Arbitration CAS 2018/A/6050 Kayserispor Kulübü Derneği v. Sibiri Alain Traore, award of 18 September 2018

Panel: Mr Mark Hovell (United Kingdom), President; Mr João Nogueira da Rocha (Portugal); Mr Alexis Schoeb (Switzerland)

Football
Termination of the employment contract
Player's just cause to terminate the contract
Financial and sporting implication of the breach

1. **Whilst the FIFA Regulations on the Status and Transfer of Players (RSTP) does nor provide a definition of "just cause", the commentary to the RSTP (No 2 to Article 14) provides some indications regarding the notion of just cause. In this respect, a CAS panel may consider in a particular case three relevant criteria such as (1) the duration of the contractual violation, (2) the overdue amount and (3) the necessary warning from the person suffering from the breach. In this regard, not paying the player's salary for over 3 months and not paying him on time for over 6 months is a contractual violation that occurred over a significant period of time and which may already be qualified as a substantial breach of the club's main obligation to pay the player. In addition, the fact that the overdue amount at the time of the termination of the employment contract is not an unsubstantial sum and corresponds to more than two of the player's monthly salaries is also relevant. Finally, the fact that the player had warned the club, which was not heeded by the latter is relevant as well. Those factors constitute just cause for the player to terminate the contract.**

2. **Apart from the outstanding remuneration due to the player, a CAS panel is to consider the question of compensation on a *de novo* basis, pursuant to Article R57 of the CAS Code and may put itself in the shoes of the FIFA Dispute Resolution Chamber and apply the applicable law, i.e. the RSTP and in particular Article 17.1. Where the termination of the employment contract was due to a breach by the club, the *"remuneration"* factor, together with *"the time remaining"* factor, plays a major role. However, there is no possibility to award the player additional compensation from the club, even though the employment contract was terminated with just cause, if the player was able to find a new club and receive more money than he would have received from the club, in other words, if the player was able to fully mitigate his losses.**

I. PARTIES

1. Kayserispor Kulübü Derneği Football Club (the "Club" or the "Appellant") is a professional football club with its registered office in Kayseri, Turkey. The Club is a member of the Turkish Football Federation (the "TFF"), which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA").

2. Sibiri Alain Traore (the "Player" or the "Respondent") is a professional football player born in Bobo Dioulasso, Burkina Faso on 31 December 1988 and who currently plays for RS Berkane.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. The employment agreement between the Parties

4. On 12 August 2016, the Player and the Club signed an employment contract (the "Employment Contract"), which was valid until 31 May 2018.

5. In accordance with Article 6.1 of the Employment Contract, the Player was entitled to a salary of EUR 400,000 for the 2016/2017 season and EUR 450,000 for the 2017/2018 season. In particular, the salary for the 2016/2017 season was payable as follows:

   a) EUR 50,000 on the date of signature of the Employment Contract;

   b) EUR 50,000 on 31 August 2016;

   c) EUR 75,000 on 30 November 2016;

   d) EUR 75,000 on 31 January 2017;

   e) EUR 75,000 on 31 March 2017; and

   f) EUR 75,000 on 31 May 2017.

6. According to Article 6.3 of the Employment Contract, the Player was also entitled to EUR 10,000 for each season*, "for the expenses with regard to - including but not limited with - residence, car, flight tickets"*.

7. By 31 August 2016, the Club had paid the Player a total of EUR 110,000, corresponding to the first two instalments of wages, as well as EUR 10,000 that the Respondent claimed were for expenses owed to him under Article 6.3 of the Employment Contract.

8. The third instalment of EUR 75,000, which was due on 30 November 2016 was paid late, and in three separate payments: EUR 30,000 on 17 February 2017, EUR 20,000 on 2 March 2017 and EUR 25,000 on 20 April 2017.

9. On 20 April 2017, the Club paid the Player a further EUR 5,000 as part payment of the EUR 75,000 which was due on 31 January 2017. As of that date, the Respondent alleged that the Club therefore had overdue payments totalling EUR 145,000, corresponding to the remaining EUR 70,000 from the 31 January 2017 instalment, and EUR 75,000 for the 31 March 2017 instalment.

10. On 26 April 2017, the Player put the Club in default for the payment of EUR 145,000, corresponding to part of the instalment due on 31 January 2017 and to the entire instalment due on 31 March 2017, granting the Club ten days to remedy the default, failing which the Player would terminate the Employment Contract with just cause.

