Arbitration CAS 2015/A/3891 Kasimpasa Spor Kulübü v. Fernando Varela Ramos, award of 10 December 2015

Panel: Mr Lars Halgreen (Denmark), President; Mr Frans de Weger (The Netherlands); Mr Gerardo Luis Acosta Pérez (Paraguay)

Football
Termination of employment contract without just cause
Burden of proof
Compensation for damages caused by the unlawful termination of employment contract

1. **A party wishing to terminate an employment contract with just cause due to the other party's alleged absence(s) from work without permission has the burden to prove that the absence from work was without permission and was sufficient to constitute a just cause for termination.**

2. **According to Article 17 para. 1 of FIFA's Regulations on the Status and Transfer of Players (RSTP), a player has to be compensated for the damages caused by the unlawful termination of an employment contract. In principle the harmed party should be restored to the position in which the same party would have been had the contract been properly fulfilled (principle of the so-called positive interest). However the harmed party has a duty to mitigate its damage.**

I. THE PARTIES

1. Kasimpasa Spor Kulübü (hereinafter referred to as the "Club" or the "Appellant") is a Turkish football club with its registered office in Istanbul, Turkey. It is affiliated to the Turkish Football Federation (TFF), which in turn is affiliated to Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

2. Mr Fernando Varela Ramos, (hereinafter referred to as the "Player" or the "Respondent") is a former professional football player of Spanish nationality.

3. The Appellant and the Respondent together shall hereinafter be referred to as the "Parties".

II. FACTUAL BACKGROUND

4. The circumstances and provisions discussed below constitute a summary of the relevant facts and evidence as set forward by the Parties in their respective written submissions and during

the hearing. This factual 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.

5. On 10 July 2010, the Parties entered into an employment contract (hereinafter referred to as the "Contract"), which was valid for two seasons i.e. the 2010/2011 and the 2011/2012 season. The Contract was supposed to end on 31 May 2012.

6. The relevant provisions of the Contract provide the following:

"Article 1.1. Parties:
[name and address of club represented by: Mr M Suha Suha Sidal],
Nationality Turkish.
Fax: […]

And

[name and address of the Player]
Passport number: AF 002189,
Nationality: Spain
Fax: […]

The Parties agreed that all notices pursuant to this contract shall be considered as properly given and made when delivered to the above written addresses and fax number, unless any Party changed his address by giving written notice to the other Party.

…

"Art. 4. Terms and conditions

4.1. The Player is obliged to perform as a Professional football player to the best of his ability in the matches of the Club, to take part in training sessions and training camp in accordance with the direction of the Club's officials and use only the sporting materials provided by the Club.

4.4. The Player in the course of his professional duties shall follow the instructions of the Club management and coaches. The Player shall acknowledge and abide by the statute, other club normative documents, Football Federation of the Turkish Professional Football League Statutes and Regulations, Football Federation of the Turkey and Turkish Professional Football League, legal bodies' rulings as well as other FIFA and UEFA normative document and official bodies' rulings, regulations and Disciplinary Coach of the Club in connection with the Player.

Art. 5. Rights and obligations by the Parties

The Player is obliged to:

5.1. To play for the Club and shall respect the following points:

A. Training sessions organised by the Club;
B. Participation to the official games of the Club in all championships and all tournaments;
C. Participation to training sessions and friendship games;
D. Participation to any promotional activities for the Club and/or the football.

5.2. To improve his sporting performance achievements and the Club image to perform his working duties diligently at proper time and at a high professional level.

5.3. To maintain high standards of physical, technical, tactical, psychological and functional form;

To follow the Club's doctors, medical and rest instructions;

5.4. To reach a written agreement with the coach of a team employing the Player on the annual main holidays and additional permission planned and return.

The Club is obliged:

5.10. To fulfil the Player labour remuneration terms under the present Contract: to provide to the Player an apartment (up to rental fee EUR 1.000) and a car for the period of the validity of the Contract that is acceptable. To provide the Player two flight tickets each year.

The Club has a right to:

5.11. To involve the Player in the Club's sporting, advertising and public events.

5.12. To make an individual training plan for the Player.

5.13. To make periodic checks of the Player's health, physical performance.

5.14. To terminate the Contract without any compensation if the Player has an illness or injury which is not come in to being by reason of matches and training that limits him meeting the required level of performance.

Art. 6. Remuneration

A. For 2010/2011 season: The Club will pay the Player an amount of 600,000 Eur net (six hundred thousand) for 2010-2011 football season as follows:

- 100,000 Euro net advanced payment shall be paid upon signing

- The amount of 500.000 Eur (five hundred thousand) net shall be paid in ten monthly instalments of equal amounts, namely 50,000 Eur net each month between 30.08.2010-31.05.2011.

