaries as from October 2012, but argues that it paid the Player a total amount of EUR 235,000, which is equal to 60% of the Player's salary over the first half season, and that the remaining amount of EUR 95,000 is unsubstantial.

- With reference to article VI (b) of the Employment Contract and CAS jurisprudence, the Club maintains that the Player had to notify the Club in writing before terminating his Employment Contract.

- The Club argues that due to the Player's premature termination of the Employment Contract, the Club was forced to acquire a new player just for the second half of the season with a higher salary than the Player (*i.e.* EUR 670,000 instead of EUR 500,000).

- The Club argues that both parties are responsible for the termination of the Employment Contract and that the Player is therefore *"not entitled to receive an amount of EUR 476.000,- as compensation for breach of contract. The amount of EUR 476.000,- is disproportionate when it is compared with the fact that the Player just fielded seventeen games and played for 90 minutes just at three of them"*.

- Finally, the Club refers to article VI (c) of the Employment Contract and argues that *"the Player did not give his best effort to find a new club. Therefore if the Panel decides a compensation should be paid, then the amount of EUR 476.000,- should be reduced"*.

49. The Player's submissions, in essence, may be summarized as follows:

- The Player points out that he had just cause to unilaterally terminate the Employment Contract on 16 January 2013, *"because the monthly salaries of the three previous months (October to December 2012) at a total amount of EUR 95'000 were outstanding"*.

- With reference to Swiss law and legal doctrine, the Player acknowledges that it is a basic principle of labour law that a unilateral termination of an employment contract should be proceeded by a warning, but that this warning is not mandatorily subject to a specific form and that no warning is necessary in case such warning would be superfluous.

- The Player argues that he warned the Club repeatedly as of November 2012 by complaining to club officials that his salary was unpaid, referring explicitly to a conversation with the Club's president and the Club's manager on or around 10 January 2013, which conversation *"was witnessed by several persons, inter alia the player's teammate Pascal Feindouno. Thereby, the player threatened that he would terminate the contract if his salaries remained unpaid. He then waited about one more week (until 16 January 2013) before he finally proceeded to terminate the employment contract"*. The Player refers to the written witness statement of Mr Feindouno and the termination letter dated 16 January 2013.

- Further, the Player refers to article VI (b) of the Employment Contract in submitting that filing a written warning was not mandatory, but that the Player was free to follow this guidance.

- Subsidiarily, the Player maintains that should the Panel deem that no warning was given by the Player, the Player was entitled to terminate his Employment Contract without a prior warning since a warning would have been superfluous.

- In view of all the above, the Player requests the Appealed Decision to be upheld.

V. ADMISSIBILITY

50. The appeal was filed within the 21 days set by article 67 (1) of the FIFA Statutes (2013 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

51. It follows that the appeal is admissible.

VI. JURISDICTION

52. The jurisdiction of CAS, which is not disputed, derives from article 67 (1) of the FIFA Statutes as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

53. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both parties.

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

VII. APPLICABLE LAW

55. 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

56. The Panel notes that article 66 (2) of the FIFA Statutes stipulates 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".*

57. The Panel observes that article X (d) of the Employment Contract determines as follows:

> *"The PARTIES elect FIFA judicial bodies as the competent party for solving any queries arising from this agreement. […]"*

58. Although article X (d) of the Employment Contract does not contain a specific choice of law clause, the Panel finds that the parties elected for the application of the FIFA Regulations on the Status and Transfer of Players (hereinafter: the "FIFA Regulations") by assigning the judicial bodies of FIFA as the competent organs to resolve any queries arising from the Employment Contract.

59. Consequently, the Panel will decide the present dispute primarily in accordance with the FIFA Regulations and, subsidiary, Swiss law should the need arise to fill a possible gap in the regulations of FIFA.

VIII. MERITS

A. The Main Issues

60. In view of the above, the Panel observes that the main issues to be resolved are the following:

a. Did the Player terminate the Employment Contract with just cause?
   aa. Did the Player notify the Club about the outstanding salaries?
   ab. Is the non-payment of three months salaries to be considered as a sufficient basis for the unilateral termination of the Employment Contract by the Player?
b. If so, to what amount of outstanding salary is the Player entitled?
c. If so, to what amount of compensation for breach of contract is the Player entitled?

a) Did the Player terminate the Employment Contract with just cause?

aa) Did the Player notify the Club about the outstanding salaries?

61. The Panel observes that it is undisputed that the Player terminated the Employment Contract by means of the termination letter dated 16 January 2013. As such, the first issue to be determined in the present matter is whether the Player had just cause to terminate the Employment Contract or not. The burden of proof in this respect obviously lies with the Player.