11. On 9 May 2017, the Club replied to the Player's letter, acknowledging that it had arrears due to the Player, while stating, however, that it had already paid him EUR 60,000 on 4 May 2017. The Club stated that the Player did not have just cause to terminate the Employment Contract and warned him that he would be in breach if he did.

12. On 10 May 2017, the Player sent another letter to the Club, by means of which he acknowledged receipt of the payment of the EUR 60,000 and put the Club in default for the amount of EUR 85,000, requesting payment thereof within the following five days.

13. On 16 May 2017, the Player wrote to the Club again stating that he had still not been paid the remaining overdue amount of EUR 85,000 and as such, he terminated the Employment Contract with immediate effect.

B. Proceedings before FIFA

14. On 9 August 2017, the Player lodged a claim in front of the FIFA Dispute Resolution Chamber (the "FIFA DRC") against the Club for breach of contract, requesting the following:

"a) EUR 85,000 plus 5% interest p.a., for outstanding salaries, broken-down as follows:

i. EUR 10,000 for part of the instalment due on 31 January 2017, plus 5% interest p.a. as of the same date;

ii. EUR 75,000 for the instalment due on 31 March 2017, plus 5% interest p.a. as of the same date.

b) EUR 535,000 as compensation for breach of contract, corresponding to the remaining value of the contract, plus 5% interest p.a. as of the date of the claim".

15. Upon request of the FIFA Administration, the Player informed FIFA that, on an unspecified date, he had entered into an employment contract with the Qatari Club Al-Markhiya, valid from 1 July 2017 until 30 June 2019 (the "Qatari Contract"). According to the Qatari Contract, the

Player was entitled to a monthly salary of Qatari Rial (QAR) 216,667 *"which is equal 54,166 Euro"* payable on the last day of each month as from 1 July 2017 until 30 June 2018.

16. After the closure of the investigation-phase, the Club informed the FIFA Administration that it had paid the Player the amount of EUR 50,000 on 29 March 2018. The Player, upon request of FIFA, acknowledged receipt of such payment.

17. On 10 August 2018, the FIFA DRC issued a decision in this case partially accepting the claim of the Player (the "Appealed Decision") as follows:

"1. The claim of the [Player], is partially accepted.

*2. The [Club], has to pay to the [Player], **within 30 days** as from the date of notification of this decision, outstanding remuneration in the amount of EUR 35,000, plus 5% interest p.a. as of 1 April 2017 until the date of effective payment.*

*3. The [Club] has to pay to the [Player], **within 30 days** as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 75,000, plus 5% interest p.a. as of 9 August 2017 until the date of effective payment.*

4. In the event that the amounts plus interest due to the [Player] in accordance with the above-mentioned numbers 2. and 3. are not paid by the [Club] within the stated time limits, 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 is rejected".

18. The grounds of the Appealed Decision were notified to the Parties on 16 November 2018.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 7 December 2018, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2017 edition) (the "CAS Code"), the Club filed a Statement of Appeal against the Player challenging the Appealed Decision at the Court of Arbitration for Sport (the "CAS"). In its Statement of Appeal, the Club nominated Mr João Nogueira da Rocha, Attorney-at-law in Lisbon, Portugal, as arbitrator.

20. On 24 December 2018, the Player wrote to the CAS Court Office, nominating Mr Alexis Schoeb, Attorney-at-law in Geneva, Switzerland, as arbitrator.

21. On 3 January 2018, pursuant to Article R51 of the CAS Code, the Club filed its Appeal Brief with the CAS.

22. On 20 February 2019, pursuant to Article R55 of the CAS Code, the Player filed his Answer to the CAS Court Office.

23. On 6 February 2019, pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to this case was constituted as follows:

President: Mr Mark A. Hovell, Solicitor in Manchester, United Kingdom

Arbitrators: Mr João Nogueira da Rocha, Attorney-at-law in Lisbon, Portugal

Mr Alexis Schoeb, Attorney-at-law in Geneva, Switzerland

24. On 24 April 2019, the CAS Court Office sent the Order of Procedure to the Parties.

25. Aslo on 24 April 2019, the Club duly signed and returned the Order of Procedure.

26. On 29 April 2019, the Player duly signed and returned the Order of Procedure.

IV. HEARING

27. On 28 March 2019, the CAS Court Office informed the Parties that a hearing in this matter would take place on 27 June 2019.