B. For 2011/2012 season: The Club will pay the Player an amount of 600,000 Eur net (six hundred thousand) for 2011-2012 football season as follows:

- *100,000 Euro net advanced payment shall be made on July 2011*
- *The amount of 500,000 Eur net (five hundred thousand) shall be paid in ten monthly instalments of equal amounts, namely 50,000 Eur net each month between 30.08.2011-31.05.2012.*

Bonuses:

- *If the Club shall finish Turkish Super League as a champion, the Player shall receive net 200,000 €.*
- *If the Club shall finish Turkish Super League in the second place, the Player shall receive net 100,000 €.*
- *If the Club shall play Turkish Cup final the Player shall receive net 25,000 €.*
- *If the Club shall win the Turkish Club, the Player shall receive net 100,000 €.*
- *If the Club shall not attend to UEFA according to above circumstances, the Club shall attend according to classification of the Club at the end of the season (like 3rd place, 4th place, 5th place) then the Player shall receive net 50,000 €.*

6.1. The Player shall receive above-mentioned monthly salaries at the end of the month.

6.4. Any claim raised by the Player in relation to late payments can only be lodged after a payment delay of 90 days. In such case, the Player shall be entitled to send a written 30-day warning to the Club asking for the outstanding salaries. If the Club does not liquidate its debt to the Player within the term of the notice, the Player shall be entitled to terminate the labour relationship.

Art. 7. Penalties and results

7.1. The Player accepts that he read and understand and received the copy Regulations and Disciplinary Coach of the Club. In the event that the Player has committed any or all actions listed in Regulations & Disciplinary Coach of the Club to the present Contract, the Player agrees to pay any fine which the Club has fixed for him according to Regulations and Disciplinary Coach of the Club. The Player's salary that month is reduced without any notification. The Player agrees with these deductions. If the Player does not commit any of the above-mentioned actions, the following month the amount of the salary shall be restored.

Art. 8. General provisions

5) The parties elect FIFA – Federation International de Football Association – to settle any disputes that might arise from this Contract".

7. From 20 to 24 March 2011 and from 30 March until 4 April 2011 inclusive, the Appellant alleges that the Respondent left Turkey without permission. On 14 April 2011, the Respondent was fined USD 20,000 for the allegedly unjustified absences from work. The

Respondent did not appeal or protest against these fines, but they were never discounted against his salary.

8. At the end of the 2010/11 season, the Club was relegated to the second tier of national football in Turkey (the "second division").

9. On 22 June 2011, the Club informed the Player that pre-season training for the 2011/12 season would start on 25 June 2011.

10. It is undisputed that the Player returned to Turkey and resided there in the period from 25 June – 7 July 2011 at the Wow Airport Hotel, which was provided by the Club and was paid by the Player. The Club had not rented an apartment for the Player when he returned to Turkey. According to the Player's statement, he attended the training from the time he returned to Turkey until 5 July 2011, as far as he was allowed to do so by the Club, but most of the time he ended up training alone at the Club's facilities.

11. On 5 July 2011, the Club's first team left for a pre-season training camp in Bolu, which lasted until 15 July 2011. It is disputed between the Parties why the Player did not attend the pre-season training camp. The Club maintained that he failed to appear at the work place and did not attend the pre-season camp without authorization and without just cause. Contrary hereto, the Player claims that he was neither invited to the training camp nor allowed to join, as he was not being informed of the team's departure. Furthermore, the Player claims that he was not allowed to train in the Club's facilities, after the team had left for the pre-season training camp.

12. The Player maintains that he then asked the Club for permission to leave from 7-11 July 2011 to visit his family in Spain. The Player states that this permission was granted verbally, as it had occurred many times before, but that he specifically requested the Club to send him the authorization in writing. On 7 July 2011, the Club, according to the Player, authorized his leave by means of a hand-written note faxed to him from the Club's offices. The Club, on the other hand, maintains that such permission was never given, and that the hand-written note filed by the Player had been forged.

13. On 12 July 2011, the Player, allegedly being under the assumption that he was owed overdue amounts of his salary for the month of May 2011, requested payment of EUR 50,000, which he believed had not been paid on 31 May 2011. According to the Player's statement his confusion was caused by the Club's lack of clarity and control, when paying him the amounts in accordance with the contract.

14. On 14 July 2011, the Club sent a notice by facsimile to the Player stating he had been absent without authorization from training as from 5 July 2011. Due to this breach, the Club decided to impose a fine of USD 20,000 as well as deducting from his salary an amount corresponding to 7-day remuneration. The Club furthermore warned the Player that he had failed to attend the pre-season camp in Bolu, Turkey, and that he had not followed the training programme

of which he had been informed orally. At the same time, the Club informed the Player of his time schedule and location.

15. On 20 July 2011, the Player repeated that he had received a valid written permission for his absence from 7-11 July 2011. However, when he returned to Turkey he was not allowed to train with the first team. The next day, the Player sent a letter to the Club stating that he was neither allowed to enter the "youth set-up facility" (the Club's youth team training ground) in order to carry out his training.

16. By letters dated 22 July and 27 July 2011, the Club rejected the Player's allegations and maintained that he had not been denied access to the training ground, that he had been absent without authorization during the period from 7-11 July and, that he had been fined with a total of USD 40,000 for his unjustified absence. Finally, the club warned the Player that the Club would terminate the Contract, unless the Player joined the Club's training camp on 28 July 2011.

17. On 1 August 2011, the Club sent a final warning letter to the Player requesting that he returned to the Club the next day. Without response from the Player, the Club terminated the Contract by means of a written notice dated 3 August 2011.

