Arbitration CAS 2019/A/6209 Kayserispor Kulübü Dernegi v. X., award of 13 January 2020

Panel: Mrs Svenja Geissmar (Germany), President; Mr João Nogueira Da Rocha (Portugal); Mrs Anna Bordiugova (Ukraine)

Football
Termination of contract with just cause by the player
Amount paid after termination and assessment of just cause
Compensation for damages
Discretion of the CAS panel in adjusting the amount of compensation

1. **The mere fact that a club ultimately paid an amount to the player after the termination of contract is not relevant for the discussion as to whether the player had just cause to terminate the employment contract, as this is to be assessed at the moment of termination. Such payment is however to be taken into account in awarding any outstanding salary or compensation for breach of contract to the player.**

2. **A party responsible for and at the origin of the termination of the contract is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed. Hence, in a case where the player terminated the employment contract, but the club was at the origin of the termination by breaching its contractual obligations towards the player, the club is thus liable to pay compensation for the damages incurred by the player as a consequence of the early termination.**

3. **In assessing the amount of compensation for damages, the CAS panel will proceed to assess the objective damages, before applying its discretion in adjusting this total amount of objective damages to an appropriate amount, if deemed necessary.**

I. PARTIES

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

2. X. (the "Player") is a professional football player of Cameroonian nationality.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the parties, the hearing and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal analysis.

A. Background Facts

4. On 24 January 2017, the Player and the Club concluded an employment contract (the "Employment Contract"), for a period of two and a half football seasons, i.e. valid as from the date of signing until the end of the 2018/2019 season in May 2019. The Employment Contract contains the following relevant terms:

> *"**ARTICLE 6- OBLIGATIONS OF THE CLUB***
>
> *The Club is obliged to pay the amounts as written below to the Player in return of his services subject to this employment contract, all payments indicated in the employment contract are to be considered as "net" payments. All payments and remunerations are net of any kind of taxes and deductions of any nature.*
>
> ***For 2016/2017 Football Season : 300.000,00-Euro*** […]
>
> *The aforementioned amount is to be paid to the Player by the Club as the guarantee payment in 5* […] *installments on the belowmentioned* [sic] *dates:*
>
> *On the signing date of this contract : 50.000,00-Euro* […]
> *Payable by bond dated 30.01.2017 : 50.000,00-Euro* […]
> *28.02.2017 : 50.000,00-Euro* […]
> *31.03.2017 : 50.000,00-Euro* […]
> *30.04.2017 : 50.000,00-Euro* […]
> *31.05.2017 : 50.000,00-Euro* […]
>
> ***For 2017/2018 Football Season : 650.000,00-Euro*** […]
>
> *The aforementioned amount is to be paid to the Player by the Club as the guarantee payment on the belowmentioned* [sic] *dates:*
>
> *31.08.2017 : 150.000,00-Euro* […]
>
> *500.000,00-Euro* […] *of the aforementioned amount is to be paid to the Player by the Club as the monthly salary in 10* […] *equal installments between the period August 2017 – May 2018. The monthly salaries are to be paid the last day of the relevant months.*

> ***For 2018/2019 Football Season : 650.000,00*** […]
>
> *The aforementioned amount is to be paid to the Player by the Club as the guarantee on the belowmentioned* [sic] *dates:*
>
> *31.08.2018 : 150.000,00-Euro* […]
>
> *500.000,00-Euro* […] *of the aforementioned amount is to be paid to the Player by the Club as the monthly salary in 10* […] *equal installments between the period August 2018 – May 2019. The monthly salaries are to be paid the last day of the relevant months.*
>
> […]
>
> ***6.2.*** *The Player shall be paid in the amount of 7.500,00-Euro* […] *in relation with the second half of 2016/2017 football season and the amount of 15.000,00-Euro* […] *in relation with the second half of 2017/2018 football season and the amount of 15.000,00-Euro* […] *in relation with the second half of 2018/2019 football season will be paid for the expenses with regard to – including but not limited with – residence, car, flight tickets besides the abovementioned payments. All of the aforesaid expenses (not included medical expenses) are included in abovementioned payment"* (emphasis in original).

5. On 24 April 2017, the Player put the Club in default, requesting outstanding remuneration in an amount of EUR 100,000, corresponding to the salaries of February and March 2017.

6. On 4 May 2017, the Club paid the Player an amount of EUR 50,000.

7. On 17 May 2017, the Club paid the Player an amount of EUR 65,000.

8. On 16 June 2017, the Player put the Club in default, requesting outstanding remuneration in an amount of EUR 92,500.

9. On 28 June 2017, the Club paid the Player an amount of EUR 92,500.

10. On 7 September 2017, the Player put the Club in default, requesting outstanding remuneration in an amount of EUR 200,000, corresponding to the advance payment of EUR 150,000 due on 31 August 2017 and the salary of August 2017.

