Arbitration CAS 2008/A/1463 Futebol Clube do Porto v. O. & CAS 2008/A/1466 O. v. Futebol Clube do Porto, award of 3 December 2008

Panel: Mr Jan Paulsson (France), President; Mr Rui Botica Santos (Portugal); Mr Georg Engelbrecht (Germany)

Football
Unilateral termination of the employment contract between a coach and a club
Applicable law to coaches with regard to compensation for breach
*Status of a "*contrato colectivo*" under Portuguese law*

1. **The measure of compensation for breach in the case of unilateral termination of an employment contract by a coach cannot be determined in accordance with Article 17 of the FIFA Regulations. Article 1 of the FIFA Regulations ("Scope") provides that the Regulations concern "players", not coaches. Moreover, the FIFA Statutes no longer contain the provision which appeared in Article 33 para. 4 of their 2001 version which equated coaches with players. The fact that Article 22 of the current FIFA Regulations makes clear that FIFA has competence to hear disputes between coaches and clubs does not mean that *substantive* rules applicable to players also apply to coaches.**

2. **Under Portuguese law, a *contrato colectivo* may replace general law, but only with respect to non-mandatory provisions of the latter. The Portuguese Labour Code makes explicit that matters of "indemnification" may be regulated by a *contrato colectivo.* In turn, a mandatory provision of a *contrato colectivo* overrides any contrary stipulations in individual employment agreements.**

These cases involve the termination in August 2006 of the relationship between Futebol Clube do Porto, Futebol, SAD ("FC Porto"), a professional football club, located at Via FC Porto, Entrada Poente – Piso 3, 4350-451 Porto, Portugal, and its head coach, J., a Dutch professional football coach, as well as his assistant, O., also a Dutch professional football coach, (together with FC Porto – the "Parties").

At the FIFA level, a Single Judge of FIFA Player's Status Committee (the "FIFA Committee") rendered two decisions to the effect that the two coaches had breached their employment agreements and should pay damages to FC Porto in the amount of €1,150,000 and €146,250, respectively. Each decision is appealed by each party. FC Porto considers that the FIFA decisions were right in principle but the amount awarded was wrong and insufficient. J. and O. each contend that the decisions were wrong in principle and they should have incurred no liability; to the contrary, they should be awarded

the amount of earned bonuses which remained unpaid at the time the club and the coaches parted ways.

The four appeals have been consolidated, and the Panel deems it appropriate to analyze and determine issues in a single text, leading to two separate awards: one in the cases CAS 2008/A/1463 and CAS 2008/A/1466 and another in the cases CAS 2008/A/1464 and CAS 2008/A/1467.

On 20 May 2005, J. signed an employment agreement with FC Porto to become the head coach of FC Porto's first professional team from 1 July 2005 until 30 June 2007, in effect covering the 2005/06 and the 2006/07 football seasons (the "J. Contract").

As envisaged under the J. Contract, J. selected his assistant coach. This was O., who accordingly signed a separate employment agreement with FC Porto on 20 May 2005 (the "O. Contract", and together with J. Contract – the "Contracts"). Article 6.2 of the O. Contract provided that its duration and termination would be "the same" as the corresponding provisions of the J. Contract.

On 12 January 2006 and pursuant to Article 1.1 of the J. Contract, FC Porto exercised its unilateral right to extend Mr. J.'s employment until 30 June 2008, or for the 2007/08 season. The Parties signed a written notice acknowledging the extension. The O. Contract was extended for the same period pursuant to Article 6.2 thereof.

The financial terms of the J. Contract called for an annual salary in the net amount of €1,300,000 in the 2005/06 and the 2006/07 seasons, and €1,500,000 in 2007/08 season, paid in twelve equal monthly instalments. It did not specify the due date of the monthly salary instalments.

The O. Contract provided for an annual salary in the net amount of €120,000 in the 2005/06 and the 2006/07 seasons, and €150,000 in the 2007/08 season, payable in monthly installments in the same way as the J. Contract.

The J. Contract also required FC Porto to pay J. team performance bonuses for winning the Portuguese Championship and the National Cup in the net amount of €750,000 and €100,000, respectively. The bonuses were payable at the end of the month following the month in which the bonus became due.

O.'s team performance bonuses were different only with respect to their amount. For winning the Portuguese Championship and the National Cup, his bonuses equaled 75% of the player premiums, which were determined annually. It is undisputed that O.'s net bonuses amounted to €103,750 at the end of the 2005/06 season.

