Arbitration CAS 2015/A/4346 Gaziantepspor Kulübü Derneği v. Darvydas Sernas, award of 5 July 2016

Panel: Mr Fabio Iudica (Italy), President; Mr Rui Botica Santos (Portugal); Mr Manfred Nan (The Netherlands)

Football
Termination of the employment contract with just cause by the player
Decision ex aequo et bono in appeals cases
CAS power of review
Party liable to pay compensation for damages and principle of "positive interest"
Duty to mitigate the damage

1. **The possibility for a CAS panel to decide a case *ex aequo et bono* is established by art. R45 of CAS Code only with respect to ordinary arbitration and is not applicable to appeal arbitration proceedings. In any case, according to art. R45 of the CAS Code, the possibility that the CAS panel decide *ex aequo et bono* is subject to the authorisation of both parties.**

2. **The full power to review the facts and the law granted under the provisions of art. R57 of the CAS Code, has a dual meaning: not only procedural flaws of the proceedings of the previous instance can be cured in the proceedings before the CAS, but also the CAS panel is authorized to admit new prayers for relief and new evidence and hear new legal arguments.**

3. **In case of termination of an employment contract with just cause, the other party which has given rise to premature termination, is liable to pay compensation for damages suffered by the injured party. The latter is entitled to a whole reparation of the damages suffered, pursuant to the principle of the *"positive interest"*, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been, had the contract been fulfilled to its end. Therefore, in application of art. 337b and 337c of the Swiss Code of Obligations (SCO) by analogy, according to CAS case law, the damages to be taken into account are not only those that may have caused the act or the omission that justify the termination, but also the *"positive interest"* which, in case of termination of an employment contract, corresponds to the salaries and other material income or benefits that the player would have earned if the contract would have been performed until its natural expiration.**

4. **According to art. 337c (2) SCO, the duty of mitigation is related to the rule that the employee must permit a set-off against the amount of compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn. Such a rule implies that, in**

accordance with the general principle of fairness, the injured player must act in good faith after the breach by the club and seek for other employment, showing diligence and seriousness. This principle is aimed at limiting the damages deriving from breach and at avoiding that a possible breach committed by the club could turn into an unjust enrichment for the injured party. The wording of art. 337c (2) SCO, with reference to what the employee intentionally failed to earn, suggests that the duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign the contract with worse financial conditions, in the absence of any valid reason to do so.

I. INTRODUCTION

1. This appeal is brought by Gaziantepspor Kulübü Derneği, against the decision rendered by the FIFA Dispute Resolution Chamber of the Fédération Internationale de Football Association (the "FIFA DRC") on 11 June 2015 regarding an employment-related dispute between the Appellant and Mr Darvydas Šernas.

II. THE PARTIES

2. Gaziantepspor Kulübü Derneği is a professional Football Club based in Gaziantep, Turkey, competing in the Turkish Super Lig, affiliated with the TFF (Türkiye Futbol Federasyonu) which in turn is affiliated with FIFA (the "Club" or the "Appellant").

3. Mr Darvydas Šernas is a Lithuanian professional football player, born on 22 July 1984 (the "Player" or the "Respondent").

(hereinafter jointly referred to as "Parties").

III. THE CHALLENGED DECISION

4. The challenged decision is the decision rendered by the FIFA DRC on 11 June 2015, on the claim filed by the Player against the Club regarding an employment-related dispute arisen between the Parties (the "Appealed Decision").

IV. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, on the file of the proceedings before the FIFA DRC and relevant documentation

produced. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in the Award only to the submissions and evidence it considers necessary to explain its reasoning.

6. During the period corresponding to the second half of the season 2012/2013, the Player was registered with the Appellant on a temporary basis under a loan agreement signed with the Polish club FC Zaglebie Lubin, until the Club exercised the "buy out" clause provided in the loan agreement, by which the Player was permanently transferred to the Club.

   On 8 January 2013, the Player and the Club signed an employment contract (the "Employment Contract"), valid from the date of signature until 31 May 2016.

7. According to art. 3 of the Employment Contract, the Club undertook to pay the following salaries to the Player:

   - EUR 100,000 net for the second half of the season 2012/2013, of which EUR 10,000 was advance payment payable on 30 July 2013 and the remaining EUR 90,000 divided in four monthly instalments (4 x EUR 22,500) payable on the 10th day of each month, from 10 February 2013 until 10 May 2013;
   - EUR 350,000 net for the season 2013/2014, divided in ten monthly instalments (10 x EUR 35,000) payable on the last day of each month from 30 August 2013 until 31 May 2014;
   - EUR 400,000 net for the season 2014/2015 divided in 10 monthly instalments (10 x EUR 40,000) payable on the last day of each month from 30 August 2014 until 31 May 2015;
   - EUR 450,000 net for the season 2015/2016 divided in ten monthly instalments (10 x 45,000) payable on the last day of each month from 30 August 2015 until 31 May 2016.

8. Pursuant to the "Special Provisions" stipulated in the Employment Contract *"In the event that the Club fails to comply with a part of its payment obligation at least 60 days, the player shall notify the Club in writing. If the Club does not pay the outstanding amounts within 30 days upon the receipt of the written notice, the player will be entitled to terminate the employment contract with Cause. For purpose of this Contract, "Cause" shall mean (A) Permanent violation of the provisions and conditions of the Contract by the Club hereunder, (B) Non-payment of salaries, benefits and any other monetary obligations of the Company in the amount of at least two instalments (C) Sportive just cause defined under the FIFA Regulations. The Player shall not be entitled to any compensation if he terminates the Contract before the lapse of the term of sixty days mentioned above"*.