28. The hearing was held on 27 June 2019 in Lausanne, Switzerland. The Parties did not raise any objection as to the composition of the Panel. The Members of the Panel were all present and were assisted by Mrs Kendra Magraw, CAS Counsel. The following persons attended the hearing:

    i. The Club: Mr Sami Dinç, counsel; and

    ii. The Player: Mr Riza Köklü and Mrs Didem Sunna, both counsel.

29. The Panel had presented the Parties with a copy of another publically available CAS award that could have some relevance in the matter-at-hand, namely *CAS 2018/A/4623 & 4624*. The Parties had the opportunity to present their factual and legal arguments, as well as to answer the Panel's questions. At the end of the hearing, all Parties confirmed that their respective rights to be heard and to be treated equally had been respected in the present proceedings. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

V. THE PARTIES' SUBMISSIONS

30. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Club's Submissions

31. In its Statement of Appeal, the Club submitted the following requests for relief:

"The [Club] *herein respectfully requests the Panel:*

1. *To accept this appeal and cancel the [Appealed Decision],*
2. *To decide to extend the deadline of appeal brief – at least 15 days,*
3. *To cancel the [Appealed Decision] which states that the Club has to pay in the amount of 35.000,00-EUR plus 5% interest,*
4. *To decide that the Player hasn't any receivables from the Club,*
5. *To decide that the termination of the Player is without just cause,*
6. *To cancel the [Appealed Decision] which states that the Club has to pay compensation in the amount of 75.000,00-EUR for the breach of contract,*
7. *To condemn the [Player] to the payment of the whole CAS administration costs and the Arbitrator's fees".*

32. In its Appeal Brief, the Club submitted the following requests for relief:

"The [Club] *request the Panel:*

1. *To accept this appeal against the [Appealed Decision],*
2. *To adopt an award declaring the annulation of the said decision,,*
3. *To decide that the [Player] has only in the amount of 1.147,81-Euro receivables from the [Club],*
4. *To decide that the unilaterally termination of the [Player] is without just cause,*
5. *To adopt an award declaring the rejection of the compensation claim of the [Player], otherwise make deduction at the rate of 75% minimum from the remaining amount after mitigation.*
6. *To make a decision that the judicial costs and the attorneyship fees that the [Club] is faced with shall paid by the* [Player]*".*

33. In summary, the Club submitted the following in support of its Appeal:

Outstanding Amounts Owed by the Club

34. The Club submitted that, contrary to the Player's notification dated 26 April 2017 that he was owed EUR 145,000, the amount actually in arrears was EUR 120,712.56 at that time.

35. The Club further submitted that in the intervening period before the Player terminated the Employment Contract on 16 May 2017, it paid an amount totalling EUR 69,564.75, leaving a balance of EUR 51,147.81 due to the Player.

36. The Club stated that the outstanding amount was less than the equivalent of one instalment due to the Player, and together with the length of the Employment Contract, the payments made to the Player and the amount outstanding, the decision to terminate the Employment Contract was in fact *"without just cause due to the lack of persistence failure on the financial obligations"*. The Club

also sent a notification to the Player on 9 May 2017 warning that any termination in these circumstances would be without just cause.

37. The Club submitted that it further reduced the arrears by making a payment totalling EUR 50,000 on 29 March 2018. Therefore, by the time the FIFA DRC rendered the Appealed Decision, the amount owed was only EUR 1,147.81.

38. Further, the Club submitted that the FIFA DRC did not take proper account of the payments made to the Player and therefore erred in its decision that this termination was with just cause.

39. At the hearing, the Club stated that it had a right to pay the Player in Turkish Lira ("TL"), as opposed to Euros, and had done so. All the payments in Lira should be taken out of the Player's salary. There had been 17 or 18 winning matches, so if the Lira payments were for winning bonuses as the Player aruged, there would have been more than the Player had claimed.

40. Additionally, the EUR 10,000 for expenses had not been paid. There was no set payment date and would have been paid at the end of the Employment Contract term. As such, this amount was not overdue when the Player terminated.

41. Finally, in the event the Panel determined the Player did have just cause to terminate the Employment Contract, he had fully mitigated his losses, so there was no need to award compensation. FIFA had erred in this regard. There was no indemnity awarded, nor could there be under the applicable version of FIFA's Regulations on the Status and Transfer of Players (the "RSTP").