11. On 2 October 2017, the Player put the Club in default, requesting outstanding remuneration in an amount of EUR 250,000, corresponding to the advance payment of EUR 150,000 due on 31 August 2017 and the salaries of August and September 2017.

12. On 2 November 2017, the Player put the Club in default, requesting outstanding remuneration in an amount of EUR 300,000, corresponding to the advance payment of EUR 150,000 due on 31 August 2017 and the salaries of August, September and October 2017.

13. On 4 December 2017, the Player put the Club in default, requesting outstanding remuneration in an amount of EUR 350,000, corresponding to the advance payment of EUR 150,000 due on 31 August 2017 and the salaries of August, September, October and November 2017.

14. On 15 December 2017, the Player unilaterally terminated the Employment Contract. The Player invoked the Club's failure to remunerate him for his services as the reason for the termination, despite written notifications being sent to the Club on 7 September, 2 October, 2 November and 4 December 2017.

B. Proceedings before the FIFA Dispute Resolution Chamber

15. On 29 December 2017, the Player lodged a claim against the Club for breach of the Employment Contract before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting EUR 365,000 as outstanding salary, EUR 965,000 as compensation for breach of contract and EUR 300,000 as additional compensation on the basis of Article 337(c)(3) of the Swiss Code of Obligations (the "SCO"), plus interest.

16. On 9 April 2018, the Club paid the Player an amount of EUR 200,000.

17. On 10 May 2018, the Club argued in its reply that the Player did not have just cause to terminate the Employment Contract and disputed that there were any outstanding amounts owed to the Player.

18. On 24 May 2018, the Player acknowledged receipt of the amount of EUR 200,000, but further reiterated the arguments set out in his claim.

19. On 8 July 2018, the Club reiterated the arguments set out in its reply.

20. On 13 August 2018, further to a request from the FIFA DRC, the Player indicated that he had no secured new employment.

21. On 14 September 2018, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

> *"1. The claim of the* [Player] *is partially accepted.*
>
> *2. The* [Club] *has to pay to the* [Player] ***within 30 days*** *as from the date of notification of this decision, outstanding remuneration in the amount of EUR 150,000, plus interest as follows:*
>
> - *5% interest p.a. on the amount of EUR 50,000 as from 1 October 2017 until the date of effective payment;*
>
> - *5% interest p.a. on the amount of EUR 50,000 as from 1 November 2017 until the date of effective payment;*

- *5% interest p.a. on the amount of EUR 50,000 as from 1 December 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 980,000, plus 5% interest p.a. as from 29 December 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 points 2. and 3. are not paid by the* [Club] *within the stated time limit, 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* [Player] *is rejected.*

6. *The* [Player] *is directed to inform the* [Club] *immediately and directly of the account number to which the remittances are to be made and to notify the Dispute Resolution Chamber of every payment received".*

22. On 1 March 2019, the grounds of the Appealed Decision were communicated to the parties determining, *inter alia*, the following:

- *"*[…] *[T]he members of the Chamber, first of all, pointed out that although the Regulations do not define when there is a "just cause" to terminate an employment contract, according to the Dispute Resolution Chamber's longstanding jurisprudence the late payment of remuneration by an employer does in principle constitute a "just cause" for the termination of an employment contract. In this respect, the Chamber underlined that indeed, the club's payment obligation is the main obligation towards its players. If the payment of the salary is repeatedly not made at the date designated in the employment contract, this may obviously cause the player's confidence in the proper fulfilment of future obligations to be lost. However, the DRC was keen to underline that the right of the player to terminate an employment contract with just cause in a situation of late payment by the club of his salary would only be given if the player has, prior to terminating the employment contract, issued the club a warning or in other words, drawn the club's attention to the breach of the contractual obligations.*

- *Reverting to the facts of the present matter, the members of the DRC found that the prerequisite for invoking just cause to terminate an employment contract were, in casu, indeed met. In this regard, the Chamber established that the* [Club]*, without any valid reason, failed to remit to the* [Player]*, until 15 December 2017, date on which the* [Player] *terminated the contract, the total amount of EUR 350,000, and that prior to this, the* [Club] *had been warned on several occasions by the* [Player]*, namely on 7 September 2017, 2 October 2017, 2 November 2017 and 4 December 2017. Consequently, and considering that the* [Club] *had been repeatedly and for a significant period of time been in breach of its contractual obligations towards the* [Player]*, the Chamber was of the opinion that the foregoing situation legitimately cause the* [Player's] *confidence in the* [Club] *respecting its future duties under the contract to be lost.*

- *Furthermore, the DRC strongly emphasized that the circumstance that the* [Club] *paid the amount of EUR 200,000 on 9 April 2018, does not remedy the breach, as the payment was done at a later*

stage by the [Club]*, this is, after the termination of the contract by the* [Player] *occurred, and cannot in any way repair the* [Club's] *disrespect of its contractual obligations.*

- *As a consequence, the members of the Chamber reached the conclusion that the* [Player] *had just cause to unilaterally terminate the employment contract on 15 December 2017, and that as a result, the* [Club] *is to be held liable for the early termination of the employment contract with just cause by the* [Player]*".*