9. After the signing of the Employment Contract, the Player was transferred on a loan basis to the Australian club Perth Glory, from 20 January 2014 until 31 May 2014, during which the Player was to receive a monthly salary of EUR 15,000.

10. On 15 January 2014, the Parties entered into a second agreement (the "Second Agreement") whereby the Club agreed to pay to the Player the total net salary of EUR 75,000 during his loan period with Perth Glory, to be divided in two instalments of EUR 50,000 to be paid no later than 5 February 2014 and EUR 25,000 to be paid no later than 5 April 2014. The Club also

acknowledged a debt towards the Player amounting to EUR 175,000, corresponding to outstanding salaries under the Employment Contract at that time. In this regard, under clause 1 of the Second Agreement, the Club undertook to pay the mentioned amount in two instalments of which EUR 75,000 no later than 5 April 2014, and EUR 100,000 no later than 5 August 2014, or, alternatively, in the case of transfer of the Player to another club before 5 August 2014, within 5 days after the Player's transfer.

11. On 25 April 2014, the Player sent a formal notice to the Appellant, reminding the failure of the Club to respect its financial obligations and claiming the payment of the outstanding amount of EUR 150,000 which was overdue at that time under the Second Agreement, within the term of 2 May 2014.

12. By a second reminder letter dated 12 June 2014, the Player requested the Club to settle the outstanding salaries amounting to EUR 150,000, no later than 13 July 2014, failing which he would exercise his right to terminate the Employment Contract in accordance with the "Special Provisions", and file a relevant claim with FIFA.

13. On 20 June 2014, the Player sent to the Club a written request for information regarding the beginning and the venue of the training sessions for the sporting season 2014/2015, thus expressing his availability and will to join the team, provided that the Club would satisfy the request for payment of the outstanding salaries within the term of 13 July 2014.

14. By letter dated 14 July 2014, the Player, maintaining that the Club had failed to pay the overdue amount within the term specified in the written notice dated 12 June 2014, notified the Club of the unilateral termination, with immediate effect, of the Employment Contract with "Cause" pursuant to the "Special Provisions" set forth under the Employment Contract and requested payment of the total amount of EUR 250,000 corresponding to outstanding salaries, of which EUR 150,000 as overdue amount under the Second Agreement and EUR 100,000 payable within 5 August 2014, as well as EUR 850,000 as compensation allegedly due according to article 17 of the FIFA Regulations on the Status and Transfer of Players (the 'FIFA Regulations'), within 10 days as of receipt of the relevant termination letter.

15. On 31 July 2014, the Player lodged a claim in front of the FIFA DRC against the Club for breach of contract justifying the unilateral termination of the Employment Contract by the Player, with "Cause", requesting that the Club be condemned to pay the following amounts:

    - EUR 250,000 as outstanding salaries;
    - EUR 850,000 as compensation for breach of contract;
    - EUR 2,684,79 for late payment,
    - plus interest on the awarded amount at the rate of 5% per annum until the effective payment.

16. Notwithstanding FIFA's invitation to do so, the Club failed to submit its position in reply to the Player's claim.

17. During the FIFA proceedings, the Player further informed the FIFA DRC that, after the termination of the Employment Contract, he had found a new employment with the Polish club Suwalski Klub Sportowy Wigry, from 1 August 2014 until 30 June 2015, with a monthly salary of EUR 1,000.

18. On 11 June 2015, the FIFA DRC rendered the Appealed Decision by which the Player's claim was partially upheld and the Club was ordered to pay to the Player the total amount of EUR 150,000 as outstanding remuneration, the amount of EUR 100,000 as acknowledged debt, plus interest at the rate of 5% per annum as from the relevant deadlines until the date of effective payment, as well as EUR 750,000 as compensation for breach of contract, plus 5% interest as from 31 July 2014 until the date of effective payment.

19. The grounds of the Appealed Decision were served by fax to the Parties on 25 November 2015.

V. SUMMARY OF THE APPEALED DECISION

20. The grounds of the Appealed Decision can be summarized as follows:

- The FIFA DRC firstly considered that, in accordance with the Employment Contract and the Second Agreement, at the time the Employment Contract was terminated, the Club was obliged to pay to the Player the amount of EUR 50,000 due on 5 February 2014, the amount of EUR 75,000 due on 5 April 2014 and the amount of EUR 25,000 due on 5 April 2014, but failed to remit the total amount of EUR 150,000 within the prescribed term without any valid reason.

- Since the Club failed to provide its position to the FIFA DRC in reply to the Player's claim, the chamber considered that the Club had renounced to its right of defence and has accepted the allegations of the Player.

- As a consequence, the chamber concluded that the Player had just cause to unilaterally terminate the Employment Contract on 14 July 2014 and that, as a result, the Club was responsible for the early termination and was therefore also obliged to pay compensation to the Player according to art. 17 of the FIFA Regulations.