B. The Player's Submissions

42. In his Answer, the Player submitted the following prayers for relief:

> *"1. To dismiss the claims of [the Club] in full,*
>
> *2. To confirm the [Appealed Decision],*
>
> *3. To condemn [the Club] the payment of CHF 10.000 in the favour of the Player of the legal expenses incurred,*
>
> *4. To establish that the costs of the present arbitration procedure shall be borne by the* [Club]*".*

43. In summary, the Player submitted the following in support of his Answer:

a) Outstanding Amounts Owed by the Club

44. According to the Employment Contract and for the 2016/2017 Season, the Club was obliged to pay the Player the following amounts on the following dates:

- EUR 10,000 (for expenses) with EUR 50,000 - on the date of signing of the Employment Contract;

- EUR 50,000 - on 31 August 2016;
- EUR 75,000 - on 30 November 2016;
- EUR 75,000 - on 31 January 2017;
- EUR 75,000 - on 31 March 2017; and
- EUR 75,000 - on 31 May 2017.

45. The Player submitted that the Club paid a total amount of EUR 110,000 up until 31 August 2016 in two separate payments which corresponded with the first two scheduled payments and expenses in the amount of EUR 10,000. It was logical that the sum for expenses was paid in advance, as no receipts etc. were required; it was a lump sum for the Player to *"spend wisely"*.

46. Further, the Player submitted that afterwards the payment of EUR 75,000 due on 30 November 2016 was finally paid as follows:
    - EUR 30,000 on 17 February 2017;
    - EUR 20,000 on 2 March 2017; and
    - EUR 20,000 on 20 April 2017.

47. The Player also acknowledged that on 20 April 2017, the Club paid the amount of EUR 5,000 which constituted a small partial payment of the amount due on 31 January 2017 (i.e. EUR 75,000).

48. In summary, the Player submitted that as of 20 April 2017, the Club owed EUR 145,000 which corresponded to the remaining amount of EUR 70,000 (from the 31 January 2017 instalment) and EUR 75,000 (from the 31 March 2017 instalment).

49. Consequently, the Player notified the Club that it was in arrears in the amount of EUR 145,000 on 26 April 2017. The Player requested payment of the amount outstanding with interest and granted a 10-day period for the Club to settle the debt.

50. The Player further submitted that the Club erroneously responded on 9 May 2017 claiming that the amount owed was less than what was detailed in the Player's notification (EUR 75,000 relating to one payment outstanding according to the Club).

51. The Club also stated that EUR 60,000 was paid on 4 May 2017. On 10 May 2017, the Player acknowledged this payment by the Club and therefore gave the Club a final deadline of 5 days to clear the new outstanding amount totalling EUR 85,000.

52. However no payment was made, which led to the Player unilaterally terminating the Employment Contract with just cause.

53. The Player stated that at some point during the proceedings at FIFA, the Club paid the Player a further EUR 50,000, leaving a balance of EUR 35,000 outstanding.

b) Response to the Club's arguments

54. The Player submitted that all the payment currencies stipulated in the Employment Contact were in EUR currency and therefore it was clear that the Turkish Lira payments were only paid in relation to match bonuses.

55. In this regard, the Player submitted the following:

- The payment dated 28 September 2016 in the amount of 10,800 TL was made in respect of the 2-1 win on 25 September 2016 against Club Caykur Rizespor A.S. in which the Player was fielded in the first 11.
- The payment dated 27 October 2016 in the amount of 8,100 TL was made in respect of the 2-1 win on 21 October 2016 against Club Gaziantepspor in which the Player entered well into the match as a substitute.
- The payment dated 23 February 2017 in the amount of 14,000 TL was made in respect of the 2-0 win on 17 February 2017 against Club Bursaspor in which the Player was fielded in the squad.
- The payment dated 28 February 2017 in the amount of 19,000 TL was made in respect of the 4-0 win on 24 February 2017 against Club Caykur Rizespor A.S. in which the Player was fielded in the squad.
- The payment dated 5 May 2017 in the amount of 17,500 TL was made in respect of the 3-0 win on 29 April 2017 against Club Alanyaspor in which the Player was fielded in the squad.
- The payment dated 9 May 2017 in the amount of 20,000 TL was made in respect of the 3-2 win on 6 May 2017 against Club Trabzonspor in which the Player was fielded in the squad.