18. Just before the end of the summer transfer window, the Player signed on 30 August 2011 a new employment contract with the Spanish Club, Real Valladolid Club de Fútbol, S.A.D. ("Real Valladolid"), valid until 30 June 2012. This contract provided for a total fixed remuneration of EUR 125,000, and the conditional payment of EUR 20,000 in case the Spanish club was promoted to the Spanish first division at the end of the 2011/2012 season, which eventually occurred.

19. On 26 March 2012, the Player filed a claim against the Club before the FIFA Dispute Resolution Chamber (DRC). The basis for the claim was that the Club had no just cause to terminate the Contract. The Player requested the following amounts before the DRC:

1) EUR 150,000 as outstanding remuneration, including the monthly instalment of EUR 50,000 due on 31 May 2011 and the amount of EUR 100,000 due in July 2011;

2) EUR 500,000 as compensation corresponding to the residual value of the Contract as of 4 August 2011.

20. The Club, in turn, filed a counterclaim with the DRC requesting the following compensation:

1) EUR 18,392.70 corresponding to the amount paid in excess of the Players' dues;

2) EUR 28,000.00 corresponding to the fines imposed on the Player due to his absence;

3) EUR 17,956.98 corresponding to the Player's salary for the periods during which he was absent;

4) EUR 650,000 as compensation taking into consideration inter alia the Contract's residual value of EUR 500.000 and the sporting damage suffered by the Club estimated at EUR 150,000;

5) 5 percent interest on the above amounts as of 5 August 2011.

Furthermore, the Club also asked the Spanish club Real Valladolid to be held jointly and severally liable for the payment of all the amounts claimed.

21. On 25 September 2014, the FIFA DRC rendered the following decision without grounds ("the FIFA DRC Decision"):

"1. The claim of the Claimant/Counter Respondent 1, Fernando Varela Ramos, is partially accepted.

2. The Respondent/Counterclaimant, Kasimpasa S.K., has to pay to the Claimant/Counter respondent 1, within 30 days as of the date of notification of this Decision, outstanding remuneration in the amount of EUR 100,000.

3. The Respondent/Counterclaimant has to pay to the Claimant/Counter Respondent 1 within 30 days as of the date of notification of this Decision compensation for breach of contract in the amount of EUR 355,000.

4. In the event that the amounts due to the Claimant/Counter respondent 1 in accordance with the above-mentioned point 2 and 3 are not paid by Respondent/Counterclaimant within the stated time limit, interest at the rate of 5 per cent p.a. will fall due as to expiry of the above-mentioned time-limits, and the present matter shall be submitted upon request to the FIFA Disciplinary Committee for consideration and a formal decision.

5. Any further claim lodged by the Claimant/Counter Respondent 1 is rejected.

6. The Claimant/Counter Respondent 1 is directed to inform the Respondent/Counter Claimant immediately and directly of the account number to which the remittance are to be paid and to notify the Dispute Resolution Chamber of every payment received.

7. The counterclaim of the Respondent/Counterclaimant is rejected".

22. The grounds of the FIFA DRC Decision were communicated to the Parties on 7 January 2015.

III. PROCEEDINGS BEFORE THE CAS

23. On 23 January 2015, the Appellant filed his Statement of Appeal before the Court of Arbitration for Sport (hereinafter referred to as the "CAS") against the Respondent with respect to the FIFA DRC Decision.

24. The Appellant nominated Mr Frans de Weger as arbitrator in the present proceedings.

25. On 9 February 2015, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present arbitration proceedings.

26. On 10 February 2015, the Appellant filed his Appeal Brief with the CAS in accordance with Article R51 of the Code.

27. On 17 February 2015, the Respondent nominated Mr Gerardo Luis Acosta Perez as arbitrator in the present proceedings.

28. On 9 March 2015, the Respondent filed its Answer with the CAS Court Office in accordance with Article R55 of the Code.

29. On 10 March 2015, the CAS Court Office informed the Parties that the Panel appointed to hear the case was constituted as follows:

President: Mr Lars Halgreen, attorney-at-law in Copenhagen, Denmark
Arbitrators: Mr Frans de Weger, attorney-at-law in Zeist, The Netherlands
Mr Gerardo Luis Acosta Pérez, attorney-at-law in Asunción, Paraguay.

30. On 13 May 2015, the Parties respectively signed and returned the Order of Procedure to the CAS Court Office.

31. On 9 June 2015, a CAS hearing was held in Lausanne Switzerland. The Panel was assisted at the hearing by legal counsel to the CAS, Mr Antonio de Quesada.

32. The Appellant was represented by Mr Georgi Gradev and Mr Ersin Hamarat, both Attorneys-at-law in respectively Sofia, Bulgaria and Istanbul, Turkey. The Appellant called the following witness:

- Mr Süha Sidal (former Sports Director of the Club).

33. The Respondent appeared in person and was represented by Ms Reyes Bellver Alonso and Mr Miguel Liétard, both Attorneys-at-law in Madrid, Spain. The Respondent called the following witness:

- Mr Cumhur Erol (former physiotherapist of the Club).