- In this respect, and with regard to the calculation of the above-mentioned compensation for breach of contract, the FIFA DRC, having established that the Employment Contract did not provide any compensation clause, the amount of compensation payable to the Player has to be assessed in application of the other criteria set forth under art. 17 of the FIFA Regulations.

- Consequently, the chamber concluded that the amount of EUR 850,000 (i.e. the entire remuneration due to the Player for the sporting seasons 2014/2015 and 2015/2016 according to the Employment Contract) served as the basis for the relevant calculation.

- The chamber further mitigated the starting amount of EUR 850,000 of the alternative salaries earned by the Player with other Clubs after the termination of the Employment Contract, in accordance with FIFA's constant practice with regard to the application of art. 17 of the FIFA Regulations.

- In this regard, the chamber considered that the Player received the amount of EUR 6,000 from 1 August 2014 until January 2015 under the employment contract with the Polish club Sulwalski Klub Sportowy Wigry, and the amount of EUR 40,000 under the employment contract with the Scottish club Ross Country Football Club as from January 2015 until 10 June 2015.

- At the time the Appealed Decision was rendered, no further information about the Player's employment situation was available to the chamber and, therefore, the FIFA DRC deemed that the amount of EUR 804,000 should be further mitigated and therefore established that the amount of EUR 750,000 was to be considered a reasonable and justified amount of compensation.

- In conclusion, the FIFA DRC ordered the Club to pay the Player the amount of EUR 150,000 plus interest of 5% as of 31 July 2014 until the effective date of payment; EUR 100,000 plus 5% interest as from 6 August 2014 until the date of effective payment and EUR 750,000 plus 5% interest as from 31 July 2014 until the date of effective payment.

VI. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 15 December 2015, the Club filed an appeal before the Court of Arbitration for Sport (the "CAS") against the Appealed Decision by submitting a statement of appeal in accordance with articles R47 and R48 of the Code of Sports-related Arbitration, Edition 2013 (the "CAS Code"). In its statement of appeal, the Appellant nominated Mr Rui Botica Santos as arbitrator and chose English as the language of the present arbitration.

22. The appeal was not directed at FIFA.

23. By fax letter of the CAS Court Office dated 21 December 2015, FIFA was invited to inform the CAS whether it intended to participate as a party in the present arbitration proceedings pursuant to article R41.3 of the CAS Code.

24. By fax letter dated 21 December 2015, the CAS Court Office invited the Parties to express their position about the possibility that the present dispute be submitted to CAS mediation.

25. By communication to the CAS Court Office dated 23 December 2015, the Respondent acknowledged receipt of the Club's statement of appeal, nominated Mr Manfred Nan as arbitrator and agreed with the Appellant's choice of language. The Respondent also informed the CAS Court Office that he would not agree to submit the present matter to CAS mediation.

26. On 26 December 2015, the Appellant filed its appeal brief.

27. By fax letter dated 4 January 2016, the Respondent acknowledged receipt of the appeal brief on 30 December 2015 and requested the CAS Court Office that the time limit to file his answer be fixed after the payment by the Appellant of its share of the advance of costs, pursuant to article R55 of the CAS Code.

28. By fax letter on 12 January 2016, FIFA informed the CAS Court Office that it renounced its right to request for intervention in the present arbitration proceedings.

29. By fax letter on 2 February 2016, the CAS Court Office informed the Parties that the Panel appointed to decide the present dispute was constituted as follows:

- President: Mr Fabio Iudica, attorney-at-law in Milan, Italy
- Arbitrators: Mr Rui Botica Santos, attorney-at-law in Lisbon, Portugal
- Mr Manfred Nan, attorney-at-law in Arnhem, the Netherlands.

By the same fax letter, the Parties were informed that the Appellant had paid its share of the advance of costs in the present arbitration proceedings and the Respondent was granted a time limit of 20 days from the receipt of the same communication to file his answer.

30. On 18 February 2016, the Respondent filed his answer.

31. By fax letter dated 19 February 2016, the CAS Court Office invited the Parties to inform the CAS whether they preferred a hearing to be held in the present arbitration proceedings or for the Panel to issue an award based solely on the Parties' written submissions.

32. On 25 February 2016, the Respondent informed the CAS Court Office that he did not consider a hearing to be necessary in the present arbitration proceedings.

33. By fax letter dated 26 February 2016, the Appellant informed the CAS Court Office that it did not specifically request a hearing to be held in the present matter, unless the Panel would decide otherwise.

34. On 7 March 2016, the CAS Court Office forwarded the Order of Procedure to the Parties, informing them, *inter alia*, that the Panel considered itself to be sufficiently well informed to decide this matter without the need to hold a hearing.

35. The Order of Procedure was returned duly signed by the Respondent to the CAS Court Office on 9 March 2016 and by the Appellant on 10 March 2016.

36. With the signature of the Order of Procedure, the Parties confirmed the jurisdiction of the CAS over the present dispute and that their right to be heard has been respected.

VII. SUBMISSIONS OF THE PARTIES

37. The following outline is a summary of the main positions of the Appellant and the Respondent which the Panel considers relevant to decide the present dispute and does not comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Appellant and the Respondent, even if no explicit reference has been made in what follows. The Parties' written submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. Appellant's Submissions and Requests for Relief

38. The Appellant made a number of submissions in its statement of appeal and in its appeal brief which can be summarized as follows.