56. Further, the Player submitted that these payments were only made for winning games, being in the first 11 on the pitch, being in the squad or coming on as a substitute. There was no payment made when the Player was left out, or the Club suffered a defeat or only managed a draw at home. The Player stated that all the TL payments were made a week after the Player was fielded in a winning match, so *"[i]n this case it is clear that the TL payments are match bonus payments externally"*.

57. The Player further supported this point by highlighting two of the other players at the Club who received match bonuses in the same way.

58. Furthermore, the Player submitted that there was no mention of deducting TL payments to reduce the amount owed in the correspondence of 9 May 2017 (the Club acknowledged at that time, in response to the Player's notification on 6 May 2017 that EUR 145,000 was unpaid, that in its view just one instalment was outstanding in the amount of EUR 75,000).

59. The Player concluded on this point that, with its response on 9 May 2017, the Club accepted and acknowledged that the Turkish Lira payments were not made in connection to the salary payments derived in the Employment Contract. At the hearing, the Player submitted that these

bonuses were discretionary. Before matches the President would address the team and tell them that if they won that match they would receive a certain sum as a bonus and this was always paid in Liras.

60. At the hearing, the Player supported the approach taken by the CAS panel in *CAS 2018/A/4623 & 4624*.

61. Consequently, *"by deducting the payment of EUR 50,000, made during the FIFA case, it is not disputed that the outstanding remuneration of the* [Player] *is EUR 35,000 as it is stated in the* [Appealed] *Decision"*.

62. The Player concluded his submissions by stating that the termination was made with just cause. *"There is no dispute on this fact. The* [Player] *signed with another club starting from Season 2017/2018. The ruled EUR 75.000.-as compensation is the amount that the Player suffered between the term starting from the termination date until the end of 2016/2017 Season and therefore just"*.

63. With regards to the issue of mitigation, at the hearing, the Player stated that FIFA had rightly considered the Employment Contract on a season-by-season basis. The Player had not been able to mitigate his losses by finding a new club before the last instalment of the first season of the Employment Contract had fallen due and had therefore correctly awarded him EUR 75,000 as compensation. The Player had fully mitigated his losses for the second season.

VI. JURISDICTION

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

"An appeal against a 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".

65. The jurisdiction of the CAS, which is not disputed by the Parties, derives from Article 67.1 of the FIFA Statutes (2015 edition) as it determines that:

"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".

66. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

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

VII. ADMISSIBILITY

68. 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 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.

69. According to Article 67.1 of the FIFA Statutes, appeals *"shall be lodged with CAS within 21 days of notification of the decision in question"*.

70. The Statement of Appeal, which was filed on 7 December 2018, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee, as well as the time limit set out in the FIFA Statutes. The Appeal Brief was filed within the time limit provided by the CAS Court Office.

71. It follows that the Appeal is admissible.

VIII. APPLICABLE LAW

72. Article R58 of the CAS Code provides the following:

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

73. Article 57(2) of the FIFA Statutes provides the following:

"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

74. The Parties submitted that the applicable regulations are those of FIFA, with Swiss law applying subsidiarily. The Panel agrees with this position and will apply the various Regulations of FIFA, with Swiss law on a subsidiary basis.

75. The Panel notes that Article 26(2) of the RSTP (edition 2018) provides that: *"Any case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulations"*.

76. In accordance with Article 29 of the RSTP (2018), the RSTP came into force on 1 January 2018. The claim of the Player was lodged before FIFA on 09 August 2017.

77. As a result, the Panel determines that the applicable RSTP shall be the previous edition of the edition 2018, i.e. the 2016 RSTP edition (as found by the FIFA DRC in the Appealed Decision; cf. para. 3).

IX. MERITS

A. The Main Issues

78. The Panel notes that the main issues before it are:

    a. Which Party breached the Employment Contract, and was this with or without just cause?

    b. What are the financial implications of the breach, if any?

79. The Panel will consider each of the above issues in turn.

a) Which Party breached the Employment Contract and was this with or without just cause?

80. The Panel notes that as of 16 May 2017, when the Player terminated the Employment Contract, he claimed that he was owed EUR 85,000 by the Club, comprising EUR 10,000 that had been due from the 31 January 2017 instalment and the entire 31 March 2017 instalment of EUR 75,000. The Player had given clear warnings to the Club that had not resulted in payment, and, as such, he had just cause to end the Employment Contract.