34. The witness testimonies may be summarized as follows:

(i) The testimony of Mr Süha Sidal (via telephone conference)

35. Mr Süha Sidal was the Sports Director of the Club, when the Player was under contract. He signed the Contract on behalf of the Club and was the Club's named representative. Mr Sidal was asked about the circumstances surrounding the Player's leave from 7 to 11 July 2011. Mr Sidal confirmed that the Player had asked for permission to leave Turkey, because he wanted to look for another club. He had been given a verbal permission, but the written permission was a forgery. It was not his signature. He did not have the authorization to pay the players' salary, and he did not follow the training program of the players. He had not given a specific permission to the Player to attend the training facilities. He was surprised to hear that the Player was not allowed to train. According to Mr Sidal, the Player had attended training on 20 July and 7 August 2011. The Player was not interested in playing in the second division, and the Club had initiated discussions with the Player after the relegation to the second best league in Turkey. The Club wanted to obtain a transfer fee, but the Player insisted on a free transfer. He confirmed that the Player's salary was one of the highest in the Club at the time. It was the normal procedure that the players obtained a verbal permission if they had to be excused from training or matches. Mr Sidal confirmed, that Mr Erol, the physiotherapist of the Club, acted

as the translator since he spoke some Spanish. On cross examination, the representative of the Respondent asked Mr Sidal if he would clarify his opinion vis-à-vis the written statement signed by him on 9 February 2015 (exhibit 18) in which he stated that *"the player has never asked me for a permission to be absent from work from 9-11 July 2011, and I have never given him such"*. Mr Sidal moderated his statement and said that a verbal permission had been given, but not a written one.

(ii) The testimony of Mr Cumhur Erol (via telephone conference)

36. Mr Erol confirmed the content of his previous written statement, which the Respondent had presented during these proceedings. Mr Erol was a sports physiotherapist, and he spoke Spanish, English, Italian and Portuguese as well as Turkish. For these reasons, he acted as an interpreter for the Player. It was his impression that the Player did not have many friends among his team colleagues, because he only spoke Spanish. It was his general impression after having spent time in Turkish football that Turkish clubs, which were relegated, generally speaking wanted to get rid of their most expensive players, because the revenues in the lower division were very small. It was his impression that the Player did not want to leave the Club. He knew that his annual salary was EUR 600,000, and that was one of the highest in the Club according to what he knew from other players in the Club. He heard from the Player that he had been given permission to go back to Spain in the beginning of April because his father had cancer. According to his impression, the Player had not returned to look for another Club, but only to stay with his family. He knew that the first team had gone to the training camp in Bolu in the beginning of July, but he did not know whether the Player had been informed. He had not spoken with the Player regarding this training camp. He had not acted as a paid translator for the Club, but the Club had on a number of occasions made use of his language skills towards foreign players.

37. The Player renounced his right to give testimony during these proceedings, but the Panel asked him to clarify certain training dates during July 2011.

38. Following the testimonies, the Parties presented their closing statements and conclusions. Both Parties declared at the end of the hearing that they had no objections with respect to the way in which these proceedings had been conducted, and that their right to be heard and to be equally treated had been granted.

IV. SUBMISSIONS OF THE PARTIES

A. The position of the Appellant

39. In the Appeal Brief, the Appellant challenged the FIFA DRC Decision, submitting the following requests for relief:

1) *"To annul the decision passed on 25 September 2014 by the FIFA Dispute Resolution Chamber.*
2) *To issue a new decision establishing that the Appellant terminated the Employment Contract with the Respondent with just cause, on 4 August 2011.*

3) To order the Respondent to pay the Appellant the following amounts:

EUR 25,751.07 + TL 23,000 + USD 40,000 + CHF 1,000 increased with interest of 5 per cent p.a. as from 4 August 2011 until the date of effective payment;

or, in the alternative, to order a set-off of the amount(s) eventually due by the Appellant to the Respondent against the aforementioned sums.

4) To order the Respondent to pay the Appellant compensation for breach of contract in the amount of EUR 322,500 plus interest of 5 per cent p.a. as of 4 August 2011 until the date of effective payment; or, in the alternative, to completely deny or, at the least, significantly reduce at the Panel's discretion the Appellant's liability for damages.

5) To order the Respondent to bear all costs incurred with the present procedure.

6) To order the Respondent to pay the Appellant a contribution towards its legal and other costs (for two external counsels), in an amount to be determined at the discretion of the Panel".

40. At the beginning of the hearing, the legal representative of the Appellant withdrew the claims for reimbursement and compensation (request No. 3 and 4). Thus, these requests for relief would not be dealt with by the Panel during these proceedings.

41. In support of its remaining requests for relief, the Appellant's submissions, in essence, may be summarized as follows:

- The Appellant submits that the Appellant's termination of the Contract was with just cause, due to severe breaches of the Contract committed by the Respondent. Hence, the Club was entitled to terminate the Contract with just cause.

- In particular and, in support of the right to terminate the Contract with just cause, the Appellant submits that the Respondent was absent from work without authorization and without a valid reason during the following periods:

  (i) From 20 to 24 March 2011, inclusive (uncontested);

  (ii) From 30 March to 4 April 2011, inclusive (uncontested);

  (iii) From 5 July 2011 onwards, of which the absence from work without permission and without a valid reason from 12 to 18 July 2011, inclusive and from 22 July to 3 August 2011, inclusive, is uncontested.