In the course of the first contractual season, J.'s popularity with FC Porto fans and the local media declined. On one occasion at the end of January 2006, over a dozen fans besieged J.'s car as he was leaving the training facilities. A news article submitted by J. describes the attackers as having used rocks and light flares to smash the car's windows and cause other property damage. J. eventually

escaped the attackers by speeding off. The episode was caught on a security camera, and its footage was played on television news.

FC Porto's management publicly condemned the attack, turning the footage over to the police to have the perpetrators identified and criminally persecuted. J. acknowledges that the board of directors of FC Porto actively supported him in the midst of the surrounding controversy. FC Porto notes that there were no recurrences of similar attacks.

The season ended on a high note. FC Porto won the Portuguese League Championship on 22 April 2006 and the Portuguese National Cup on 14 May 2006. The team's defense was the least scored against in Europe. J. was recognized as the football coach of the year in Portugal.

Despite this success, J. claims that his relation with FC Porto at the end of 2005/06 season was tense. He cites a lack of support at the Board of Directors level, delays in the payment of salary, failure of FC Porto to pay the bonuses, and the players' rebellion as the reasons for making his working conditions between the 2005/06 and the 2006/07 seasons intolerable. O. endorses J.'s position.

J. submits that the Board in effect withheld its support for him at the end of the 2005/06 season. The Board sold several important players, including J.'s preferred striker Benny McCarthy, without signing the replacement players allegedly promised to J. FC Porto's President Pinto da Costa criticized J. for the team's performance in the Amsterdam Tournament during the preparation for the 2006/07 season.

FC Porto counters these contentions as unfounded, expressing in particular the view that the replacement players desired by J. were too costly.

J. further complains that his salary was paid at various times each month and the net monthly payments decreased consistently without an explanation. FC Porto answers that J. has conceded that ultimately the salary was always paid.

It is common ground that the team performance bonuses for winning the Portuguese Championship and the National Cup were not paid prior to 9 August 2006. The parties disagree, on the other hand, as to whether there was a verbal agreement to defer the payments. FC Porto submits that during a meeting in De Lutte, the Netherlands, in July 2006, the club reached a verbal agreement with J. to the effect that the bonuses would be paid in two installments, in September and December 2006. FC Porto relies on written statements of its General Manager Antero Jose Gomes da Ressurreição Henrique and the goalkeeper's coach W. in support of its version of events. J. denies there was an agreement to defer the bonus payment. He submits that he made repeated attempts to receive the bonuses and that in the course of the meeting in De Lutte he insisted that FC Porto should pay the bonuses to him and the coaches before 1 August 2006. On 21 July 2006, so J. says, he gave to FC Porto a final ultimatum to pay the bonuses before the end of the month. O. supports J.'s position that there was no agreement to pay the bonuses later that year. He states that FC Porto asked J. to postpone the bonus payment, but J. rejected the request.

On 7 August 2006, during a training camp at Soestduinen, the Netherlands, the FC Porto players refused for some time to leave the team bus to participate in a cross-country run organized by J. as part of the team's training program. J. and O. characterize the episode as the players' revolt against J.'s "severe" training methods, and a vote of no-confidence. FC Porto paints the episode as a frivolous contest organized by the players to avoid being the first person to leave the bus, and states that after a couple of minutes all players left the bus and began following the coaches' instructions.

On 8 August 2006, the team played a friendly match against a Dutch amateur team. According to O., the players' performance was unacceptable; they were increasingly undisciplined throughout the game, which they eventually lost. At a team dinner later that day, in J.'s version of events, the players again manifested a lack of discipline and respect for the coaching staff when they abruptly left the dining hall without permission, as a protest against J.'s decision that they should serve themselves only after the coaches. In O.'s view, the head coach's decision was a *"creative disciplinary measure"*. FC Porto understands the episode as one of provocation by J., who obliged the players to wait without eating, even as the coaches ate and had second helpings. The club explains that the players walked out to display their dissatisfaction with the coaches' arbitrary conduct and inappropriate attitude.

Shortly before breakfast on 9 August 2006, J. says he announced to the players that he and the rest of the coaching staff were resigning because of an "impossible" situation between the players and the coaches. The coaches *"left one hour later"*, not having had any discussion with FC Porto's management.