81. On the other hand, the Club denied that the EUR 10,000 from the January instalment was due, as it denied that it had paid the EUR 10,000 for expenses (and that this payment was not due as of that time) and that a number of other payments had been made in Turkish Lira (as was its right to pay in which ever currency it wished) which meant that, as of 16 May 2017, only EUR 51,147.81 was outstanding. This was thus insufficient for the Player to terminate with just cause.

82. In order to consider these diverging positions, the Panel determined to firstly consider whether the expenses had been paid and whether the payments made in Liras were against the salaries due under the Employment Contract or were *ex gratia* bonus payments.

83. The Panel notes that there appeared to be no dispute that the first two payments made by the Club totalled EUR 110,000 and were made on the due dates for the first two instalments of EUR 100,000, i.e. an additional EUR 10,000 was paid at that stage. Was this on account of the next instalment due in 2 months' time or was it the payment of the expenses sum? The Panel determines that it was the latter. The Club did not have a habit of paying early, rather the opposite; whilst the Employment Contract is silent as when to pay the expenses, there would be nothing to stop the Club paying these at the beginning of the Employment Contract; and, it makes sense to pay this sum at the beginning of the Employment Contract, as it is at this stage that the Player would be arranging his accommodation and transport. As such, the Club's position that the expenses had not been paid and were due to be paid later is rejected.

84. With regards to payments made in Liras, the Panel notes that the CAS panel in *CAS 2018/A/4623 & 4624* had a similar situation. That panel considered the following issues to be of relevance: (1) that the payments were made in Liras and not Euros, when the contract referred to instalments in Euros; (2) the payments were made into a Lira account, rather than the player's Euro account that received most of his salary; (3) the payments made in Lira bore

no relation to the amounts set out in the contract; (4) the dates of the Lira payments coincided with the dates the club had won various matches; and (5) there was witness evidence from other players that these payments were bonuses.

85. In the case-at-hand, whilst the Player failed to bring his former colleagues as witnesses to support his position, the Panel did place some weight on the fact that there were documents that supported his position that other players were receiving these bonuses too. The Lira payment did not fit with the pattern of Euro payments that the Club had made (these were all in thousands of Euros), but did fit with the pattern of matches the Club had won and that the Player had participated in. Paying into a Lira account was not seen as being of particular importance, as Liras could not be paid into a Euros account. Balancing all these factors, the Panel determines that these Lira payments were *ex gratia* bonuses and could not be taken against sums due to the Player under the Employment Contract.

86. As such, the Panel determines that as of 16 May 2017, the Club owed the Player EUR 85,000, a part of which had been due for over 3 months. The Panel also notes that the Player was effectively receiving EUR 75,000 every two months, during the first season of the Employment Contract, so such arrears was in excess of 2 months' salaries. The Panel further notes that the Club had become a late payer since November 2016.

87. The Panel next needs to determine whether these facts presented the Player with just cause to terminate the Employment Contract. The relevant part of the RSTP is article 14:

"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".

88. Whilst the RSTP does not provide a definition of "just cause", according to the commentary to the RSTP (No 2 to Article 14):

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

89. The following example is provided by the commentary (No 3 to Article 14):

"A player has not been paid his salary for over 3 months. (…) The fact that the player has not received his salary for such a long period of time entitles him to terminate the contract, particularly because persistent noncompliance with the financial terms of the contract could severely endanger the position and existence of the player concerned".

90. The Panel, however, notes that in *CAS 2016/A/4482*, that CAS panel wished *"to underline that the Panel does not share the interpretation advanced by the Club of the example contained in the FIFA Commentary of a delay in payment of salary of three months as being a final, decisive, minimum amount:* ***A termination under Art. 14 FIFA RSTP may under certain circumstances be justified also if the amount overdue is less than three months"*** (emphasis added).

91. In *CAS 2006/A/1180 (para. 26)*, referred to in many other CAS awards, that CAS panel held that: *"The non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated as in the present case - constitute "just cause" for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; CAS 2003/O/540 & 541, non-public award of 6 August 2004); for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is* ***a substantial breach of a main obligation such as the employer's obligation to pay the employee****. However, the latter* ***applies only subject to two conditions****. Firstly, the amount paid late by the employer may* ***not be 'insubstantial' or completely secondary****. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have* ***given a warning****. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract"* (emphasis added).

92. In the case-at-hand, the Panel therefore considers the following three relevant criteria: (1) the duration of the contractual violation; (2) the amount; and (3) the necessary warning.