- Moreover, the Appellant submits that the Respondent was fined three times by the Appellant in April and July 2011, but he did not rectify his behaviour.

- Thus, the Respondent failed to comply with his contractual obligations, in particular:

  - To take part in training sessions and training camps of the Appellant in accordance with the directions of the latter's officials (clause 4.1 and 5.1 of the Contract).

- To comply with instructions of the Appellant's management and coaches (clause 4.4 of the Contract).
- To perform his working duties diligently at proper time and at a high professional level (clause 5.2 of the Contract).
- To reach a written agreement with the coach of the annual main leave and additional leaves planned and return (clause 5.4 of the Contract).

- The Appellant refuses the Respondent's claim that he was not paid his salary in May 2011, and that he was not invited to take part in the training camps in Bolu, nor that he was able to partake in training at the Appellant's training ground. In this respect, the Appellant submits that well-established CAS jurisprudence confirms that any party wishing to prevail on a disputed issue, must discharge its burden of proof, i.e. must give evidence of the facts on which its claims has been made. Hence, the Appellant submits that the Respondent has not discharged his burden of proof.

- In particular, the Appellant submits that the alleged permission signed by Mr Süha Sidal is a clear forgery based on which the Respondent cannot make any valid justification for his absence.

- With respect to the Respondent's claim for outstanding remuneration in the amount of EUR 100,000 due in July 2011, the Appellant submits that wages in principle are paid only in exchange for services. Therefore, in a situation where the Respondent was in default himself, the Appellant considers that it was legal and proper for it to withhold the payment for July 2011until the Respondent resumed duty.

- As for the compensation for breach of contract, the Appellant refers to Article 17, para 1 RSTP (ed. 2010) and CAS jurisprudence, which outlines the compensation due by the principle of the so-called "positive interest". In the present case, the Respondent was due to receive from the Appellant the amount of EUR 500,000 for the remaining time under the contract from August 2011 until May 2012. Under his new contract with Real Valladolid, the Player apparently received EUR 145,000 for the same period, which finding was established by FIFA DRC, and was not appealed against by the Respondent to the CAS. Although, the Appellant by the beginning of the hearing had withdrawn its claim for compensation for breach of contract in the amount of EUR 322,500 plus interest, the Appellant has maintained its alternative counterclaim against the FIFA DRC Decision, namely to completely deny or at least significantly reduce at the Panel's discretion the Appellant's liability for damages.

B. The position of the Respondent

42. In his Answer, the Respondent has submitted the following request for relief on the merits:

1. *That the Appeal filed by Kasimpasa is rejected.*
2. *That Kasimpasa shall bear all court costs related to the current arbitral proceedings.*

3. *That Kasimpasa must pay a contribution towards Mr Varela's legal fees and other expenses in an amount to be determined by the Panel.*

43. In support of its request for relief, the Respondent's submissions, in essence, may be summarized as follows:

- Overall, the Respondent fully rejects the reasons put forward by the Club to unilaterally terminate the Contract. It is clear from the content of the warning letter and the termination letter that said termination was based on alleged contractual breaches of the Player as of 1 July 2011. No reference whatsoever was made by the Club in those letters to any alleged unjustified absences of the Player prior to 1 July 2011 when stating its reasons to terminate the Contract. Therefore, the Respondent submits that when addressing whether the Contract was terminated with or without just cause, the Club is bound by the content of its warning and termination letters to the Player.

- For the sake of good order, the Respondent, without prejudice to the above submissions, states that the Player's absence in March and April 2011 were in any event justified due to the severe illness of his father.

- The Respondent submits that the Club's attempts to portrait the Player as the party who did not wish to stay in the Club because of the relegation to the second division is both misleading and wrong. The Player was very happy in Istanbul, got along well with his teammates and was earning a very good salary for his work. He had no reason to leave the Club.

- Even though the Player was in Istanbul and had trained with the team as of 26 June 2011, as required by the Club, he was not even invited to partake in the pre-season training camp in Bolu scheduled for 5-15 July 2011. Since he was not invited to join the team in the pre-season camp, and in frustration of not being allowed to train at the team's facilities afterwards, the Player asked to be allowed to travel back to Spain from 7-11 July to visit his family. The requested leave was authorized by the Club through its note, sent by facsimile on 7 July 2011, and the validity of this authorization is proven by the fact that the facsimile came from the official facsimile number of the Club – similar to the official facsimile number that was in the header of the Contract.

- As a reason for the Club's eagerness to terminate the Contract for alleged breach of the Player, the Respondent submits that these steps by the Club were taken only when the Player, by his letter of 12 July 2011, requested an outstanding salary. The fact that the Club had been relegated to the second division, which meant significantly lower revenues to the Club, was the real reason behind the Club's wish to reduce costs.