- Turning to the financial consequences thereof, *"*[…] *the members of the DRC recalled the payment of EUR 200,000 on 9 April 2018, and as a result decided to take said payment into account, in particular as to the advance payment of August 2017, corresponding to the amount of EUR 150,000 and the monthly salary of August 2017, corresponding to the amount of EUR 50,000. Consequently, the Chamber concluded that the* [Club] *is liable to pay to the* [Player] *outstanding remuneration in the amount of EUR 150,000, consisting of the monthly salaries of September to November 2017, EUR 50,000 each.*

- *Furthermore, considering the* [Player's] *claim for interest and also taking into account the Chamber's longstanding jurisprudence, the Chamber ruled that the* [Club] *must pay 5% interest p.a. on the amounts of EUR 50,000 as from 1 October 2017, EUR 50,000 as from 1 November 2017 and EUR 50,000 as from 1 December 2017.*

- As to the compensation for breach of contract and having established that no compensation clause was included in the Employment Contract, *"*[…] *the members of the DRC took into account the remuneration due to the* [Player] *in accordance with the employment contract as well as the time remaining on the same contract, along with the professional situation of the* [Player] *after the early termination occurred. In this respect, the DRC pointed out that at the time of the termination of the employment contract on 15 December 2017, the contract would run until the end of the 2018/2019 football season in Turkey, that in accordance with TMS (cf. art. 6 par. 3 of the Annexe 3 of the Procedural Rules) runs until 31 May 2019, which a total of EUR 980,000 as salaries and expenses were still to be paid. Consequently, taking into account the financial terms of the contract, the members of the DRC concluded that the remaining value of the contract as from its early termination by Respondent* [sic] *until the regular expiry of the contract amounts to EUR 980,000 and that such amount shall serve as the basis for the final determination of the amount of compensation for breach of contract.*

- *In continuation, the Chamber remarked that following the early termination of the employment contract at the basis of the present dispute, the* [Player] *did not sign a new professional contract during the relevant period of time and was therefore not able to mitigate his damages.*

- *In view of all the above, the members of the Chamber decided that the* [Club] *must pay the amount of EUR 980,000 to the* [Player] *as compensation for breach of contract without just cause, which is considered by the DRC to be a fully justified amount as compensation.*

- […] *In addition, taking into account the* [Player's] *request as well as its longstanding jurisprudence, the Chamber decided that the* [Club] *must pay to the* [Player] *interest of 5% p.a. on the amount of*

compensation as of the date on which the claim was lodged, i.e. 29 December 2017, until the date of effective payment.

- *Moreover, the DRC referred to the* [Player's] *request for additional compensation based on the Swiss Code of Obligations. In this respect, the members of the DRC established that the request of the* [Player] *cannot be granted as there is no contractual basis in this regard.*

- *Finally, the members of the Chamber concluded their deliberations in the present matter by establishing that any further claim lodged by the* [Player] *is rejected".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 22 March 2019, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the 2019 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In this submission, the Club named the Player as the sole respondent.

24. On 26 March 2019, the CAS Court Office acknowledged receipt of the Club's Statement of Appeal and requested the Player to nominate an arbitrator from the list of CAS arbitrators published on the CAS website within 10 days of receipt of such letter. The Player was informed that, if he would fail to nominate an arbitrator, the President of the CAS Appeals Arbitration Division, or her Deputy, would proceed with the appointment *in lieu* of the Player.

25. On 28 March 2019, upon being invited by the CAS Court Office to express its position in this regard, FIFA renounced its right to request its possible intervention in the present arbitration proceedings.

26. On 11 April 2019, in the absence of a nomination by the Player within the prescribed deadline, the parties were advised that it was for the President of the CAS Appeals Arbitration Division, or her Deputy, to nominate an arbitrator *in lieu* of the Player.

27. On 16 April 2019, the Club filed its Appeal Brief, in accordance with Article R51 CAS Code.

28. On 8 May 2019, the Player filed his Answer, in accordance with Article R55 CAS Code.

29. On 15 May 2019, upon being invited to express their opinion in this respect, the Club indicated its preference for a hearing to be held, whereas the Player remained silent.

30. On 28 May 2019, in accordance with Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

- Ms Svenja Geissmar, General Counsel, Arsenal FC, London, United Kingdom, as President;
- Mr João Nogueira Da Rocha, Attorney-at-Law in Lisbon, Portugal; and

- Dr Anna Bordiugova, Attorney-at-Law in Kyiv, Ukraine, as arbitrators.

31. On 26 June 2019, further to a request from the Panel on the basis of Article R44.3 CAS Code, the Player provided the CAS Court Office with a copy of his employment contract concluded with the Norwegian football club Kongsvinger IL Toppfotball on 27 March 2019, i.e. during the present CAS proceedings.