62. The Player puts forward that he had just cause to unilaterally terminate the Employment Contract on 16 January 2013, *"because the monthly salaries of the three previous months (October to December 2012) at a total amount of EUR 95'000 were outstanding"*. The Player stresses that the continuing non-payment of his salaries was a violation of qualified severity as it involves three months out of the four first months of his employment.

63. The Club disputes that the Player notified the Club as of November 2012 that he would leave the Club if his outstanding remuneration remained unpaid and that the outstanding remuneration in the amount of EUR 95,000 was sufficiently substantial to justify a termination with just cause by the Player. It is not contested that the Player did not return to the Club after leaving without permission on 16 January 2013 and that subsequently, on 1 February 2013, he signed an employment contract with Göztepespor.

64. It is at this juncture that the parties have divergent positions. In fact, whereas the Player considers that he had just cause to unilaterally terminate the Employment Contract, the Club, on the other hand, sustains that the outstanding remuneration was not substantial and that the Player suddenly left the Club without prior warning or notice. The Club argues that the Player *"did not give any notice or letter warning the Club about his receivables",* and that *"the procedure of termination of the Contract has been foreseen under the Article VI lit a* [sic]*"* of the Employment Contract*,* obliging the Player to notify the Club in writing, with which obligation the Player did not comply.

65. The Panel observes that article 14 of the FIFA Regulations provides for the possibility of terminating a contract with just cause as follows:

"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause".

66. The Panel observes that the Commentary to the FIFA Regulations provides guidance as to when a contract is terminated with just cause:

"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally".

67. In this regard, the Panel notes that in CAS 2006/A/1180, a CAS panel stated the following:

"[A] prerequisite for terminating because of late payment is that the Appellant should have given a warning. This follows from the principle of good faith; for the breach of duty is – objectively – from the outset not so grave that it would have been unreasonable to expect the Appellant to continue the employment. However, if that is the case the Appellant must – before he terminates the Contract – let the Respondent know firstly that he is complaining that the Respondent's conduct is not in accordance with the Contract and secondly that he is not prepared to accept such breaches of contract in future. With regard to employment contract relationships in the world of football, according to the principle of contractual stability, the unilateral termination of a contract must be considered as an absolute last resort, where, given the particularities of the situation at stake, it could not be expected that one of the parties could reasonably continue to be bound by the contractual relationship".

68. The Panel observes that article VI lit. b) of the Employment Contract provides as follows:

"In case of non-payment of "two consecutive salaries" or the "second season's advance payment" in full or in part, the PLAYER should notify the club in writing. If the CLUB should not pay the notified amount in 30 (thirty) days starting from the due date of the second unpaid salary or the due date of the second season's advance payment, then the PLAYER shall have the right to unilaterally terminate the CONTRACT with just cause".

69. The Panel understands that this contractual provision is specifically agreed upon to deal only with the following two situations:

- Non-payment of two consecutive salaries; or
- Non-payment of the second season's advance payment.

70. As such, this provision entitles the Player – by way of derogation from the principle enshrined in the Commentary to the FIFA Regulations that a player in principle has the right to terminate his contract if his salaries have not been paid for a period of **three** months – to unilaterally terminate the Employment Contract in case the Club does not pay **two** consecutive salaries within 30 days after the due date of the second unpaid salary (or does not pay the second

season's advance payment), under the specific condition that the Player has to notify the Club in writing. The Panel considers this provision to be a deviation from the general principles enshrined in the Commentary to the FIFA Regulations to the benefit of the Player.

71. The Panel finds that, in principle, nothing prevents the parties from defining when and under which circumstances a party may terminate the Employment Contract with just cause, as long as such deviation is mutual or to the benefit of the party willing to terminate the Employment Contract.

72. The Panel observes that the Player did not notify the Club in writing on 1 December 2012, but terminated the Employment Contract by letter dated 16 January 2013 after three months of salaries remained unpaid.

73. The Panel finds that article VI (b) would only be of relevance if the Player wanted to terminate the Employment Contract after two months of unpaid salaries; only then, the Player was obliged to warn the Club in writing. Otherwise, the general principle enshrined in the Commentary to the FIFA Regulations would apply, which does not mandatorily require a written notification to be made, but only requires a notification to be made, *i.e.* thus including an oral notification.

74. As such, the question to be answered is whether the Player, in order to be entitled to validly terminate the Employment Contract with just cause, orally notified the Club in order for the latter to have a last chance to comply with its obligations.

