Arbitration CAS 2011/A/2579 Sønderjysk Elitesport A/S v. Bosun Ayeni, award of 6 June 2012

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football
Termination of an employment contract without just cause by the club
Head butt as an act of gross misconduct
Breach of contract leading to termination of the employment contract under Danish law
Fight with teammates as just cause to terminate the contract under the FIFA regulations
Contributory acts of a player in the FIFA Regulations and in Swiss law
Duty to mitigate of the injured party

1. **A head butt can certainly be treated as an act of gross misconduct, but it could also be treated as misconduct, under certain circumstances. The violence can be sufficient to be treated as "gross misconduct" *per se*, but the circumstances behind it must be examined by the employer before coming to the decision as to whether it amounts to gross misconduct and therefore it can dismiss the employee without notice.**

2. **Under Danish labour law, whether a certain behaviour can be considered as a breach of contract of such a serious nature as to lead to a termination of the employment contract without notice must be decided in each case by a specific judgment on the circumstances of the case.**

3. **The Commentary on the FIFA Regulations on the Status and Transfer of Players (RSTP) provides examples of when a contract can be terminated for just cause. It explicitly provides an example of a player who regularly argues and often fights with teammates. However, it is the player's persistent misconduct/breaches that enables the club to terminate the contract with just cause. One incident of fighting with teammates does not allow the club to terminate the contract.**

4. **Article 17 RSTP does not expressly consider the contributory acts of a player, however Swiss law does. A claim for compensation under Article 337c para. 1 of the Swiss Code of Obligations (CO) cannot be reduced on the basis of any contributory negligence of the employee.**

5. **The RSTP does not provide any guidance on mitigation. According to Article 337c CO, the employee must permit a set-off against the amount compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn. However, there is no mitigation if the club has not been able to demonstrate whether the player has received any offers of employment or signed contracts as a professional football player for other clubs. Any remuneration earned by the player in his/her new position as a cleaner must be disregarded.**

1. THE PARTIES

1.1 Sønderjysk Elitesport A/S (hereinafter referred to as the "Club" or the "Appellant") is a football club with its registered office in Haderslev, Denmark. It is a member of the Danish Football Federation (hereinafter referred to as the "DFF") and plays in the Danish Superliga.

1.2 Bosun Ayeni (hereinafter referred to as the "Player" or as the "Respondent") is a former professional football player.

2. FACTUAL BACKGROUND

2.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced in the present proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning.

2.2 On 3 December 2006, the Club signed an employment contract with the Player for the period from 1 January 2007 until 30 June 2009 (hereinafter referred to as the "Contract").

2.3 On 26 March 2008 the Player had a "quarrel" with a fellow player, Mr Kenneth Fabricius, during a training session which resulted in the Player "head butting" Mr Fabricius.

2.4 On 26 March 2008, Mr Jacob Gregersen, the then Sports Director of the Club, visited the Player at his flat and verbally dismissed him.

2.5 On 28 March 2008, the Club informed the Player in writing that as a result of his "*gross breach of contract*" the Contract was terminated with effect as of 26 March 2008.

2.6 On 8 April 2008, the Player's attorney sent a draft writ to the Club, threatening to sue the Club for unlawful breach of contract.

2.7 On 28 August 2008, the Nigerian Football Federation (hereinafter referred to as the "NFF"), on behalf of the Player, lodged a claim with the FIFA Dispute Resolution Chamber (hereinafter referred to as the "FIFA DRC") against the Club for unlawful termination of the Contract. The NFF also lodged a copy of the letter dated 9 July 2008 that it had received from the Player, in which he alleged he had been racially abused by Mr Fabricius.

2.8 On 9 November 2009, the Club responded to the FIFA DRC and enclosed an undated statement from Mr Fabricius and a statement from Mr Janus Blond, one of the trainers at the Club. This latter statement was also undated, but was countersigned by 4 other players that participated in the training session of 26 March 2008.

2.9 On 8 March 2010, the Player's attorney's filed further submissions with the FIFA DRC, including a statement from the Player.