39. With strict regard to the facts of the present dispute, the Appellant basically agrees with the findings established by the FIFA DRC in the Appealed Decision, based on the Player's allegations, apart from mentioning that, after the termination of the employment contract with the Scottish club Ross Country Football Club on 10 June 2015 (which is after the Appealed Decision was rendered), the Player signed another employment agreement with the Lithuanian club, Zalgiris Vilnius on 6 July 2015.

40. Therefore, according to the Club's argument, the compensation for breach of contract awarded to the Player in the amount of EUR 750,000 is excessive and shall be at least deducted with the salaries earned by the Player during the employment contract with the above mentioned club.

41. In any event, the amount of compensation established by the FIFA DRC is not reasonable nor justified also because the obligation to mitigate damages not only implies the Player's responsibility to conclude new contracts, but also the responsibility to obtain, under the new contracts, financial conditions at least similar to the ones granted under the terminated contract.

42. In this respect, the Appellant maintains that drastic reductions in salaries should be considered as the Player's deliberate choice and even if the Player has acted in good faith, concluding employment contracts with worse financial conditions shall be considered as a Player's violation of the obligation to mitigate damages. As a result, according to the Appellant's submissions, the Club should not bear the consequences of the Player's choice to accept worse financial conditions after the termination of the Employment Contract since the Player failed to comply with his obligation to mitigate damages under the provisions of art. 17 of the FIFA Regulations.

43. In this context, the club makes reference to the decision of the FIFA DRC and CAS in the case Wanchope v. Al-Gharafa, where the player, after termination of his employment contract for breach by the club, *"found almost immediately employment with another club, Sport Herediano, at exceptionally less favourable financial conditions, at a monthly salary of 500 USD"* (see FIFA DRC decision dated 23 March 2006 Ref. No. 06-00085/plo). In the relevant decision, *"the Chamber was eager to emphasize that the player apparently agreed to accept such a financial treatment and consequently*

cannot claim any loss originating from the considerable difference in salary between the contracts. The Chamber added that as a general rule, in such circumstances, when concluding a new contract following the termination of an existing employment contract, the player has the obligation to mitigate any possible financial damage deriving from the conclusion of such a contract".

44. The Appellant also stresses that, deciding the same case, the CAS Panel in CAS 2006/A/1124, concluded that *"The amount the Player is earning out of the new contract, in fact, is very low with respect to the salary the Player was earning on the basis of the Contract, and to the value of the Player himself as an international footballer playing for the Costa Rican national team. As a result, the Panel agrees with the conclusion reached by the DRC in the Decision, i.e. that the drastic reduction in the salary was (also) a choice of the Player, who preferred to play for Herediano, in Costa Rica, i.e. decided to earn much less than he could have earned, in order to have the opportunity to better prepare, in his home country, for the upcoming World Cup, and that the financial effects of such choice should not be borne by the Club".*

45. Secondly, in relation to the outstanding remuneration awarded to the Player, the Club contends that, although the Player's claim before FIFA refers to a global amount of EUR 250,000 with no distinction (and corresponding to all the monies due as per the Second Agreement), the Appealed Decision considered that while EUR 150,000 corresponded to salaries already due at the time of termination of the Employment Contract, as to the remaining EUR 100,000, although they were payable only on 5 August 2014 (i.e. after the termination of the Employment Contract), the FIFA DRC established that this amount is nonetheless part of an old acknowledged debt of the Club and as such, it was also payable to the Player. In this respect, the Club alleges that the FIFA DRC made a legal misinterpretation and, as a consequence, the awarded EUR 100,000 shall be repealed or at least be considered as part of the compensation because the payment was not due at the time of termination.

46. In its appeal brief, the Appellant submitted the following requests for relief:

"To set aside the challenged FIFA Dispute Resolution Chamber decision,

To lift the ruled compensation amount, or if it is not accepted to reduce compensation amount according to the above-mentioned facts,

To condemn the Respondent as the only responsible of this trial, to the payment in the favor of the Appellant of the legal expenses incurred,

To establish that the costs of this arbitration procedure shall be borne by the Respondent as the only responsible of this trial".

B. The Respondent's Submissions and Requests for Relief

47. The position of the Respondent is set forth in its answer and can be summarized as follows.

48. The Player basically maintains that the Appealed Decision is well founded and reasonable and that the appeal does not constitute any ground to set aside the Appealed Decision, in full or in part.

49. In relation to the compensation for breach of contract awarded to the Player, the Appellant's request to repeal or reduce it is unjustified since such a petition was never filed by the Club in front of FIFA and therefore, the relevant issue falls outside the scope of the present arbitration proceedings; and moreover, there was no failure by the Player to mitigate damages.

50. With specific regard to the Appellant's argument in relation to the alleged failure by the Player to comply with his duty to mitigate damages under art. 17 of the FIFA Regulations, the Respondent maintains the following.

51. After the termination of the Employment Contract, the Player was eager to find a new club as soon as possible before the closure of the "transfer window" in order to earn alternative salaries for himself and his family and also to continue his training.

52. Therefore, he first signed an employment contract with Suwalski Klub Sportowy on 1 August 2014 until 30 June 2015 under which he was granted a monthly salary of EUR 1,000 net. In this respect, the Player alleges that the relevant employment contract with the Polish club provided the possibility for both parties to unilaterally terminate the contract in the midseason, which would have given the Player the opportunity to search for a better contract with another club.