- The Respondent submits that the Club did not have just cause to terminate the Contract. Moreover, the Respondent rejects that he has the burden of proof, and that he has not complied with such burden. Notwithstanding this position, the Respondent considers that he is able to prove the following:

- He arrived to Turkey on 25 June 2011 as requested by the Club and trained at the Club in so far as he was allowed to, until the team left for the pre-season training camp in Bolu.

- He was not invited by the Club to attend the pre-season training in Bolu from 5-15 July 2011; in fact, he was expressly allowed to stay in Istanbul until 7 July 2011 and then allowed to leave for Spain from 7-11 July 2011.

- He was in Istanbul from 19 July onwards, and any further absences were authorized by the Club.

- The Club alleges that it was not in a position to prove that the Player did not attend training as of 1 July 2011, nor that he was invited to attend training camp, or that he did not complete his training program sent on 15 July 2011. By doing so, it tries to shift the burden of proof onto the Player so that he is the person who would have to prove having attended training. This assertion by the Club is contrary to the Swiss legal principle of *"Beweisnotstand"*. Under this principle, the existence of difficulties in proving "negative facts" by the party bearing the burden of proof results in a duty of cooperation of the contesting party. This, however, does not lead to a reallocation of the risk if a specific fact cannot be established, which will remain with the party bearing the proof, cf. *CAS 2011/A/2384* ad para 256.

- Thus, the Respondent submits that the Club has not discharged its burden to prove the alleged contractual breaches by the Player as of 1 July 2011 and it has not demonstrated that it had just cause to terminate the Contract. Therefore, it must be concluded that the termination of the Contract by the Club was without just cause.

- As for the payment of outstanding salaries until the date of termination, the Respondent submits that the Club was not entitled to withhold the payment of the EUR 100,000 owed to him for the month of July 2011. The Player is thus entitled to receive his full salary for this month, and in this respect, the Player concurs with the decision rendered by the FIFA DRC.

- As for the Player's claim for compensation for the Club's termination of the Contract without just cause, the Player relies on the principle established in Article 17 RSTP of "positive interest" and CAS jurisprudence, which has determined the scope of this principle. Moreover, the Respondent relies on the fact that the interpretation applied by the FIFA DRC in this matter is fully consistent with Swiss law in relation to the calculation of damages for unilateral termination of an employment contract without just cause by the employer.

- With respect to the amount of compensation awarded to the Player in the FIFA DRC, the Respondent rejects the Appellant's argument that a reduction of the compensation should take place in view of an alleged contributory fault of the Player. The Player denies

that he would have any alleged contributory fault in the case at hand. The Respondent maintains that both CAS jurisprudence and Swiss law dismisses the possibility of reducing the compensation due to the alleged contributory fault or negligence by the Player.

- In conclusion, the Respondent submits that while he is precluded from requesting a higher compensation because he has not filed an appeal, it is evident from all of the above considerations that not only is the Club not entitled to, nor has it justified any reduction of the compensation that it must pay to the Player, but it has in fact caused further damage to the Player after having terminated the Contract. Hence, the FIFA DRC Decision shall be upheld by the CAS.

V. LEGAL ANALYSIS

A. Jurisdiction

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

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

45. The jurisdiction of CAS derives from Article 66 and 67 of the FIFA Statutes. No objections have been raised by the Respondent as to the jurisdiction of the CAS. Therefore, the Panel confirms that the CAS has jurisdiction to hear this dispute.

B. Admissibility of the appeal

46. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document".

47. The grounds of the FIFA DRC Decision were communicated to the Parties on 7 January 2015, and the Appellant filed the Statement of Appeal on 23 January 2015. Moreover, no objections to the admissibility of the appeal had been raised by the Respondent. Accordingly, the Panel concludes that the Appeal has been filed within the 21-day deadline foreseen in Article 67 para 1 of the FIFA statutes. Therefore the Appeal is admissible.

C. Applicable law

48. Article R58 of the CAS Code provides as follows:

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

49. Article 66, para 2 of the FIFA statutes provides:

"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".

50. In these proceedings it is undisputed by the Parties that the FIFA RSTP shall apply, and subsidiarily, Swiss law. Therefore, the Panel considers that the applicable law to this matter is FIFA Regulations and, subsidiarily, Swiss law.

D. Scope of the Panel's review

51. According to Article R57 of the CAS Code:

"The Panel shall have full power to review the facts and the law. It may issue a new decision, which replaces the Decision challenged, or annul the Decision and refer the case back to the previous instance (…)".

E. The Merits

52. The following issues shall be determined by the Panel in these proceedings:

Question 1:
Did the Appellant terminate the Contract with just cause?

Question 2:
What should be the consequences of such a termination?

(i) Analysing Question 1

53. As an initial matter, the Panel deems pertinent to refer to Article 14 of the FIFA RSTP which reads 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".

54. The above-mentioned provision is in line with Article 337 of the Swiss Code of Obligations, which pertinent part reads as follows:

"L'employeur et le travailleur peuvent résilier immédiatement le contrat en tout temps pour de juste motifs […]".

This provision can be informally translated into English as follows:

"The employer and the employee may immediately terminate the contract at any time if there is just cause".

55. In light of the above-mentioned provisions, the Panel notes that both, employer and employee, are entitled to terminate an employment agreement at any time in case there is just cause.