2.10 On 15 April 2010, the Club filed its additional submissions with the FIFA DRC.

2.11 On 27 October 2010, the written decision of the FIFA DRC taken on 13 October 2010 (hereinafter referred to as the "Appealed Decision") was notified to the Club. The Appealed Decision stated, as follows:

"1. The claim of the Claimant, Bosun Ayeni, is partially accepted.

2. The Respondent, Sønderjysk Elitesport A/S has to pay to the Claimant the amount of DKK 250,000 as compensation for breach of contract within 30 days as from the date of notification of this decision.

3. In the event that the aforementioned amount is not paid within the stated time limit, interest at the rate of 5% P.A. will fall due as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for its consideration and a formal decision.

4. Any further request filed by the Claimant is rejected.

5. The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".

2.12 On 1 November 2010, the Appellant requested the grounds of the Appealed Decision; and on 4 November 2010, the Respondent did so too.

2.13 On 7 September 2011, the detailed grounds of the Appealed Decision were forwarded by fax to the parties by FIFA.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On 28 September 2011, the Appellant filed its statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as "the CAS"). The Appellant challenged the above mentioned Appealed Decision, submitting the following requests for relief:

1. "Primarily:

1.1 that the claims of the Respondent against the Appellant be dismissed.

In the alternative:

1.2 that the Respondent's claims be reduced significantly at the discretion of the CAS".

3.2 On 10 October 2011 the Appellant lodged its Appeal Brief with the CAS with the following revised requests for relief:

"Primarily:

1.1 That the decision of the FIFA Dispute Resolution Chamber dated 27 October 2010 be annulled.

1.2 That it be established that the Appellant terminated the Respondent's employment contract with just cause.

1.3 That the Respondent's claims against the Appellant be dismissed.

1.4 That the Respondent be ordered to bear the costs of the proceedings before the CAS.

1.5 That the Respondent be ordered to bear the Appellant's legal and other costs in connection with this appeal.

Alternatively:

1.6 That the Respondent's claims against the Appellant be substantially reduced as the CAS thinks fit".

3.3 On 23 November 2011, the Respondent filed his answer, with the following request for relief:

1. "The Respondent will request that the decision of FIFA be varied by finding in total his claim as presented before FIFA, which is the sum of 532,000 DKK being the sum due to the Respondent under the Contract and another sum of 200,000 United States Dollar (USD) as punitive damages for the truncation of the career of the Player (Respondent).

2. The Respondent hereby pleads that the entire costs of this proceeding before CAS be borne entirely by the Appellant.

3. The Appellant be ordered to bear the Respondent's legal and sundry costs with respect to this dispute both at the FIFA DRC and now before CAS, which in hereby assessed and fixed at 42,000 USD.

4. The Respondent regrets that because he is financially incapacitated he cannot file a counterclaim before CAS in view of the provisions of Article 64.2 of the Code of Sports Related Arbitration. If not for the preceding, the Respondent would have filed a counterclaim to seek to reverse the decision of the FIFA DRC by finding and awarding him his full claims before the FIFA DRC in the sum of DKK 532,000 being unpaid salaries and USD 200,000 as punitive damages, no amount of money will ever bring back the football career of this young man.

5. The above notwithstanding the Respondent respectfully urges the CAS Panel to take a closer look at the case and circumstances and find that the career of the Respondent was abruptly ended by the singular action of the unlawful and unilateral termination by the Appellant.

6. If CAS comes to this conclusion it should as a matter of precedent vary the decision of the FIFA DRC in favour of the Respondent, Mr Bosun Ayeni.

7. Finally the CAS Panel is urged to uphold the decision of the FIFA DRC or in the very unlikely alternative vary the same on more favourable terms to the Respondent".

3.4 On 26 January 2012, FIFA provided a copy of its case file regarding the matter in hand.

3.5 On 24 February 2012, the Sole Arbitrator in accordance with Article R56 of Code of Sports-related Arbitration (hereinafter referred to as "the Code") granted the parties a second round of submissions and directed the Appellant:

"1. To set out the position under the Danish salaried Employees Act relating to misconduct, in English;

2. *To show any drafts/emails etc relating to the proposed compromise;*

3. *Details of how the other player involved in the fight was dealt with;*

4. *To provide written witness statements from the two witnesses the Appellant proposed to call; and*

5. *To provide a squad list with details of the salaries for the relevant season".*

The Respondent was directed to *"give more details regarding his injury (timings, games missed, etc)"* and to provide his submissions in reply to those of the Appellant.