O. states that he decided to terminate his relationship with the club because he would have had *"no prospects at all with FC Porto"* without J., and expected that the club would discharge his services in light of the circumstances.

J. claims that a few days after the announcement to the players, Mr. Theo Prijn, then acting as his counsel, informed FC Porto in writing that J. had resigned as the head coach. No evidence of this communication has been provided by J. J. submits that in the absence of Mr. Henrique, Mr. Prijn discussed the matter with FC Porto, in particular with Mr. Rodrigues Pereira.

FC Porto emphatically rejects the contention that it received a written notice of resignation. Moreover, FC Porto submits that the meeting with Mr. Prijn lasted no more than five minutes, as the parties realized that they could not find an amicable solution to the conflict.

On 16 August 2007, FC Porto signed M. as head coach and C. as an assistant coach of FC Porto. FC Porto alleges that it paid €1,000,000 plus €210,000 in a VAT tax to Boavista FC – another football club located in Porto – for the release of M. and C. from their contractual obligations to Boavista FC.

The 2006/07 football season opened in Portugal on 19 August 2006.

On 28 August 2006, FC Porto gave notice to the effect of ending the employment of J. and O. on that day.

On 29 August 2006, FC Porto filed two separate claims for breach of contract against J. and O. with the FIFA Committee.

On 14 September 2006 J. and O. filed their separate claims against FC Porto with the FIFA Committee for payment of the bonuses mentioned above.

The Single Judge rendered two similar decisions on 11 December 2007, ruling in favor of FC Porto on the breach of contract claims. The Single Judge's decisions ordered J. and O. to pay FC Porto €1,150,000 and €146,250, respectively. In addition, J. and O. were ordered to pay the costs of the proceedings.

On 23 January 2008, FC Porto appealed the FIFA decisions before the Court of Arbitration for Sport (CAS).

On 28 January 2008, J. and O. lodged their own appeals against the Single Judge's decisions with CAS.

An oral hearing was held in Lausanne, Switzerland, on 22 July 2008.

Subsequently to the hearing, the Panel put five questions of Portuguese law to the Parties (see Paragraph 27 below). Responses to these questions were furnished in the form of legal opinions signed by Professor Júlio Gomes and Dr. Rui Moreira Sá (produced on behalf of FC Porto) and the law firm Barrocas Sarmento Neves (BSN) (produced on behalf of J. and O.).

LAW

Claims and Jurisdiction

1. FC Porto seeks an amendment of the Singe Judge's decisions to correspond to what the club considers as the true net monetary loss stemming from J.'s breach, namely €5,103,645.30 plus a share of the €1,210,000 (including taxes) paid to Boavista FC to free up M. as a replacement coach, as well as an award of moral and sporting damages, legal fees, and the costs of arbitration.

2. J. and O. seek to set aside the Single Judge's decisions ordering them to make payments to FC Porto, and an award of the due bonuses.

3. The Parties agree that CAS jurisdiction is established by reference to Articles 60 *et seq.* of the FIFA Statutes.

Findings of fact

4. Having had the benefit of hearing the testimony of J. and O., as well as their answers to questions put to them during the hearing, the Panel concludes that both of them breached their Contracts with FC Porto. The reasons that their attempts to justify their purported unilateral termination fail may be stated briefly as follows.

5. The problems of January 2006 are irrelevant to the dispute. In particular, the incident of the hostile fan group faded into history with the successful completion of the 2005/06 season. Moreover, the incident was not provoked by FC Porto, which naturally disapproved of the behavior of that group of fans. If either J. or O. had seriously thought of this as a grievance justifying termination of his Contract, such a posture would have been credible only by giving timely notice that FC Porto should take some steps to ameliorate the situation, and proving that those steps were not taken. There is no evidence of such demands, let alone of FC Porto ignoring them.

6. As for the coaches' allegations of untimely monthly payments and irregular deductions, neither J. nor O. has demonstrated that either of them had complained or that those complaints were justified. The monthly payments were evidently made and encashed by the two coaches without any record of protest. These unspecified *post factum* complaints do not come close to giving justification for the coaches' radical action in August 2006. CAS Panels have held that even the non-payment of monthly salary does not provide the right to terminate employment contracts in the absence of a demand for payment (see e.g. CAS 2005/A/893, para. 7.4.5).