53. In fact, on 26 January 2015, the Player concluded a new employment agreement with Ross County FC whereby he could improve his financial conditions by earning approximately EUR 40,000 until 10 June 2015.

54. On 6 July 2015, the Player signed a contract with the Lithuanian club, Zalgiris Vilnius which provided him salaries in the total amount of EUR 15,820. Also this employment contract granted the Player the unilateral right of early termination.

55. Lastly, on 15 January 2016, the Respondent signed a contract with the Turkish club Alanyaspor Kulubu valid until 31 May 2017, under which the Player was to receive the total amount of EUR 80,000 net for the remaining sporting season 2015/2016 and EUR 160,000 for the sporting season 2016/2017.

56. In consideration of the above, the Respondent contends that he has always been striving to improve his professional status and has been constantly mitigating the damages deriving from the early termination of the Employment Contract and has been improving his financial situation from time to time.

57. Moreover, according to the provisions of art. 17 of the FIFA Regulations, the duty to mitigate damages only implies that the salaries earned under the new contracts are deducted from the basis of the calculation and therefore, the mere fact that the Player concluded a new contract in reasonable time after the termination of the Employment Contract, prevents him from any

further deductions. In addition, the duty of the employee to mitigate damages set forth under art. 337 (c), para. 2 of the Swiss Code of Obligations ("SCO"), requesting that the employee must permit a set-off of his alternative salaries or what he has intentionally given up to earn, is interpreted as meaning that the employer has to prove that the employee has intentionally renounced to search for a new job, which is not the case here.

58. The difference between the salary earned under the Employment Contract and the new contract under Suwalski Klub Sportowy is related to the fact that the Player had limited time to search for a new club and mitigate his damages and, also, it has to be considered that a player involved in a dispute with a club for breach of contract encounters some difficulties in finding a new club, especially if there are pending proceedings, due to the joint and several liability of the new club in case it is decided that the player had no just cause to terminate the contract.

59. With reference to the case *Wanchope v. Al-Gharafa*, mentioned by the Appellant, the Respondent argues that the circumstances were different from the present matter and that the player in question did not intend to find a new club in order to mitigate his damages, but rather to prepare himself for the 2006 World Cup, and also, in the *Wanchope* case, the employment contract was terminated just 6 months before the natural expiry of the contract, which is not the case here.

60. With regard to the proceedings before the FIFA DRC, the Player argues that the fact that the Club did not submit its position in reply to the Player's claim, shall be considered by the Panel while examining certain aspects of the present case.

61. In particular, according to the Player, in reviewing the present case, the Panel would not have the authority to go beyond the scope of the previous litigation before the FIFA DRC and it would be allegedly bound to the issues arising from the Appealed Decision, which prevents the CAS from hearing new claims or arguments which were not raised before the FIFA DRC.

62. Besides the foregoing, it is undisputed that the Appellant failed to perform its financial obligations as from June 2013 without any valid reason, as it was also confirmed by the same Club by the acknowledgement of debt under the Second Agreement. As a result, there is no doubt that the Appellant is responsible for breach of contract and that the Player had just cause to terminate the Employment Contract on 14 July 2014. Therefore, there is no ground for the CAS to set aside the Appealed Decision.

63. The FIFA DRC correctly determined the amount of compensation under the provisions of art. 17 of the FIFA Regulations, which is also consistent with the provisions of art. 337 (c) of the SCO, and in accordance with the established practice of FIFA DRC and the CAS therefore the amount of EUR 750,000 shall not be reduced.

64. The Respondent's requests for relief were submitted in its answer and are the following:

"1. To dismiss the Appeal of the Appellant Gaziantepspor Kulübü Derneği;

2. To confirm 11 June 2015 decision of the FIFA Dispute Resolution Chamber rendered in the case No 14-01385;

3. To award from the Appellant Gaziantepspor Kulübü Derneği to the Respondent Darvydas Šernas the costs of legal assistance and representation and other costs related to the present arbitration proceedings".

VIII. CAS JURISDICTION

65. The jurisdiction of the CAS shall be examined in the light of art. R47 of the CAS Code, which reads as follows: *"An Appeal against the decision of a federation, association or sports-related body may be filed with 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".*

66. Both the Appellant and the Respondent rely on article R47 of the CAS Code and on art. 67 para. 1 of the FIFA Statutes which reads as follows: *"Appeals 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".*

67. Moreover, the signature of the Order of Procedure by the Parties confirmed that the jurisdiction of the CAS in the present case was not disputed. Accordingly, the Panel is satisfied that it has jurisdiction to hear the present case.

68. Under art. R57 of the CAS Code, the Panel has the full power to review the facts and the law and may issue a new decision which replaces the decision appealed or annul the challenged decision and/or refer the case back to the previous instance.

IX. APPLICABLE LAW

69. Art. 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

70. Art. 66 para. 2 of the FIFA Statutes so 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".

71. The Panel observes that according to consistent CAS case law *"by accepting the jurisdiction of the CAS as established in the FIFA statutes, the parties accept that, pursuant to the above quoted Articles R58 of the CAS Code and 66 para. 2 of FIFA Statutes, CAS panels decide the dispute in accordance with the rules and regulations of FIFA, with additional application of Swiss law on a subsidiary basis"* (see CAS 2014/A/3690).