93. The Panel first notes that not paying the Player's salary for over 3 months and not paying him on time for over 6 months is a contractual violation that occurred over a significant period of time and which may already be qualified as a substantial breach of the Club's main obligation to pay the Player. In addition, the overdue amount at the time of the termination of the Employment Contract, i.e. EUR 85,000, is not an unsubstantial sum and corresponds to more than two of the Player's monthly salaries. Finally, it is undisputed that the Player had warned the Club, which was not heeded by the Club.

94. In conclusion, the Panel determines that the Player did have just cause to terminate the Employment Contract.

b) What are the financial and/or sporting implications of the breach?

95. The Panel has determined above that the arrears due to the Player at the termination of the Employment Contract were EUR 85,000. The Panel also notes that on 29 March 2018, during the process before FIFA, the Club made a payment of EUR 50,000 to the Player. As such, the outstanding remuneration due to the Player is EUR 35,000.

96. The Panel notes that this sum was awarded, together with interest, by the FIFA DRC in the Appealed Decision and sees no reason to depart from that part of the decision.

97. The Panel notes, however, that FIFA additionally awarded the Player compensation, in the Appealed Decision:

"… the Respondent must pay the Claimant the amount of EUR 75,000, which is to be considered a reasonable and justified amount of compensation for breach of contract in the matter at hand".

98. The Player claimed that this was the instalment that was to be paid on 31 May 2017, showing that FIFA considered mitigation on a season-by-season basis.

99. The Panel notes the lack of any detailed reasoning in the Appealed Decision in this regard. It cannot share the Player's interpretation of FIFA's reasoning for this award. It could just as likely be a figure that FIFA felt was reasonable in the circumstances.

100. However, the Panel is to consider the question of compensation on a *de novo* basis, pursuant to Article R57 of the CAS Code. It puts itself in the shoes of the FIFA DRC and applies the applicable law, i.e. the RSTP and in particular Article 17.1, which reads as follows:

"[…] unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, ***the remuneration and other benefits due to the player*** *under the existing contract and/or the new contract,* ***the time remaining on the existing contract*** *up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period"* (emphasis added).

101. It is indeed possible for the FIFA DRC and CAS to increase or decrease a party's objective damages, by establishing *"on a case-by-case basis the prejudice suffered by a party in case of an unjustified breach or termination of contract, with due consideration of all elements of the case including all the non-exclusive criteria mentioned in art. 17 para. 1 of the FIFA Regulations"* (see *CAS 2008/A/1519-1520*, at para. 87) and by having as a guidance art. 337c para. 3 and art. 337d para. 1 of the Swiss Code of Obligations, under which a judging authority is allowed to grant a certain *"special indemnity"* to the employee as well as the specificity of sport, which serves to verify the solution for compensation reached otherwise (see *CAS 2008/A/1519-1520*, at para. 157; see also *CAS 2015/A/4042* paras. 113-115).

102. In the present case, in which the termination of the Employment Contract was due to a breach by the club, the *"remuneration"* factor, together with *"the time remaining"* factor, plays a major role (see also *CAS 2017/A/5111*, paras. 137-138).

103. However, such criteria such as the law of the country concerned, the fees and expenses paid for the Player, and the protected period seemed to have little relevance in the case-at-hand. Further, there seemed no place for the specificity of sport either – the breach had not precluded the Player from finding a new club; indeed he seemed to do this within a couple of months and to find an improved contract, financially.

104. When the Panel looks at the time left under the Employment Contract and the sums the Player would have expected to have been paid, it notes that he has covered this and more under the Qatari Contract. He has fully mitigated his losses and there was no evidence of any other losses or damages that he suffered as a result of the Club's actions.

105. As such, the Panel sees no possibility to award him additional compensation from the Club, even though the Employment Contract was terminated with just cause, as he was able to find a new club and receive more money than he would have received from the Club.

B. Conclusion

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

a) The Club's Appeal is partially allowed;

b) The Appealed Decision is amended as follows: the compensation for breach of contract (CHF 75'000) is cancelled. Having fully mitigated his losses, Sibiri Alain Traore is not entitled to any compensation payment; and

c) All other claims or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 7 December 2018 by Kayserispor Kulübü Derneği against the decision rendered by the FIFA Dispute Resolution Chamber on 10 August 2018 is partially allowed.

2. Item 3 of the decision rendered by the FIFA Dispute Resolution Chamber on 10 August 2018 is cancelled.

3. (…).

4. (…).

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