32. On 17 July 2019, further to a request from the Panel on the basis of Article R57 CAS Code, FIFA provided the CAS Court Office with a copy of the complete case file related to the proceedings that resulted in the Appealed Decision.

33. On 30 July 2019, the CAS Court Office invited the Club to explain on what basis it considered it necessary to hold a hearing.

34. On 5 August 2019, the Club informed the CAS Court Office that it wanted a hearing to be held *"pursuant to right of to be heard regarding the present CAS proceedings"*.

35. On 19 August 2019, the CAS Court Office informed the parties that the Panel had decided to hold a hearing.

36. On 28 August 2019, the CAS Court Office informed the parties that Mr Dennis Koolaard, Attorney-at-Law in Arnhem, the Netherlands, had been appointed as *Ad hoc* Clerk.

37. On 4 September 2019, the CAS Court Office provided the parties with an Order of Procedure, which was duly signed and returned by the Player and the Club on 4 and 6 September 2019, respectively.

38. On 19 September 2019, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, all parties confirmed that they had no objection as to the constitution and composition of the arbitral tribunal.

39. In addition to the Panel, Mr Antonio De Quesada, CAS Head of Arbitration, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

a) For the Club:

1) Mr Sami Dinç, Counsel

b) For the Player:

1) Mr Nazım Burçin Çelen, Counsel;
2) Ms Su Erbaş, Counsel.

40. No witnesses or expert witnesses were heard.

41. Both parties were given full opportunity to present their cases, submit their arguments and to answer the questions posed by the members of the Panel.

42. Before the hearing was concluded, both parties expressly stated that they had no objection to the procedure adopted by the Panel and that their right to be heard had been respected.

43. At the hearing, the parties discussed the possibility of reaching an amicable agreement. The Panel provided the parties with a deadline to inform the CAS Court Office if an amicable agreement had been found.

44. On 7 October 2019, the Player informed the CAS Court Office that the parties had not been able to reach a settlement.

45. On the same date, further to a discussion that arose during the hearing and upon the request of the Panel, the Player provided a salary slip issued to him by Kongsvinger IL Toppfotball on 25 September 2019.

46. On 21 October 2019, the CAS Court Office, on behalf of the Panel, requested the Player to confirm the net salary he earned with Kongsvinger IL Toppfotball up to 31 May 2019 and to submit evidence of the relevant pay slips translated into English.

47. On 4 November 2019, in the absence of any response from the Player to the CAS Court Office letter dated 21 October 2019, the CAS Court Office, on behalf of the Panel, reiterated its request.

48. On 6 November 2019, the Player provided a translation into English of the salary slip issued to him by Kongsvinger IL Toppfotball on 25 September 2019.

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

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

50. The Club submitted the following in its Appeal Brief (*verbatim*):

- *"The Appellant is a professional football club in Turkey and has a long and successful history with the numerous accomplishments in Turkey. The Appellant concluded an employment contract with the Respondent for the half of the 2016/2017 football season, 2017/2018 and 2018/2019 football seasons. Then the Respondent sent several notifications about his due receivables which have not been paid by the Appellant allegedly and he asked the grounds of his exclusion from the A team. Then the Respondent sent another notification dated 15.12.2017 and he terminated his employment contract without just cause.*

- *Firstly, we would like to state that the Respondent has no due and outstanding receivables as of the date of termination. Because the Appellant paid to the Respondent the belowmentioned amounts* ***(Annex-1)****:*

- *50.000,00-Euro :25.01.2017*
- *25.000,00-Euro :01.03.2017*
- *25.000,00-Euro :20.04.2017*
- *25.000,00-Euro :20.04.2017*
- *50.000,00-Euro :04.05.2017*
- *65.000,00-Euro :17.05.2017*
- *92.500,00-Euro :28.06.2017*
- *200.000,00-Euro :09.04.2018*

- *With the abovementioned payments, the* Respondent *hasn't any outstanding remunerations from the Appellant as of the termination and it is crystal clear that the* Respondent *terminated his employment contract without just cause.*

- *As it is clearly seen that the* Respondent *hasn't any outstanding remunerations from the Appellant as of the termination. In this context, taking into consideration;*

  - *that the contractual period's length between the parties,*

  - *that the payments which has been paid by the Appellant.*

- ***the Respondent's termination is without just cause due to the lack of persistence failure on the financial obligations.*** *Beside this, as the Appellant stated above the parties have signed the Contract for 2 and half years. Taking into consideration of the contract duration, it should be decided that the* Respondent's *termination without just cause and the decision of FIFA DRC about the compensation has to be cancelled by Panel.*

- ***As it is stated above the termination made by the Respondent is without just cause because of the payments made by the Appellant. FIFA DRC did not take into consideration of the payments made by the Appellant. Therefore, we kindly request your Panel to take into consideration the payments made by the Appellant and to decide that the termination made by the Respondent is without just cause. In case your Panel considers that the termination is with just cause, we kindly ask your PANEL to make deduction from the compensation which has been decided in FIFA DRC decision at the rate of 75% minimum.***