72. The Parties agree that the present case is governed primarily by the FIFA Regulations and subsidiarily by Swiss law. Moreover, the Appellant requests that the Panel decide *ex aequo et bono* in consideration of the alleged specificity of the present case. Such a request is contested by the Respondent.

73. In consideration of the above and pursuant to art. R58 of the CAS Code, the Panel holds that the present dispute shall be decided according to FIFA Regulations as a first choice, with Swiss law applying subsidiarily.

74. The Panel rejects the Appellant's request that the present case be decided *ex aequo et bono* since this rule is established by art. R45 of CAS Code only with respect to ordinary arbitration and is not applicable to appeal arbitration proceedings. Without prejudice to the foregoing, the Panel notes that according to art. R45 of the CAS Code, the possibility that the Panel decide *ex aequo et bono* would anyway be subject to the authorisation of both parties, which is not the case here.

75. With regard to the applicability *ratione temporis* of the relevant FIFA Regulations, the Panel holds that the present case is governed by 2012 edition, given that the Player lodged his claim with FIFA on 31 July 2014.

X. ADMISSIBILITY OF THE APPEAL

Art. R49 of the CAS 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late"*.

76. More specifically, the Panel notes that art. 67 para 1 of the FIFA Statutes determines as follows: *"Appeals 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"*.

77. The Panel notes that the FIFA DRC rendered the Appealed Decision on 11 June 2015 and that the grounds of the Appealed Decision were notified to the Parties on 25 November 2015. Considering that the Appellant filed its statement of appeal on 15 December 2015, i.e. within the deadline of 21 days set in the FIFA Statutes, the Panel is satisfied that the present appeal was filed timely and is therefore admissible.

XI. MERITS OF THE APPEAL – LEGAL ANALYSIS

78. Before addressing the main controversial issues in the present case, the Panel preliminarily notes that the Respondent submits that the legal arguments and relevant requests for relief put forward by the Appellant would allegedly fall out of the scope of the previous litigation before the FIFA DRC, since the Club did not participate in the proceedings, which fact would consequently prevent the CAS from adjudicating on the Appellant's claims.

79. In this regard, the Panel abides with the CAS jurisprudence as in the case CAS 2008/A/1700 & 1710, establishing that *"Under article R57 of the CAS Code, the Panel's scope of review is fundamentally unrestricted…. The CAS Code contemplates a full hearing de novo of the original matter and grants the CAS Panel the authority to render a new decision superseding that rendered by the previous instance. The "full power" granted the deciding Panel under the CAS Code precludes any notion that the Panel must abide by restrictions on evidence which may or may not have been adduced in previous proceedings before a national or international disciplinary tribunal. National or international sports organizations may freely decide to accept or not to accept the arbitral jurisdiction of the CAS; however, when they do accept the CAS's jurisdiction they necessarily accept the application of the basic principles of the CAS Code, including the principle of a de novo review of the case. The CAS must, therefore, be accorded the unrestricted right to examine not only the procedural aspects of an appealed decision, but also, and above all, to review and evaluate all facts and legal issues involved in the dispute"*.

80. The Panel observes that the full power to review the facts and the law granted under the provisions of art. R57 of the CAS Code, has a dual meaning: not only that procedural flaws of the proceedings of the previous instance can be cured in the proceedings before the CAS, but also that the Panel is authorized to admit new prayers for relief and new evidence and hear new legal arguments (see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Edition 2015, comment under article R57, para 12, p. 508) with some limited restrictions which are not applicable in the present case.

81. In fact, art. R57 of the CAS Code simply provides that the Panel "has discretion" to exclude "evidence" presented by the parties if it was available to them or could reasonably been discovered by them before the challenged decision was rendered. Therefore, the Panel notes that there is no limitation to the scope of the panel's review with respect to legal arguments and submissions.

82. Therefore, the Panel is satisfied that it has the full power to adjudicate the legal arguments and requests for relief put forward by the Appellant.

83. With regard to the merits of the present dispute, first of all, the Panel observes that it is undisputed between the Parties that the Employment Contract was terminated with just cause by the Player on 15 July 2014, due to the Club's breach of contract, pursuant to art. 14 of the FIFA Regulations and in accordance with the Special Provisions stipulated under the Employment Contract.

84. In fact, the Club never contested its failure to pay the Player's salaries in the requested amount of EUR 250,000, of which EUR 75,000 as salaries due by the Club during the loan period with the Australian club Perth Glory and EUR 175,000 as outstanding salaries under the Employment Contract which were already overdue at the moment of signing of the Second Agreement, *i.e.* on 15 January 2014.

85. In particular, the Panel notes that by the Second Agreement, the Club expressly acknowledged its debt towards the Player for outstanding salaries in the amount of EUR 175,000.

86. What is firstly disputed in the present case, is whether the amount of compensation awarded by the FIFA DRC in the Appealed Decision is excessive and unreasonable, as maintained by the Appellant, or whether it was correctly determined by the FIFA DRC under the applicable regulations, as affirmed by the Respondent.