7. The unpaid bonuses undoubtedly did concern a valid debt owed to the two coaches. Nevertheless, the evidence, particularly in light of the testimony at the hearing, is quite clear that the unpaid bonuses cannot be considered as valid grounds for termination. The Panel is satisfied as follows:

   - Both sides agree that FC Porto requested that the bonuses be paid in two instalments during the second half of 2006. This factual proposition is therefore established.
   - FC Porto says its request was accepted by the coaches. The coaches deny it. There is no written proof. Given that the coaches acknowledge that FC Porto made the request, it was for them to ensure that their refusal was put on record, in even the simplest letter. There is none. It is thus not established that the coaches refused the request.
   - J.'s testimony was that he originally complained about the non-payment of the bonuses and said he would quit by 1 August 2006 if he did not get them. The facts are that he did not get them and he did not resign on 1 August 2006. This confirms that (i) he accepted the request, (ii) he was considering it, or (iii) he had changed his mind. In either case, FC Porto was entitled to consider that the delay in payment was not a matter of essence for J.

- J.'s testimony also was crystal clear that his resignation on 9 August 2006 was not due to the non-payment of the bonuses. He was asked twice by the Panel, and he responded emphatically that his resignation was due to the fact that he had lost control of the team because of the club management's lack of support for him.

8. Finally, as for the alleged lack of support by the FC Porto's Board, this is a subjective matter which cannot be given the weight desired by J. in light of the facts that FC Porto did not desire him to resign and that the terms of his Contract did not allow J. to dictate recruitment choices for players, let alone to walk out whenever he had the impression that he was not getting his way with respect to the many policy choices which any professional club must make in light of numerous factors, of which keeping the head coach happy is only one.

9. Given these findings, it must be concluded that the coaches resigned without valid cause. J.'s comment about why he did not consult a lawyer before taking action (*"because he would have told me not to do it"*) is indicative of a high degree of impulsiveness without regard to the consequences for FC Porto.

10. Neither J. nor O. has been able to show that they gave FC Porto notice of any contractual complaint before they terminated their employment on 9 August 2006. Nor have satisfied the Panel that they actually sent a letter of termination.

11. J.'s withdrawal took place ten days before the start of the 2006/07 Portuguese championship season, and the team played its first championship match in his absence on 25 August 2006. He was temporarily replaced by an assistant coach. The disruption caused by J.'s departure was exacerbated by the fact that three Dutch assistant coaches departed with him (although W. later returned to FC Porto). In these circumstances, FC Porto formally notified J. by letter dated 28 August 2006 that it deemed his Contract to be at an end.

12. FC Porto found two coaches willing to replace J. and O. To obtain their release from Boavista FC, however, FC Porto agreed to pay compensation in the amount of €1,000,000 plus tax.

13. There is no doubt that J. made the decision to walk out and that O. simply followed either out of a sense of personal loyalty or as a matter of inevitability. In any event, O. is an adult professional and is answerable for his acts. If he acted out of a sense of loyalty, he must pay the price (and perhaps ask himself whether loyalty should extend to breaching a contract). If he felt he had no future with the club in the absence of J., this was not for him to decide unilaterally, but to inquire with FC Porto, which may or may not have shared this view.

14. The fact that O. was in breach, and is responsible therefore, does not absolve J. of blame for having influenced O. to follow him out the door. It is quite clear that J. approved and indeed desired this outcome because it in effect validated his own decision, or at least avoided the opposite inference if O. had not followed him.

The applicable law

15. The final article of each Contract (Article 12 in the case of the J. Contract; Article 10 in the case of the O. Contract) is captioned "Governing law; arbitration". The first subsection reads:

    "This Employment Agreement shall be governed by and construed in accordance with the laws of Portugal".

16. The second subsection reads:

    "All disputes arising between the parties in connection with this Employment Agreement shall be settled by way of arbitration in accordance with the rules and regulations of the FIFA. The arbitration shall take place in Zurich, Switzerland, and shall be held in the English language".

17. These two paragraphs give the immediate impression that the first corresponds to the "governing law" element in the caption of the final article; the second to "arbitration".

18. This impression is confirmed by a closer reading. To provide that arbitration shall take place "in accordance with" FIFA rules suggests that the procedure shall be that envisaged under FIFA rules, not that the substantive law shall be found there. True, a broad reading of "in accordance" could also include the idea of deciding in conformity of certain substantive rules, but that would have the consequence of contradicting the first paragraph, which clearly refers to the substantive law of Portugal. It is an elementary rule of interpretation that a document should, if possible, be construed so as not to be self-contradictory.