- *At this point we would like to inform your honourable Panel that the* Respondent *has signed a new employment contract on 31 March 2019* ***(Annex-2)*** *with a Norwegian club Kongsvinger IL. According the FIFA Regulations and CAS Code, the remuneration of the Player has to be deducted from the compensation.*

- ***Consequently, according to our explanations above, we firstly request your Panel to decide that the termination of the Respondent is without just cause.*** *In case your Panel considers that the termination of the* Respondent *is just cause (like decision of FIFA DRC), then it is necessary to make deduction of the Player's remuneration regarding to his new employment contract and has to make equity deduction at the rate of 75% minimum from the remaining amount after mitigation.*

- *Under the light of the above explanations, the Appellant has no choice but to appeal the decision of FIFA Dispute Resolution Chamber in order to cancel of the decision of FIFA DRC".* (emphasis in original)

51. On this basis, the Club submits the following prayers for relief:

> *"**1.-** To accept this appeal against the decision of the Dispute Resolution Chamber of FIFA dated 1st of March 2019,*
>
> ***2.-** To adopt an award declaring the annulation of the said decision,*
>
> ***3.-** To decide that the unilaterally termination of the Respondent is without just cause,*
>
> ***4.-** To adopt an award declaring the rejection of the compensation claim of the Respondent, otherwise make deduction regarding the Player's* [sic] *new Employment Contract and make equity deduction at the rate of 75% minimum from the remaining amount after mitigation.*
>
> ***5.-** To make a decision that the judicial costs and the attorneyship fees that the Appellant is faced with shall be paid by the Appellant".*

B. The Respondent

52. The Player submitted the following in his Answer (*verbatim*):

> *"**The matter of the payments made by the Appellant;***
>
> - *Firstly, we would like to state that the proof of payments submitted by the Appellant in appeal brief are related to the receivables that occurred 2016/2017 football season.*
> - *But it is clear that the Player requests the overdue payables in the amount of 365.000-Euro, which became due and payable during the football season of 2017/2018 until the termination.*
> - *Dispute Resolution Chamber has, rightfully, rendered an award in favour of the Player, since the Claimant's allegation of payment proofs are simply belonging to previous season (2016/2017) and has nothing to do with the present dispute.*
>
> ***The matter of the termination made by the Player is without just cause;***
>
> - *The Player served 4 (four) written notices to the Appellant during the football season of 2017/2018 and claimed the overdue payments and asked the reasons of the unfair treatment. However, the Club continuously disregarded the Player's notifications and neither fulfilled its payment obligations nor bothered to make any explanations to the Player.*
> - *It is clear from the documents in the file, the Player has waited for the payment for a long time and warned the Appellant in writing many times and tried its best to respect the player's contract.*

However, as a last resort, the Player has terminated his Contract with just cause, after putting the Appellant in default and granting deadlines to remedy the said defaults many times.

The matter of the Player has signed a new employment contract with third party;

- *It is unfortunate that we informed your honourable Panel that the Club is malicious regarding its request inclusive deduction from the compensation.*

- *The Player terminated the contract on 15th December of 2017 without bearing any fault or neglect. The termination in subject was "only but only" caused by the actions of the Claimant. As a result, the Player cannot perform his football profession more than 1.5 years and had a huge set back in his career. The malicious and unlawful actions of the Claimant made irreparable damages to the Player. There are no righteous grounds for mitigating or deducting any portion of the awarded DRC decision.*

- *Moreover, we also would like to state that the Player signed a new employment contract on 31 March 2019, following the FIFA Dispute Resolution Chamber has adjudicated. The decision of the DRC was effective on the time it made. Because of this reason the Claimant also cannot request any deduction from the compensation".*

53. On this basis, the Player submits the following prayers for relief:

"1. To reject the appeal against the decision of the DRC dated 1 March 2019,

2. To uphold the decision of the DRC dated 1 March 2019,

3. To condemn the Appellant to bear all the judicial costs of the proceedings and reimburse the attorney fees of the Respondent".

V. JURISDICTION

54. The jurisdiction of CAS derives from Article 58(1) FIFA Statutes (2018 Edition), as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question"* and Article R47 CAS Code. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by both parties.

55. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

56. The appeal was filed within the deadline of 21 days set by Article 58(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

57. It follows that the appeal is admissible.

VII. APPLICABLE LAW

58. The Club submits that, in accordance with Article R58 CAS Code, in the absence of any choice of law and given that FIFA issued the Appealed Decision, Swiss law shall be applied.