56. In this respect, the Panel considers pertinent to refer to the award in the case CAS 2013/A/3216 which in its relevant part reads as follows:

"Pursuant to Article 337 of the Swiss Code of Obligations, both, employer and employee, are entitled to terminate an employment agreement at any time and with immediate effect for important reasons; […]. An important reason is given, in particular, in light of a fact or occurrence the terminating party cannot be expected, in good faith, to continue the employment relationship. The judge shall determine, at its discretion, whether or not an important reason is given […]".

57. In order to establish whether there were sufficient grounds to consider that the Contract was terminated by the Appellant with just cause, it is important that the Panel outlines the relevant context and factual circumstances, which have been presented in these proceedings.

58. Based on the evidence presented in this matter, the Panel notes that the Parties on 10 July 2010 entered into a valid employment contract for two seasons (the 2010/2011 and the 2011/2012 season). The Contract was supposed to expire on 31 May 2012. The Contract does not provide for a termination of the Contract prematurely in case of e.g. relegation to a lower division, which means that both parties were contractually bound to honour the Contract for both seasons even in the event of the Club's relegation.

59. To assess the Appellant's arguments in support of its right to terminate the Contract with just cause, the Panel notes that the Appellant in these proceedings has based its position on the assertion that the Respondent was absent from work without justification and without a valid reason during the following periods:

- From 20 to 24 March 2011 inclusive,
- From 30 March to 4 April 2011inclusive,
- From 5 July 2011 onwards of which the absence from work without permission and without a valid reason according to the Appellant from 12 to 18 July 2011 inclusive, and from 22 to 3 August 2011 inclusive.

60. With reference to the entry/exit stamps in the passport of the Respondent, the Appellant further submitted that the Respondent was not even in Turkey during the following periods:

- From 7 to 11 July 2011;
- From 16 to 19 July 2011;
- From 24 to 26 July, and
- From 28 July to 4 August 2011.

The Appellant definitely left Turkey on 6 August 2011.

61. In determining whether the Appellant had just cause to terminate the Contract based on the Player's alleged absence from work without justification, the Panel must first of all consider whether the alleged period of absence in March and April could form the basis for a valid termination of the Contract.

62. In this respect, the Panel has, after careful examination of the evidence, found no documentation which supports the Appellant's claim and the Panel was not convinced that the Player's alleged absence in March and April was unjustified and would be sufficient to constitute a just cause for termination. The Panel concludes that the alleged unjustified absences in March and April are not to be taken into consideration when assessing as to whether the Club had a just cause to terminate the Contract.

63. As regards the critical question whether the alleged absences from work without permission in July and in beginning of August 2011 could form the basis for a just cause for the termination of the Contract, the Panel notes that the facts surrounding this period of time are highly disputed between the Parties.

64. The Panel considers that it is undisputed that the Player returned to Turkey on 25 June 2011, and that he stayed at the Wow Airport Hotel from 25 June to 7 July 2011. It is also undisputed that the Player participated in the training from the time he arrived in Turkey on 25 June until 5 July 2011. As for the question whether the Player was invited to the pre-season training camp in Bolu, which took place from 5 July 2011 until 15 July 2011, and whether his subsequent leave in the period from 7 July to 11 July to visit his family in Spain took place with or without the necessary permission from the Club, the Panel has, based on the evidence presented during these proceedings, reached the conclusions mentioned below.

65. With respect to the question whether the Club had invited the Player to partake in the pre-season training camp in Bolu in the period from 5 to 15 July, the Panel points out that the Club has not presented any compelling evidence that the Club notified the Player before the relevant training camp took place, neither indicated in what manner the Player might have been requested to partake in the camp. During the hearing, the former Sports Director of the Club, Mr Süha Sidal, did not, in the opinion of the Panel, testify in a manner which could satisfactorily convince the Panel that the Player had been informed about the pre-season training camp, and that the Club had instructed him to partake. Based on the Contract (5.11), the Panel deems that it is the Club's responsibility to ensure that the Player has been properly informed about training activities and the burden of proof for having given such proper instructions therefore lies with the Club. Since this burden of proof has not been discharged

by the Club, the Panel concludes that the Player has not violated his contractual obligations by not partaking in the training camp in Bolu.

66. As regards the disputed absence of the Player from 7-11 July 2011, the Panel has closely examined the evidence presented by the Parties as to whether the Player indeed had received a permission to leave his work place and go back to Spain. The essential question in this respect concerns whether a permission was granted by the Club. During these proceedings, the Player has argued that the Club had authorized his leave by means of a handwritten note faxed to him from the Club offices. The Club, on the other hand, maintains that such permission was never given, and that the handwritten note had been forged.

67. In support of its position, the Appellant had presented a written statement by Mr Sidal, stating that the Player had never asked him for a permission to be absent from work from 7-11 July and that he had never given him such. During the testimony at the hearing, the Panel noted, however, that Mr Sidal changed his statement and could confirm that a verbal permission to leave the work place had in fact been given. Regardless whether the Club maintains the position that the handwritten note had not been signed by Mr Sidal, the Panel is confident, based on the testimony of Mr Sidal, to reach the conclusion that the Player has provided satisfactory evidence for having been authorized to be absent from 7-11 July 2011 and thus could not be blamed for such absence. Hence, the Panel concurs with the considerations of the FIFA DRC on this point.