19. The reference to arbitration "in Zurich" has been clarified by the Parties' conduct, notably in signing the Order of Procedure dated 11 July 2008 by which, under Item 1, they confirmed CAS jurisdiction based on Articles 60 and following of the FIFA Statutes, which refers to appeals to CAS. Each party seeks to appeal the decision of the Single Judge of 11 December 2007, and have therefore invoked (and not resisted) CAS jurisdiction (FIFA is based in Zurich).

20. The same Order of Procedure affirms, under Item 7, that *"the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties"*. The chosen "rules of law" here are obviously Portuguese law.

21. Since the Parties have agreed that CAS has jurisdiction in accordance with Articles 60 and following of the FIFA Statutes, one should examine the effect of the following sentence in Article 60 para. 2 of the FIFA Statutes:

    "CAS shall primarily apply the various regulations of FIFA and additionally, Swiss law".

22. It is true that in the *Webster* case, CAS 2007/A/1298-1299-1300, para. 90, a CAS Panel concluded that they would apply:

    (i) Article 17 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA Regulations") in determining the amount of compensation;

(ii) Swiss law in *"interpreting the FIFA Regulations and the validity of the decision under appeal"*; and

(iii) Scottish law if relevant *"in conjunction with"* Article 17 of the FIFA Regulations in setting the level of compensation.

23. Apart from the *Webster* panel's view of the role of Swiss law (which the present Panel notes without comment), the elements of this reasoning – whatever their merits in the *Webster* case – are not apposite in the present case for the following reasons:

- the applicability of Article 17 of the FIFA Regulations to a coach (as opposed to a player) has not been established (see below);
- unlike the contract in *Webster*, which did not refer to Scottish law but only to the rules of the Scottish Football Association, the Contracts in the present case explicitly referred to the applicability of the national (Portuguese) law; and
- unlike the *Webster* case, where the arbitrators were disinclined to apply general principles of the Scottish law of damages because they did not sufficiently cater to the *"particularities of the football labour market and the organisation of the sport"*, in the present case the relevant Portuguese law is indeed a *lex specialis*; and by contrast, as mentioned, the applicability of FIFA's *lex specialis*, namely Article 17 of the FIFA Regulations, has not been established.

24. FC Porto argues that the measure of compensation for breach in this case should be determined in accordance with Article 17 of the FIFA Regulations. The Panel is far from certain that this is true; Article 1 of the FIFA Regulations ("Scope") provides that the Regulations concern "players", not coaches. Moreover, the FIFA Statutes no longer contain the provision which appeared in Article 33 para. 4 of their 2001 version which equated coaches with players (True, Article 22 of the current FIFA Regulations makes clear that FIFA has competence to hear disputes between coaches and clubs, which is precisely the competence exercised by the Single Judge, but that does not mean that *substantive* rules applicable to players also apply to coaches). Even if Article 17 of the FIFA Regulations were applicable, it mentions "the law of the country concerned" as the first of several factors to be given "due consideration". In the event it were questioned that "the law of the country concerned" would be Portuguese law, the same Article 17 of the FIFA Regulations immediately excludes any such alternative interpretation by stating "unless provided for in the contract", thus leading again to Portuguese law.

25. FC Porto has urged the Panel to decide these cases on the exclusive basis of the FIFA Regulations, observing that the Regulations provide under Article 22 lit. c thereof that FIFA is "competent" to decide *"employment-related disputes between a club or an association and a coach that have an international dimension"*. FC Porto also insists that the "jurisprudence" of the FIFA Committee as well as that of CAS is clearly to the effect that a breach of a relevant employment agreement leads to compensation at least in the remuneration payable under the contract, as well as any specifically proven damages.

26. FC Porto's argument in this respect is misconceived. The issue is not whether there might be competence under the FIFA Regulations, or what the substantive FIFA rules, as understood in

previously decided cases, might be. The issue is whether the Parties in these Contracts availed themselves of the opportunity to have the dispute decided in accordance with norms edicted by FIFA. To have done so may well be advisable in many situations, but this simply is not what the Parties agreed to in the relevant Contracts. The Panel will not disregard the Parties' agreement; its position in this regard is consistent with the exhortation in Article 25 para. 1 of the FIFA Regulations that disputes should be resolved *"taking into account all relevant arrangements, law, and/or collective bargaining agreements that exist at the national level"*. Nothing is more "relevant" than the Parties' own choice of legal framework and sources of norms to govern the disputes.