59. The Player did not submit any position in respect of the law to be applied.

60. Article R58 CAS Code provides as follows:

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

61. Article 57(2) 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".*

62. The Employment Contract does not contain any specific choice-of-law clause, but Article 7(A) of the Employment Contract provides as follows:

> *"The disputes arising from the present Contract may be referred by either party to FIFA – Federation International Football Association* [sic]*, headquartered in Zurich, Switzerland, as the competent party for solving any queries arising from this Agreement and Court of Arbitration for Sports (CAS) as the appeal body".*

63. In view of the choice of the parties to refer their dispute to the FIFA DRC, the Panel finds that the parties accepted the applicability of Article 57(2) FIFA Statutes. In accordance with this provision, the regulations of FIFA are primarily applicable and, if necessary, additionally, Swiss law.

VIII. MERITS

A. The Main Issues

64. The main issues to be resolved by the Panel are:

i. Did the Player have just cause to terminate the Employment Contract?
ii. What are the consequences thereof?

i. Did the Player have just cause to terminate the Employment Contract?

65. The Panel observes that at the moment of termination (i.e. on 15 December 2017), the Player claims to have been entitled to the advance payment of EUR 150,000 due on 31 August 2017 and salaries for the months of August, September, October and November 2017 (i.e. EUR 200,000), whereas the Club claims that it had duly complied with all its payment obligations vis-à-vis the Player.

66. The Panel observes that, even according to the Club's own submissions, the last payment made to the Player before termination of the Employment Contract was the payment of 28 June 2017 in the amount of EUR 92,500. It is therefore clear that the Club did not pay any of the amounts set out in the previous paragraph.

67. The mere fact that the Club ultimately paid an amount of EUR 200,000 to the Player on 9 April 2018 is not relevant for the discussion as to whether the Player had just cause to terminate the Employment Contract on 15 December 2017, as this is to be assessed at the moment of termination. Such payment is however to be taken into account in awarding any outstanding salary or compensation for breach of contract to the Player, which will be examined separately below.

68. Article 14 FIFA RSTP determines as follows:

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

69. Given that the Player terminated the Employment Contract, the burden of proof in establishing that such premature termination was justified lies with the Player.

70. The Panel considers that the FIFA Commentary provides general guidance as to when an employment contract is terminated with just cause in the context of Article 14 FIFA RSTP:

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

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

> *"The RSTP 2001 do not define when there is "just cause" to terminate a contract. In its established legal practice, CAS has therefore referred to Swiss law in order to determine the purport of the term "just cause". Pursuant to this, an employment contract which has been concluded for a fixed term, can only be terminated prior to expiry of the term of the contract if there are "valid reasons" or if the parties reach mutual agreement on the end of the contract (see also ATF 110 I 167; WYLER R., Droit du travail, Berne 2002, p. 323 and STAEHELIN/VISCHER, Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht, Teilband V 2c, Der Arbeitsvertrag, Art. 319-362 OR, Zurich*

> *1996, marg. no. 17 ad Art. 334, p. 479). In this regard Art. 337 para. 2 of the Code of Obligations (CO) states – according to the translation into English by the Swiss-American Chamber of Commerce: "A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship". According to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446; ATF 2 February 2001, 4C.240/2000 no. 3 b aa). Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545). In other words, it may be deemed to be a case for applying the clausula rebus sic stantibus (ATF 5 May 2003, 4C.67/2003 no. 2). According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 5 May 2003, 4C.67/2003 no. 2; WYLER R., op. cit., p. 364 and TERCIER P., Les contrats spéciaux, Zurich et al. 2003, no. 3402, p. 496). Pursuant to the established case law of the Swiss Federal Supreme Court, early termination for valid reasons must, however, be restrictively admitted (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 127 III 351; WYLER R., op. cit., p. 364 and TERCIER P., op. cit., no. 3394, p. 495)"* (CAS 2006/A/1180, para. 25 of the abstract published on the CAS website).

72. The Panel fully adheres to such legal framework, which is still applied in recent CAS jurisprudence (cf. CAS 2016/A/4846, para. 175 of the abstract published on the CAS website), and will therefore examine whether the Club's conduct was of such a nature that the Player could no longer be reasonably expected to continue the employment relationship with the Club.

73. Besides the general legal framework set out above, importantly, the FIFA Commentary also refers explicitly to the following example in respect of Article 14 FIFA RSTP:

> *"A player has not been paid his salary for over 3 months. Despite having informed the club of its default, the club does not settle the amount due. The player notifies the club that he will terminate the employment relationship with immediate effect. The fact that the player has not received 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".*

74. The Panel finds that the Player's situation falls squarely into the example described in the previous paragraph. Indeed, the Club did not only remain in default for three months of salary, but the outstanding debt of the Club vis-à-vis the Player at the moment of termination consisted of the advance payment in the amount EUR 150,000 due on 31 August 2017, which amount equals three months of salary, the salaries for August, September, October and November 2017 (comprising an additional amount of EUR

200,000). Accordingly, the total debt of the Club towards the Player at the moment of termination was EUR 350,000, plus interest.

75. Furthermore, the Player not only reminded the Club of its payment obligations and the fact that a continued non-compliance would result in the termination of the Employment Contract, the Player notified the Club of this four times in writing (i.e. on 7 September, 2 October, 2 November and 4 December 2017) with interim periods of approximately one month.