87. According to the Club, the amount of compensation is disproportionate because the Player actually violated the obligation to mitigate his damages, deliberately accepting worse financial conditions after the termination of the Employment Contract, with the consequence that the Club should not bear the adverse effects of such a choice; or, at least, the awarded amount shall be further reduced with the salaries earned by the Player under the employment contract with Zalgiris Vilnius signed on 15 July 2015, i.e. after the Appealed Decision was rendered.

88. On the contrary, the Player avers that he made all possible efforts to mitigate his damages and in fact he managed to sign a new employment contract soon after the termination of the Employment Contract, and also he continued improving his financial conditions by signing new contracts with other clubs. In any case, the Player contends that accepting worse financial conditions in comparison with the Employment Contract, was not the result of his deliberate choice, but, rather, the result of the emergency situation due to the premature termination because of the Club's breach.

89. In this respect, since the Player had just cause to terminate the Employment Contract due to the Club's failure to comply with its financial obligations, the Panel is satisfied that the present case falls under the application of art. 17 para 1 of the FIFA Regulations which provides for financial compensation in favour of the injured party.

90. In fact, according to the well-known FIFA doctrine and consistent CAS jurisprudence, in case of termination of an employment contract with just cause, the other party which has given rise to premature termination, is liable to pay compensation for damages suffered by the injured party (see Commentary under art. 14 FIFA Regulations; CAS 2008/A/1447).

91. According to art. 17 para 1 of the FIFA Regulations, compensation for breach of contract shall be calculated, unless otherwise specifically provided for in the employment contract, with due consideration for some objective criteria (to be considered as non-exhaustive examples) 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 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 a protected period)"*.

92. In the absence of any compensation clause in the Employment Contract, the FIFA DRC correctly applied the other parameters set out under art. 17 of the FIFA Regulations, particularly taking into account the entire remuneration payable to the Player under the Employment Contract for the remaining time of its duration, i.e. the sporting season 2014/2015 and 2015/2016, that is EUR 850,000, as the basis for the determination of the amount of compensation to be awarded to the Player.

93. In fact, consistent with the well-established CAS jurisprudence, the injured party is entitled to a whole reparation of the damages suffered, pursuant to the principle of the *"positive interest"*, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been, had the contract been fulfilled to its end (CAS 2012/A/2698; CAS 2008/A/1447).

94. Therefore, following the application of art. 337b and 337c of the SCO by analogy, according to CAS case law, the damages to be taken into account are not only those that may have caused the act or the omission that justify the termination (in the present case, the outstanding salaries), but also the *"positive interest"* which, in case of termination of an employment contract, as is the present case, corresponds to the salaries and other material income or benefits that the player would have earned if the contract would have been performed until its natural expiration (CAS 2008/A/1147; CAS 205/A/801; CAS 2006/A/1061; CAS 2006/A/1602).

95. Moreover, the Panel observes that art. 337c (1) and (2) provides the following: *"(1) If the employer dismisses the employee without notice in the absence of a valid reason, the latter shall have a claim for compensation of what he would have earned if the employment relationship had been terminated by observing the notice period or until the expiration of the fixed agreement period. (2) The employee must permit a set-off against this amount for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn"* (the French version reads as follows: *"(1) Lorsque l'employeur résilie immédiatement le contrat sans justes motifs, le travailleur a droit à ce qu'il aurait gagné, si les rapports de travial avaient pris fin à l'échéance du délai de congé ou à la cassation du contrat conclu pour une durée determine. (2) On impute sur ce montant ce que le travailleur a épargné par suite de la cessation du contrat de travail aisni que le revenu qu'il a tiré d'un autre travail ou le revenu auquel il a intentionellement renoncé"*).

96. In view of the above, the Panel is satisfied that the Player has the right to compensation to be determined under the provisions of art. 17 of the FIFA Regulations, in the light of the principle of the *"positive interest"* as specified above and with due consideration of the duty to mitigate damages according to Swiss law which is consistent with CAS jurisprudence (CAS 2005/A/909-910-911; CAS 2005/A/801; CAS 2004/A/587).

97. In this context, the Appealed Decision correctly deducted the salaries the Player earned after termination of the Employment Contract, as far as it was known at the time when the Appealed Decision was rendered, namely, the salaries received under the contract with the Polish club, Sulwalski Klub Sportowy Wigry from 1 August until and including January 2015, in the amount of EUR 6,000 and the salaries he received under the employment contract with the Scottish Club Ross Country Football Club, until 10 June 2015, in the amount of EUR 40,000. As such, the amount of compensation would be EUR 804,000 (EUR 850,000 – EUR 46,000).

98. Failing any other information about the Player's contractual situation as from 11 June 2015 (the date the Appealed Decision was rendered) until the natural expiry of the Employment Contract (31 May 2016), the FIFA DRC, in view of the duty of mitigation of damages, decided to further mitigate the amount of EUR 804,000 to EUR 750,000 on an equitable basis.

99. During the present arbitration proceedings, it resulted from the file that after 10 June 2015, the Player signed another contract with the Lithuanian Club Zalgiris Vilnius on 6 July 2015 pursuant to which he was entitled to receive the total amount of EUR 15,820. Later, on 15 January 2016 the Player signed a new contract with the Turkish club, Alanyaspor Kulubu valid until 31 May 2017 pursuant to which he was entitled to receive the total amount of EUR 80,000 net for the remainder of the sporting season 2015/2016.