75. The Club argues that the Player did not warn the Club that he would terminate the Employment Contract should the Club not comply with its obligations, but simply left the training camp without permission from the Club and terminated his Employment Contract.

76. The Player maintains that as of November 2012 he *"orally complained at several occasions towards club officials that his salary was unpaid and that he did not agree with this situation"*. Furthermore, the Player filed a witness statement of Mr Feindouno, which statement supports his contention that on or around 10 January 2013, during a training camp in the winter break, he had a conversation with both the president and the manager of the Club in which he *"again complained that he had not received his salaries for October, November and December 2012, and he threatened to terminate the contract in case of continuous non-payment"*.

77. The witness statement of Mr Feindouno reads, *inter alia*, as follows:

> *"In January 2013, the training of the team was held in Antalaya, in Turkey. At the occasion of that camp, there was a meeting between the president of the club Elazigspor and his right hand and translator, Ozgur, on one side, and on the other side the players Hervé Tum, Julien Faubert and me.*
>
> *At that meeting, the three players of us have complained to the president because we were not paid regularly by the club. Due to that, we wanted to resign to our contracts. That meeting took place at the reception of our Hotel in Antalya"*.

78. The Panel notes that the Club only argues that the Player *"did not give any notice or letter warning the Club about his receivables",* but did not try to refute the facts and circumstances as described and evidenced by the Player in these proceedings, nor did it file documents or witness statements to refute the assertions made by the Player and it did not take the opportunity to cross-examine the announced witness, Mr Feindouno. As a result, the Panel has no reason to doubt the correctness of the facts and circumstances as set out by the Player, nor does the Panel have any reason to question the truth of the witness statement of Mr Feindouno.

79. As such, the Panel considers that the Player has demonstrated that he orally complained regarding the late payment of his salaries and that he warned the Club prior to his resignation.

80. In view of this, the Panel concludes that the Player complied with his duty to notify the Club before terminating his Employment Contract, by orally informing the Club that if it would not comply with its payment obligations he would terminate the Employment Contract.

ab) Is the non-payment of three months salaries to be considered as a sufficient basis for the unilateral termination of the Employment Contract by the Player?

81. The Panel observes that whereas the Player maintains that he had just cause to unilaterally terminate the Employment Contract, *"because the monthly salaries of the three previous months (October to December 2012) at a total amount of EUR 95'000 were outstanding"* and that this non-payment was a violation of qualified severity because it involved three months out of the four first months of employment, the Club finds that the amount of EUR 95,000 was not sufficiently substantial to prematurely terminate the Employment Contract with just cause.

82. The Commentary to the FIFA Regulations specifically refers to the following example of a breach with just cause:

"Example 1: A player has not been paid his salary for over 3 months. Despite having informed the club of its default, the club does not settle the amount due. The player notifies the club that he will terminate the employment relationship with immediate effect. The fact that the player has not received for such a long period of time entitles him to terminate the contract, particularly because persistent non-compliance with the financial terms of the contract could severely endanger the position and existence of the player concerned".

83. The CAS has had the opportunity of specifying in its jurisprudence that while the FIFA rules do not define the concept of "just cause", reference should be made to the applicable law (CAS 2006/A/1062; CAS 2008/A/1447). When Swiss law applies, as in the particular case, Article 337(2) of the Swiss Code of Obligations (hereinafter: the "SCO") provides that *"[a]ny circumstances which, according to the rules of good faith, mean that the party who has given notice of termination cannot be required to continue the employment relationship, shall be deemed good reason"*. The concept of "just cause" as defined in article 14 of the FIFA Regulations must therefore be linked to that of "good reason" within the meaning of article 337 (2) of the SCO.

84. The Panel observes that according to the Employment Contract, the Player was entitled to receive, for the first year of the Employment Contract, a total amount of EUR 500,000 (without bonuses).

85. It is undisputed that the Club paid the agreed advance payment of EUR 200,000 and the first salary instalment for the month of September in the amount of EUR 30,000 in a timely manner, but on 16 January 2013 had failed to pay the Player's salaries regarding October 2012 (EUR 30,000), November 2012 (EUR 30,000) and December 2012 (EUR 35,000), amounting up to EUR 95,000.

86. As set out above, based on well-established jurisprudence of CAS, non-payment or late payment of a player's salary by his club may constitute "just cause" for terminating the employment contract (CAS 2006/A/1180; CAS 2008/A/1589; Judgement 4C.240/2000 of the Swiss Federal Tribunal dated 2 February 2001). In this regard, the CAS panel in CAS 2006/A/1180 specified the following:

"[…] the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the later non-payment, is irrelevant. The only relevant criteria is whether the breach of the obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee".