76. Under such circumstances, the Panel does not have the slightest doubt that the Player had just cause to terminate the Employment Contract on 15 December 2017. The Player's confidence in the Club was legitimately lost to such an extent that he could no longer in good faith be expected to continue the employment relationship on 15 December 2017.

77. Consequently, the Panel finds that the Player had just cause to terminate the Employment Contract on 15 December 2017.

ii. What are the consequences thereof?

a) Overdue payables

78. As set out above, the total debt of the Club towards the Player at the moment of termination was EUR 350,000, plus interest.

79. The Club partially complied with its payment obligations in the course of the proceedings before the FIFA DRC by paying an amount of EUR 200,000 to the Player on 9 April 2018. Although the Employment Contract was already terminated at the time, this payment should obviously be taken into account in determining whether any amounts are still outstanding, as the FIFA DRC indeed did in the Appealed Decision, by setting-off this amount against the advance payment in the amount of EUR 150,000 that fell due on 31 August 2017 and the salary for August 2017, leaving an outstanding amount of EUR 150,000.

80. During the hearing, the Club indicated that it had transferred a further amount of EUR 200,000 to the Player on 10 September 2019, which was confirmed by the Player. Accordingly, this amount is also to be taken into account in deciding whether the Club currently has any overdue payables towards the Player.

81. Besides the amount of EUR 150,000, the interest that accrued over the due amounts must also be taken into account.

82. On 10 September 2019, the Club's overdue payables, including interest towards the Player were as follows:

- According to the Appealed Decision, 5% interest *p.a.* was due in respect of the amount of EUR 50,000 as from 1 October 2017 until the date of effective payment.

Since the effective date of payment is 10 September 2019, interest in an amount of EUR 4,863.01 should be added to the principal amount, which leads to a total of EUR 54,863.01.

- According to the Appealed Decision, 5% interest *p.a.* was due in respect of the amount of EUR 50,000 as from 1 November 2017 until the date of effective payment. Since the effective date of payment is 10 September 2019, interest in an amount of EUR 4,650.68 should be added to the principal amount, which leads to a total of EUR 54,650.68.

- According to the Appealed Decision, 5% interest *p.a.* was due in respect of the amount of EUR 50,000 as from 1 December 2017 until the date of effective payment. Since the effective date of payment is 10 September 2019, interest in an amount of EUR 4,445.21 should be added to the principal amount, which leads to a total of EUR 54,445.21.

- Total: EUR 163,958.90

83. Deducting the amount of EUR 200,000 from the outstanding debt of EUR 163,958.90 leaves a positive balance of EUR 36,041.10 in favour of the Club. Accordingly, the debts that were outstanding at the moment of termination of the Employment Contract have been fully settled. The Panel will set-off the positive balance of EUR 36,041.10 against the amount to be paid by the Club to the Player as compensation for damages arising out of the breach of contract.

b) Compensation for breach of the Employment Contract

84. The remaining issue to be considered by the Panel is the Player's request for compensation of damages caused by the Club's breach of contract.

85. Although it has been established that the Player had just cause to terminate the Employment Contract, Article 14 FIFA RSTP does not specifically determine that a player is entitled to any compensation for breach of contract by the club in such scenario.

86. The Panel, however, is satisfied that the Player is in principle entitled to compensation because of the Club's breach of its contractual obligations under the Employment Contract. In this respect, the Panel makes reference to the FIFA Commentary. According to Article 14(5) and (6) FIFA Commentary, a party *"responsible for and at the origin of the termination of the contract is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed"*. Hence, although it was the Player who terminated the Employment Contract, the Club was at the origin of the termination by breaching its contractual obligations towards the Player and is thus liable to pay compensation for the damages incurred by the Player as a consequence of the early termination. This approach has also been applied in CAS jurisprudence (*e.g.* in CAS 2012/A/3033, para. 72 of the abstract published on the CAS website).

87. The Panel observes that Article 17(1) FIFA RSTP provides as follows:

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

88. The parties did not deviate from the application of Article 17(1) FIFA RSTP by means of a liquidated damages clause. The compensation for breach of contract to be paid to the Player by the Club is therefore to be determined in accordance with Article 17(1) FIFA RSTP.

89. The Panel takes due note of previous CAS jurisprudence establishing that the purpose of Article 17(1) FIFA RSTP is basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (CAS 2008/A/1519-1520, para. 80, with further references to: CAS 2005/A/876, p. 17*: "*[…] *it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability'* […]*"*; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 92: *"*[…] *the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability* […]*"*; confirmed in CAS 2008/A/1568, para. 6.37).

90. In respect of the calculation of compensation in accordance with Article 17(1) FIFA RSTP and the application of the principle of "positive interest", the Panel follows the framework set out by a previous CAS panel as follows:

> *"When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.*
>
> *As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitution, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.*
>
> *The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469,*

N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehelin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also Wyler, Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (…).