3.6 On 9 March 2012, the Appellant filed its further submissions with the CAS.

3.7 On 22 March 2012, the Respondent duly filed its further submissions with the CAS.

3.8 On 27 March 2012, the Appellant filed further correspondence with the CAS.

3.9 The Sole Arbitrator noted there were additional submissions made by the Appellant. On 12 December 2011, it supplemented its submissions by way of providing "clarification" on its appeal brief. On 19 December 2011 the Respondent objected to the Appellant's submission. In accordance with Article R56 of the Code the Sole Arbitrator noted that as the Respondent objected to the supplementary submission, it was for the Sole Arbitrator to decide whether to allow the supplemental submissions. The Sole Arbitrator ruled that the additional submissions would be allowed as they assisted with the information as requested by the Sole Arbitrator in the letter of 24 February 2012. Further the Sole Arbitrator noted that the question of whether to allow the submissions was not an issue in that the Appellant had repeated the supplemental submissions of 12 December 2011 in its answer of 9 March 2012 in response to the CAS correspondence. On the other hand, the additional submissions made by the Appellant in its letter of 27 March 2012, were not allowed by the Sole Arbitrator, as these were made after the second round of submissions had closed.

4. THE CONSTITUTION OF THE PANEL AND HEARING

4.1 By letter dated 5 December 2011, the CAS informed the parties that the panel to hear the appeal had been constituted as follows: Mr Mark Hovell, as Sole Arbitrator. The parties did not raise any objection as to the appointment of the Sole Arbitrator.

4.2 Article R57 of the Code provides that the Sole Arbitrator may, after consulting the parties, decide not to hold a hearing if he deems himself sufficiently well informed. The Sole Arbitrator noted that neither of the parties requested a hearing. The Sole Arbitrator determined that,

having given the parties the opportunity to add to their written submissions by way of further submissions and testimonies, he was sufficiently well informed to decide the case without holding a hearing. The parties were advised of this by way of letter dated 24 February 2012 and in the order of procedure that was duly signed by the parties.

5. THE PARTIES' SUBMISSIONS

A. APPELLANT'S SUBMISSION

5.1 The Appellant's submissions, in essence, may be summarised as follows:

a) That the Contract was formally terminated in writing without notice on 28 March 2008 for *"gross breach of contract"*, with just cause pursuant to Article 14 of the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the "FIFA Regulations") and in accordance with the provisions of the Danish Salaried Employees Act.

b) On 26 March 2008, during a routine training session, the Respondent twice head butted one of his team mates who suffered a nose bleed as a result and had to attend the emergency room at a nearby hospital. The Club immediately suspended the training session and conducted interviews with the players and staff in order to ascertain what had happened. After talking to the players and members of staff who had been watching the incident, *"the Appellant quickly established what had happened"*.

c) The Club's then Sports Director, Jacob Gregersen, stated in his written statement that he was called to the training ground by the head coach and that he spoke with the players and coaches who told him about the quarrel. He also spoke with Kenneth Fabricius on the telephone who confirmed that he had been head butted twice. After then speaking with 2 other officials from the Club, he went to see the Player at his flat. He confirmed the head butting, so was told that he was fired. Mr Gregersen later called the head coach and told him that he had fired the Player. The coach said that it would have been difficult to work with the Player after doing something like that.

d) The trainer running the session, Janus Blond, confirmed in his written statement, that whilst he did not see how the quarrel started, he saw the two players pushing each other and saw the head butts and Mr Fabricius kicking the Player, so he split them up and sent Mr Fabricius to the showers and kept the Player on the pitch.

e) None of the players or the Club staff present at the training session indicated that the Respondent had been the victim of racial abuse or similar treatment due to his colour or origin. The Appellant noted that allegations of racial abuse have been made by the Respondent, but that he did not report such allegation or abuse to the Club at the time nor when his attorney sent a draft writ in April 2008. The Respondent's attorney simply argued that the Appellant was not entitled to dismiss the Respondent without notice. It was not until the Respondent filed the complaint with FIFA DRC that allegations of racist abuse were put forward by the Respondent.