27. In order to improve its understanding of Portuguese law, the Panel invited the Parties to comment on the following questions:

 1. Does the *Contrato colectivo de trabalho dos treinadores* (the "Contrato colectivo") have the status of law in Portugal, and is it *lex specialis* with respect to employment agreements such as the Contracts involved in these cases?
 2. Does it make any difference that the J. Contract does not contain the explicit reference to the *Contrato colectivo* which is found in Article 3.1 of the O. Contract? If so, what would the consequences be?
 3. What are the legal grounds under Portuguese law to justify FC Porto's claims, in whole or in part? If so, how would they lead to a calculated amount in these cases?
 4. What is the "Employment Federative Agreement" referred to in Article 4.1 of the J. Contract? Is the reference entitled to legal effect? If so what effect?
 5. How can it be shown whether the notion of *remuneraçao* under the *Contrato colectivo* includes only net salary, or whether it includes gross salary, as well as reimbursement of living and transportation expenses (which might be considered as reimbursement on account of expatriation rather than as income)?

28. In light of the materials provided by the Parties, the Panel has reached the following understanding with respect to those elements of these five questions which ultimately appear to be relevant in the present cases.

29. *Question 1*. Under Article 4 of the Portuguese Labour Code (the "Code"), a *contrato colectivo* may replace general law, but only with respect to non-mandatory provisions of the latter. Article 383 para. 2 of the Code makes explicit that matters of "indemnification" may be regulated by a *contrato colectivo*. In turn, a mandatory provision of a *contrato colectivo* overrides any contrary stipulations in individual employment agreements.

30. *Question 2*. Pursuant to a Ministerial Order (*Portaria de extensão*) a *contrato colectivo* may apply even to employees who are not members of a participating union. Having examined the opinions submitted, the Panel concludes that the J. Contract is subject to the *Contrato colectivo*.

31. *Question 3*. It seems clear that to the extent Portuguese law governs the *Contrato colectivo* is to be applied. The debated issue is whether Article 41 of the *Contrato colectivo* is the relevant provision, with the effect that FC Porto's compensation should be set at not less than 50% of the value of the remuneration owed under the Contracts, or whether to the contrary, the damages should be set at the equivalent of six months of remuneration on the footing that Article 41 of the *Contrato colectivo* does not apply and that the period of reference is therefore that of Article 48 of the *Contrato colectivo*. This latter conclusion is, in BSN's opinion, the consequence of considering that J. and O. abandoned their jobs, as opposed to terminating without giving valid notice. It is true that Article 41 of the *Contrato colectivo* does not explicitly refer to abandonment. It is not, however, reasonable to argue that someone who abandons without giving notice should automatically be favored over someone who gave notice that turned out to be invalid. It cannot be accepted that the coaches should be treated with greater indulgence because they did not formally resign by a letter to FC Porto. To the contrary, the principle must be that there should be an *incentive* to give notice, so that the leaders of FC Porto would know exactly where they stood, especially with respect to the need to make alternative arrangements. It is impossible to see why the coaches should be rewarded for non-professional conduct. The Panel is unwilling to read Article 41 of the *Contrato colectivo*, which mandates compensation at least equivalent to half of the remaining remuneration in cases of unilateral termination for invalid cause, should be put aside and result in less remuneration if an employee abandoning his job gives no notice whatever. At any rate, J.'s testimony was unequivocal: once he had announced to the team that he was leaving, there was *"no going back"*. He added that *"my and my staff's decision"* was definitive. He testified that he simply did not want to take a telephone that was offered to him to speak to FC Porto's President on 9th August. He told the Panel that he realised that he was putting FC Porto in a difficult position but felt it was justified because, in his words: *"I felt I had lost my authority; it's over now, my grip, my power over the group was gone"*. This was radically different from the situation of an employee who has gone off without permission but with no intent to give up his employment.

32. *Question 4*. This mention in the J. Contract appears to have been an inadvertent reference to employment agreements filed with the Portuguese Football Federation. When such contracts are filed in this manner, they naturally duplicate the originals. Accordingly (and as all consultants agree), this reference is of no moment in this case, whether or not the J. Contract was filed.