The principle of the "positive interest" shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations" (CAS 2008/A/1519-1520, para. 85 *et seq.* of the abstract published on the CAS website).

91. The Panel finds that the legal framework set out above and the principle of positive interest are applicable to the present case. Against this background, the Panel will proceed to assess the Player's objective damages, before applying its discretion in adjusting this total amount of objective damages to an appropriate amount, if deemed necessary.

92. The Employment Contract was terminated on 15 December 2017 and set to expire on 31 May 2019. The remaining salary due for this period is EUR 950,000 (i.e. EUR 300,000 (50,000 x 6 months) for the 2017/2018 season, EUR 150,000 as advance payment over the 2018/2019 season and EUR 500,000 (i.e. EUR 50,000 x 10 months) over the 2018/2019 season).

93. Accordingly, this amount should in principle be awarded to the Player as compensation for breach of contract, as this is the salary he would have been entitled to should the Club not have breached the Employment Contract.

94. Unlike the conclusion of the FIFA DRC in the Appealed Decision, the Panel finds that the expenses mentioned in Article 6.2 of the Employment Contract cannot be awarded as compensation for damages, because the Player did not incur any expenses during the period after he left the Club. The Panel finds that the Player is therefore not entitled to the amount of EUR 9,000 for the remainder of the 2017/2018 season (EUR 1,500 x 6) and EUR 15,000 for the 2018/2019 season, which limits the Player's damages to EUR 950,000.

95. However, as argued by the Club, the Panel notes that it is not in dispute between the parties that the Player found new employment with the Norwegian football club Kongsvinger IL Toppfotball before the expiry of the Player's Employment Contract with the Club.

96. The Panel finds that the Player thereby mitigated his damages and that these earnings should be deducted from the amount of compensation awarded by the FIFA DRC in the Appealed Decision. The Panel wishes to add that it by no means finds that the FIFA DRC was mistaken in its assessment, because the FIFA DRC could simply not have known that the Player would mitigate his damages at the moment of issuing the Appealed Decision. However, the filing of new evidence in the present appeal arbitration proceedings before CAS

and its consideration by the Panel, is in keeping with the *de novo* power of review of CAS as set out in Article R57 CAS Code.

97. The Panel observes that the Player's Employment Contract with the Club refers to net amounts, whereas the Player's employment contract with Kongsvinger IL Toppfotball refers to gross amounts, more specifically to a monthly gross salary of Norwegian Krones ("NOK") 60,000.

98. Based on the information provided by the Player, the Panel is satisfied that the Player's monthly gross salary of NOK 60,000 equals a monthly net salary of NOK 39,108.

99. Since the Player's employment contract with Kongsvinger IL Toppfotball entered into force on 27 March 2019 and considering that the Player's Employment Contract with the Club was supposed to expire at the end of May 2019, the Panel finds that NOK 78,216 (NOK 39,108 x 2 months) is to be deducted from the compensation otherwise due to the Player. NOK 78,216 equals approximately EUR 8,000 according to the exchange rate in March and April 2019.

100. Consequently, the Panel finds that the Club shall pay compensation for breach of contract to the Player in an amount of EUR 942,000 (EUR 950,000 -/- EUR 8,000), plus interest at a rate of 5% *p.a.* as from 29 December 2017 until the effective date of payment.

101. However, as indicated *supra*, the positive balance of EUR 36,041.10 paid on 10 September 2019 by the Club to the Player is to be set-off against this amount.

102. Accordingly, the Club shall pay compensation for breach of contract to the Player in a net amount of EUR 905,958.90 (EUR 942,000 -/- EUR 36,041.10), plus interest accruing as follows:

- 5% interest *p.a.* on the amount of EUR 942,000 as from 29 December 2017 until 10 September 2019;
- 5% interest *p.a.* on the amount of EUR 905,958.90 as from 11 September 2019 until the effective date of payment.

B. Conclusion

103. Based on the foregoing, the Panel finds that:

i) The Player had just cause to terminate the Employment Contract on 15 December 2017;

ii) The Club shall pay compensation for breach of contract to the Player in an amount of EUR 905,958.90, plus interest.

104. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 22 March 2019 by Kayserispor Kulübü Dernegi against the decision issued on 14 September 2018 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is partially upheld.

2. The decision issued on 14 September 2018 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed, save for paragraphs 2. and 3. of the operative part, which shall provide as follows:

> *"Kayserispor Kulübü Dernegi has to pay to X., within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 905,958.90 (nine hundred five thousand nine hundred fifty-eight Euros and ninety cents), plus interest as follows:*
>
> - *5% interest p.a. on the amount of EUR 942,000 (nine hundred forty-two thousand Euros) as from 29 December 2017 until 10 September 2019;*
>
> - *5% interest p.a. on the amount of EUR 905,958.90 (nine hundred five thousand nine hundred fifty-eight Euros and ninety cents) as from 11 September 2019 until the effective date of payment".*

3. (…).

4. (…).

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