87. In the present case, the Panel observes that after four months the Club had paid the Player already an amount of EUR 230,000, *i.e.* almost half of his yearly salary. It could indeed be questioned whether in view of this circumstance, the fact that an amount of EUR 95,000 is sufficient to terminate an Employment Contract with just cause. However, the Panel deems it crucial that the Club failed to pay the Player his salaries for over a period of more than three months. Pursuant to the jurisprudence of the CAS, the Panel finds that such persistent non-compliance by the Club of its obligations under the Employment Contract legitimately caused the Player's confidence in the Club respecting its duties under the Employment Contract in the future to be lost. It is therefore not so much the amount of outstanding salaries that justify the Player's unilateral termination with just cause, but the persistent nature of the Club's breaches (CAS 2013/A/3426 para. 142-158).

88. Consequently, the Panel finds that the Player had just cause to unilaterally and prematurely terminate his Employment Contract with the Club.

b) If so, to what amount of outstanding salary is the Player entitled?

89. The FIFA DRC decided it was appropriate to award the Player EUR 95,000, corresponding to the outstanding salaries at the time of the termination, with 5% interest *p.a.* on the amount of EUR 95,000 as from the day after the respective due dates of the salaries, *i.e.* as from 31 October 2012, 1 December 2012 and 31 December 2012, until the date of effective payment.

90. The Panel observes that the Club does not dispute the amount of EUR 95,000 as outstanding salaries at the time of the termination. As such, the Panel concurs with the FIFA DRC and considers that the Player is entitled to the outstanding remuneration in the amount of EUR 95,000, with interest as awarded in the Appealed Decision.

c) If so, to what amount of compensation for breach of contract is the Player entitled?

91. Having established that the Club is to be held liable for the early termination of the Employment Contract, the Panel will now proceed to assess the consequences of the unilateral breach by the Club.

92. The Panel observes that article 14 of the FIFA Regulations does not specifically determine that the Player is entitled to compensation for breach of contract by the Club. The Panel, however, is satisfied that the Player is, in principle, entitled to compensation because of the breach of the Employment Contract by the Club. In this respect the Panel makes reference to article 14 (5) and (6) of the Commentary to the FIFA Regulations, according to which a party *"responsible for and at the origin of the termination of the contract is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed"*. Accordingly, although it was the Player who terminated the Employment Contract prematurely, the Club was at the origin of the termination of the Employment Contract and is thus liable to pay compensation for damages suffered by the Player as a consequence of the early termination.

93. The Panel observes that article 17 (1) of the FIFA Regulations determines the financial consequences of a premature termination of an employment contract:

> *"The following provisions apply if a contract is terminated without just cause:*
>
> *1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annex 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the Player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within the protected period".*

94. There is ample CAS jurisprudence on the application of article 17 (1) of the FIFA Regulations. The vast majority of this jurisprudence establishes that the purpose of article 17 of the FIFA Regulations is basically nothing more than to reinforce contractual stability, *i.e.* to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (CAS 2012/A/3033, §74; CAS 2012/A/2874, §128, CAS 2012/A/2932, §84, CAS 2008/A/1519-1520, §80, with further references to: CAS 2005/A/876, §17: *"[…] it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability' […]";* CAS 2007/A/1358, §90; CAS 2007/A/1359, §92: *"[…] the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability […]";* confirmed in CAS 2008/A/1568, §6.37).

95. Regarding the calculation of compensation and the application of the principle of "positive interest", the Panel observes that CAS jurisprudence sets out the following:

"When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.

As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitutum, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.

The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469, N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehlin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also Wyler, Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (…).

The principle of the "positive interest" shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations" (CAS 2008/A/1519-1520, §80 et seq.).

96. The Panel finds that the legal framework set out above and the principle of positive interest are applicable to the present case. Against this background, the Panel will proceed to assess the Player's objective damages. However, since the Player did not file an independent appeal against the Appealed Decision, the Panel finds that it is not required to assess all the criteria mentioned in article 17 (1) of the FIFA Regulations, but only the ones referred to by the Club in its appeal.