33. *Question 5*. The Panel accepts the notion of base remuneration as understood in Article 250 para. 1 lit. a of the Code, namely an amount corresponding to the *"activity performed by the employee"*. In light of the Panel's conclusions with respect to Question 3, the relevant remuneration corresponds to what remained due under the relevant Contracts, i.e. 10 months' salary for the 2006/07 season and 12 months' salary for the 2007/08 season. This amount should be considered net of advantages relating to expatriation (such as housing allowance and transportation) which does not correspond to the value of the employee's performance.

34. As for taxes to be withheld and then paid by FC Porto on behalf of J. and O., the evidence available to the Panel establishes that they would equal 30% of the contractual salary (It may be

the case that the rate for part of the relevant period would have been 30.5%, but the Panel disregards this as *de minimis*). Article 41 of the *Contrato colectivo* does not explain whether compensation should be calculated on the basis of gross or net remuneration. The Panel has come to the view that the proper calculation should be based on the gross figure due to the fact that under Portuguese law withheld taxes are considered part of employees' salary, paid by the employer on behalf and for the benefit of the employee who owes the taxes. The calculation of the gross value of the coaches' salaries requires grossing up the due remuneration in accordance with the applicable withholding tax rate.

Damages

35. Under the J. Contract, the remaining net salary to be paid for the 2006/07 season was €1.3 million and €1.5 million for the 2007/08 season. The gross up value of the 2006/07 salary at the 30% withholding tax rate is €1,857,142.86. As the breach occurred in early August, within 10 months remaining on account of the 2006/07 season, the Panel considers that the former amount should be reduced pro-rata to €1,547,619.05. The gross up value of the 2007/08 salary is €2,142,857.14. The total is therefore €3,690,476.19. One-half that amount, corresponding to the minimum defined in Article 41 para. 1 of the *Contrato colectivo*, is €1,845,238.09. The value of lodging, use of an automobile, and travel is not to be included, as these items pertain to costs of expatriation for foreign coaches, not to the inherent value of their performance.

36. As stated, FC Porto could recover a higher amount if it proved that its actual loss was greater than the minimum defined under Article 41 para. 1 of the *Contrato colectivo*. The only quantified loss to FC Porto relates to the €1,210,000 payment to Boavista FC. Since the salary paid to the replacement coach was admittedly less than J.'s salary, it does not represent a loss to FC Porto (Mr. Henrique, in answer to a question from the Panel, revealed that the annual salary paid to M. was €750,000 and to C. €200,000). In other words, there is no reason to augment the minimum compensation due from J.

37. From the amount of €1,845,238.09 should be deducted the €850,000 bonus to which J. was entitled, as explained above. The bottom line is that he should therefore pay €995,238 to FC Porto.

38. Under the O. Contract, the net salary to be paid for the 2006/07 season was €120,000 and €150,000 for the 2007/08 season. The gross up value is €171,428.57 for the 2006/07 season and €214,285.71 for the 2007/08 season, applying the same tax withholding rate as above. On the same logic as with respect to J., the former amount should be reduced to €142,857.14. The total is therefore €357,142.85. Half that amount is €178,571.43. The Panel does not accept that O. should be considered liable for any portion of the €1.21 million demanded by Boavista FC to make its coaches available to FC Porto to replace J. and O. Such a payment, the Panel surmises, relates to the prime mover, i.e. the head coach, and it is to be expected that any head coach has an assistant who (like O.) is likely to follow his leader. Nor is the Panel willing to

accept an oral declaration to the effect that O.'s replacement was paid a higher salary than he was. After the deduction of O.'s unpaid bonus of €103,750, the bottom line is that he should therefore pay €74,821 to FC Porto.

39. J. and O. were successful in bringing the appeals, in that their obligation to compensate FC Porto was reduced. On the other hand, their claim that they were not liable for breach has failed. Under the circumstances, the Panel sees no justification for an award of costs to any Party.

40. The present award has been rendered by majority.

The Court of Arbitration for Sport:

1. sets aside the decision dated 11 December 2007 of the Single Judge of the FIFA Players' Status Committee,

2. orders O. to pay compensation to FC Porto in the amount of €74,821,

3. orders that interest will run at a rate of 5% per annum on this amount in the event it is not paid within a period of 60 days, and

4. (…).