68. With respect to the subsequent events alleged by the Club, namely whether the Player was following his personal training program or whether he had been given access to the Club's training facilities, the Panel has, based on the evidence presented, not been able to determine whether the Player in fact did follow his personal training program or whether he in fact was denied access to the Club's training facilities. However, it is the Panel's firm belief that it is the Club that must discharge the burden of proof that the Player's alleged non-participation in his personal training program forms the basis for a termination with just cause of the Contract. Further to this, with regards to the allegations of the Appellant that the Respondent was not in Turkey during several periods as from 15 July 2011 onwards, the photos that were presented during the hearing by the Respondent demonstrate that the Player was in Turkey on 20 and 21 July 2011 in any event (despite the fact that the Appellant alleged that the Player was not in Turkey during this period).

69. Since the Club has not, with the comfortable satisfaction, discharged its burden of proof, the Panel cannot on this point reach the conclusion that the termination of the employment contract was with just cause. The Panel is of the opinion that it is not demonstrated that the Player had repeatedly breached his contractual obligations in July and in the beginning of August. Therefore, the Panel considers that the Club had no sufficient grounds to terminate the Contract with just cause on 3 August 2011.

70. Furthermore, even if the Player had not properly fulfilled his contractual obligations in July 2011, which has not been proven by the Club, the Appellant, before terminating the Contract,

could and should have used more lenient measures towards the Player to fulfil its duties under the Contract and to ensure the maintenance of such Contract.

71. Thus, on account of the above considerations, the Panel considers that the Club had no just cause to terminate the Contract.

(ii) Analysing question 2

72. Having established that the Club terminated the Contract without just cause, the Panel will now deal with the issue of financial consequences derived from such termination. Taking into consideration Article 17, para 1 of the FIFA RSTP, the Panel finds that the Respondent is entitled to receive compensation for the Club's termination of the Contract without just cause in addition to any outstanding payments due under the Contract.

73. With respect to the outstanding Player's salary of July 2011 in the amount of EUR 100,000, the Panel concurs with the FIFA DRC Decision and confirms that the Player is entitled to receive an amount of EUR 100,000 for the unpaid salary of July 2011.

74. With respect to the compensation derived from the termination of the Contract without just cause, the Panel holds that the amount of compensation pursuant to Article 17, para 1 of the FIFA RSTP shall be calculated, unless otherwise provided for in the Contract, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including, 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 5 years, and depending on whether the contractual breach fell within the protected period. In this respect, the Panel considers that the objective calculation shall be made based on the principle of the so-called "positive interest", meaning *"it shall aim at determining an amount which shall be put the respective party in the position that same party would have been if the contract had been performed properly"* (BERNASCONI M., The unilateral breach – some remarks after Matuzalem).

75. According to Article 17, para 1 of the FIFA RSTP, the FIFA DRC Decision concluded that the remaining value of the Contract (as from its early termination until the regular expiry of the Contract) amounted to EUR 500,000 should serve as the basis of the final determination of the amount of compensation for breach of contract. Based on the evidence presented during these proceedings, on the request for relief submitted by the Respondent, and taking into consideration CAS jurisprudence in cases concerning compensation for termination without just cause, the Panel concurs with the FIFA DRC Decision in establishing that EUR 500,000 would be a proper basis for fixing the amount of such compensation.

76. The FIFA DRC Decision remarked that the Player had concluded a new employment contract with Real Valladolid on 30 August 2011 and which ran until 30 June 2012 in accordance with which the Player would receive a total salary equivalent to EUR 125,000 as well as a bonus of EUR 20,000 in case of promotion of Valladolid at the end of the 2011/2012 season. In relation

to this last amount, the FIFA DRC equally noted that Real Valladolid had indeed gained promotion at the end of the 2011/2012 season.

77. Bearing in mind the provision of Article 17, para 1 of the FIFA RSTP, and in accordance with the practice of the FIFA DRC as well as the general obligation of the Player to mitigate his damages such remuneration under the new employment contract should be taken into account (deducted) in the calculation of the final amount of compensation derived from the Club's termination of the Contract without just cause.

78. In view of all of the above, the FIFA DRC decided that the remuneration obtained by the Player in Real Valladolid should be deducted from the EUR 500,000 in so far as the Club should pay the Player a compensation in the amount of EUR 355,000 for breach of contract without just cause.

79. The Panel concurs fully with the FIFA DRC Decision.

VI. CONCLUSION

80. Accordingly, the Panel rules that the Club is liable to pay the Player the outstanding salary of EUR 100,000 corresponding to the month of July 2011. In addition hereto the Club is liable to pay a compensation for breach of contract in the amount of EUR 355.000. Against this background, all other or further requests of the Parties shall be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Kasimpasa Spor Kulübü on 23 January 2015 against the decision issued by the Dispute Resolution Chamber of FIFA on 25 September 2014 is dismissed.

2. The decision issued by the Dispute Resolution Chamber of FIFA on 25 September 2014 is confirmed.

(…)

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