100. As a consequence, and in application of the duty to mitigate damages according to art. 337 c) (2) of the SCO, the Panel decided to reduce the original amount of EUR 804,000 with the specific amounts that the Player was entitled to receive as alternative salaries after the Appealed Decision was rendered, under the above mentioned employment relationships and within the term of validity of the Employment Contract.

101. Consequently, the Panel finds that the amount of EUR 804,000 shall be deducted with EUR 15,820 corresponding to the salaries earned by the Player under the contract with the Lithuanian Club Zalgiris Vilnius and EUR 80,000 which the Player was entitled to receive under the contract with the Turkish club Alanyaspor Kulubu, limited to the sporting season 2015/2016, according to the facts provided by the Player. As a consequence, the Panel holds that the Player shall be awarded compensation for breach of contract in the amount of EUR 708,180.

102. In this context, the Panel is not persuaded by the allegations of the Appellant with respect to the alleged failure of the Player to mitigate his damages, because he accepted to sign new employment contracts with worse financial conditions.

103. As already noted above, according to art. 337c (2) of the SCO, the duty of mitigation is related to the rule that the employee must permit a set-off against the amount of compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn.

104. In the opinion of the Panel, such a rule implies that, in accordance with the general principle of fairness, the injured player must act in good faith after the breach by the club and seek for other employment, showing diligence and seriousness. The Panel considers that this principle is aimed at limiting the damages deriving from breach and at avoiding that a possible breach committed by the club could turn into an unjust enrichment for the injured party.

105. Moreover, the wording of art. 337c (2) of the SCO, with reference to what the employee intentionally failed to earn, suggests that the duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign the contract with worse financial conditions, in the absence of any valid reason to do so.

106. In this respect, the Panel holds that in the specific case at stake, the Player was sufficiently diligent and actually managed to find a new contract soon after the termination of the

Employment Contract and has shown a serious commitment in limiting his damages and improving his financial conditions from time to time by signing other contracts.

107. In any case, the Panel observes that the Club has not provided evidence that the Player acted in bad faith or that he deliberately decided to accept worse financial conditions.

108. As a result of the observations above, the Panel is persuaded that after termination of the Employment Contract, the Player actually complied with his duty to mitigate his damages and therefore no other deductions should be made.

109. In view of the considerations above, the Panel reached the conclusion that the Player is entitled to compensation as a consequence of termination of the Employment Contract for just cause, due to the Club's breach, in the amount of EUR 708,180 (EUR 850,000 – EUR 8,000 – EUR 40,000 – EUR 15,820 – EUR 80,000).

110. Secondly, the Panel turns its attention to the Appellant's argument that the FIFA DRC wrongly established that, as regard the outstanding remuneration awarded to the Player, the amount of EUR 100,000 which fell due on 5 August 2014, is nonetheless part of an old acknowledged debt of the Club.

111. The Club contends that FIFA allegedly made a legal misinterpretation on this point and requests that the mentioned amount be repealed or considered as part of the compensation.

112. The Panel does not agree with the Appellant's allegations.

113. In fact, it is clear from the stipulations of the Second Agreement that, irrespective of the fact that the amount of EUR 100,000 specified under clause 3.2 was payable on 5 August 2014 as a result of the postponement agreed upon by the Parties, such amount was part of an old debt of the Club corresponding to salaries payable under the Employment Contract which were already overdue when the Second Agreement was signed.

114. In this respect, the wording of the preliminary stipulations set forth under letter (B) of the Second Agreement is clear: *"the Parties note and the Club acknowledges that it is in debt of EUR 175,000 (one hundred seventy five thousand euros) to the Player at the moment of conclusion of this agreement"*. Moreover, under art. 3 of the Second Agreement it is further specified that said debt corresponds to *"outstanding salary"*.

115. As a consequence, the Panel finds the arguments of the Appellant in this respect to be baseless and are therefore rejected.

116. The Panel also considers that the FIFA DRC correctly took into account the said amount of EUR 100,000 separately from the amount of EUR 150,000 because of the different dates on which the two amounts became due, in view of the calculation of the interests.

117. In consideration of the final findings above, the Panel shall not address any other issue and all other motions or prayers for relief are dismissed.

XII. CONCLUSION

118. Consequently, in view of all the above, the Panel has decided to partially uphold the present Appeal filed by the Club and, as a result of the above, the amount of compensation awarded by the FIFA DRC in the Appealed Decision is reduced to EUR 708,180. In its remaining part, the Appealed Decision is upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Gaziantepspor Kulübü Derneği against the decision rendered by the FIFA Dispute Resolution Chamber on 11 June 2015 is partially upheld.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 11 June 2015, is partially amended.

3. Gaziantepspor Kulübü Derneği is ordered to pay to Mr Darvydas Šernas the following amounts:
   - EUR 150,000 (one hundred fifty thousand Euro) as outstanding remuneration, plus 5% interest per annum as from 31 July 2014 until the date of effective payment;
   - EUR 100,000 (one hundred thousand Euro) as outstanding remuneration, plus 5% interest per annum as from 6 august 2014 until the date of effective payment;
   - EUR 708,180 (seven hundred eight thousand one hundred eighty Euro) as compensation for breach of contract, plus 5% interest per annum as from 31 July 2014 until the date of effective payment.

4. (…).

5. (…).

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