97. The Panel observes that the Club does not dispute the remaining value of the Employment Contract, nor does it dispute the amount of remuneration of the Player with Göztepe. The Club however argues that *"[a]s the both parties have fault in this employment relationship, and breached the contract, the Player is not entitled to receive an amount of EUR 476.000,- as compensation for breach of contract. The amount of EUR 476.000,- is disproportionate when it is compared with the fact that the Player just fielded seventeen games and played for 90 minutes just at three of them"*. The Club also refers to *"Article VI lit c of the employment contract"* and argues that *"the Player did not give his best effort to find a new club. Therefore if the Panel decides a compensation should be paid, then the amount of EUR 476.000,- should be reduced"*. In addition, the Club asserts that due to the unforeseen departure of the Player it *"had been forced to sign with Mr Emir Kujovic EUR 670.000,-"*.

98. Firstly, the Panel is not convinced by the arguments adduced by the Club that the Player was partly responsible for the termination of the Employment Contract. As such, the Panel finds that this is no reason to mitigate the compensation to be awarded to the Player.

99. The Panel also finds that the argument that the compensation should be mitigated because the Player was allegedly only fielded in seventeen matches by the Club must be disregarded as it was at the discretion of the Club whether to field the Player or not. The Club in no way established that the Player was not fielded due to his behaviour or other reasons that were not related to purely sporting reasons.

100. Furthermore, the Panel finds that the argument of the Club that due to the unforeseen departure of the Player the Club had to hire a substitute player is of no relevance with regard to the calculation of the amount of compensation for breach of contract, as the Club itself was responsible for the breach of contract. The proposition that the Club made certain expenses to replace the Player does in no way mitigate the damages of the Player and must therefore be disregarded.

101. The Panel notes that well-established CAS jurisprudence provides that if the employee terminates the contract with just cause because the employer breaches the contract, the employee has a claim to compensation for the amount which he would have earned had the employment been terminated in compliance with the notice period or by expiry of the fixed term (HAAS, *Football Disputes between Players and Clubs before the CAS*, in: Sports Governance, Football Disputes, Doping and CAS Arbitration, Berne 2009, p. 242, especially the authorities cited in footnote 139).

102. According to this principle, it is fully justified to award the player the wages to be paid until the end of the employment contract, with deduction of which he has saved or earned elsewhere because of the (early) termination of the employment contract or could have earned elsewhere had he made reasonable efforts. Such a deduction is in line with article 337) (2) of the SCO (HAAS, *Football Disputes between Players and Clubs before the CAS*, in: Sports Governance, Football Disputes, Doping and CAS Arbitration, Berne 2009, p. 243, especially the authorities cited in footnote 142).

103. The Panel concurs with the FIFA DRC, that at the time of termination of the Employment Contract on 16 January 2013, the Employment Contract would run for another 17 months, in which the Player would be entitled to 5 instalments of EUR 35,000 for the period as from January 2013 until May 2013 as well as to the amount of EUR 500,000 for the whole 2013/2014 season.

104. As such, the remaining value of the Employment Contract as from its early termination until its expiry amounts to EUR 675,000, which amount has to be reduced with EUR 199,000, being the remuneration received by the Player under his new employment contract with Göztepe, for the period between 1 February 2013 and 31 May 2013.

105. The Panel notes that the Player, after the termination on 16 January 2013, found new employment with the Turkish club Göztepe, as from 1 February 2013, which is within 15 days

after the termination of the Employment Contract. As such, the Panel finds that the Player, at that time, complied with his obligation to mitigate his damages. The question is however whether the Player complied with his duty to mitigate his damages during the 2013/2014 as he allegedly remained unemployed throughout this season.

106. Mainly considering the age of the Player at the time (*i.e.* 34), the Panel finds that it could not be requested from the Player to find other employment directly after the expiry of the employment contract with Göztepe on 31 May 2013. Also, legally speaking, the Club bore the burden of proving that the Player failed to use all reasonable efforts and/or diligence to find a new club, and/or that the Player received new offers but knowingly refused to mitigate his damages by declining the said offers. The Club failed to discharge this burden.

107. It follows that there is no reason to adjust the compensation determined by the FIFA DRC in the Appealed Decision.

108. As such, the Panel concurs with the considerations of the FIFA DRC to award EUR 476,000 compensation to the Player for the breach of the Employment Contract by the Club.

B. Conclusion

109. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

a. The Player had just cause to terminate his Employment Contract with the Club prematurely;
b. The Player is entitled to an amount of EUR 95,000 as outstanding salary;
c. The Player is entitled to an amount of EUR 476,000 as compensation.

110. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 21 April 2014 by Elaziğspor Kulübü Derneği against the Decision issued on 31 October 2013 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.

2. The Decision issued on 31 October 2013 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

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