f) The Respondent has given varying and conflicting accounts of what happened at the training session however the Respondent does not deny having head butted one of his team mates.

g) There was no need and the Appellant was under any legal obligation to arrange a formal hearing to establish what had happened. The Appellant could not sanction the Respondent's gross breach of contract by means contrary to the Danish Salaried Employees Act. The FIFA DRC erred in law in that it believed that the Appellant could have taken more lenient measures, e.g. a suspension or a fine, whereas the Appellant could not under Danish Law.

h) The employment relationship between the Respondent and the Appellant was governed by the Danish Salaried Employees Act. Section 4 of that Act provides that in case of material breach of contract by an employee, the employer is entitled to summarily dismiss the employee. However the Act does not define which specific actions by the employee would justify a summary dismissal. In accordance with Danish case law, employers are entitled to summarily dismiss employees for gross misconduct in case of acts of violence.

i) In *"applying the principle of proportionality"*, Mr Gregersen, on behalf of the Appellant at his meeting with the Player on 26 March 2008, attempted to reach an amicable solution by offering the Respondent a termination on mutual terms. The offer was made to the Player in that he could stay in the apartment for the rest of April 2008. The Respondent's own agent endorsed this offer from the Appellant.

j) As the Respondent rejected the Appellant's offer, the Appellant had no option but to terminate the Respondent's employment contract with immediate effect.

k) The Appellant was legally prohibited from applying such sanctions as fining the Respondent or suspending him without pay.

l) The Appellant noted the Respondent's suggestions as to why the Contract was terminated. However, it was terminated because of the gross misconduct and not because of a long term injury or high salary. The Respondent was not injured at the time of termination and if he was injured he would not have been participating in training with his team mates. Further in relation to his salary, the Respondent was not the highest earner in the team. At the time in question the Appellant employed 5 players who received monthly salaries greater than that of the Player.

m) Should the CAS find that the termination was without just cause under Article 14 of the FIFA Regulations then the Appellant submitted that any compensation to the Respondent must be calculated in accordance with Article 17 of the FIFA Regulations and that this exhaustively states how damages are to be calculated. Further it does not provide for punitive damages to be awarded.

B. RESPONDENT'S SUBMISSIONS

5.2 The submissions of the Respondent may be summarised as follows:

a) The Appellant's appeal lacks merit and is frivolous and vexatious.

b) The Appellant admits that the Contract was terminated without notice on 28 March 2008 for alleged *"gross breach of contract"*, but that this gross misconduct was not proved. The Appellant admits that the Respondent was not heard before the decision was taken to terminate the Contract. The Appellant did not allow the Respondent a fair hearing. If the Appellant had conducted a hearing diligently it would have been able to discover that the Respondent was racially taunted by Mr Fabricius.

c) The racial insult only became apparent before FIFA because this was the first and real attempt by any party to look to discover what lead to the scuffle in the first place.

d) The fact that the unilateral termination has been admitted needs no further proof. This is a breach of Article 14 of the FIFA Regulations. Therefore as a result of the unilateral termination, as admitted, it does follow that damages will accrue to the Respondent in accordance with Article 17 of the FIFA Regulations.

e) The Appellant terminated the Contract for other motives i.e. because of the injury to the Player and the Player's high salary. The Player was injured in a League match on 12 August 2007. Therefore the injury happened at approximately 8 months into the Contract. As a result of the injury the Respondent missed approximately 22 matches.

f) The Danish Salaried Employees Act was not presented before the FIFA DRC and has not been put before the CAS. The Appellant was not legally prohibited from imposing a fine or other sanction on the Player. In any event, the Danish Salaried Employees Act does not provide for a dismissal without notice.

g) The Player rendered his services to the Appellant for 15 months without any disciplinary issues.

h) There was no attempt of a mutual termination. An offer to stay in the flat *"cannot by any stretch of imagination be construed as an offer of mutual terms of termination"*.

6. JURISDICTION OF THE CAS

6.1 Article R47 of the Code provides as follows:

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

6.2 The jurisdiction of the CAS, which is not disputed between the parties, derives from Article 62 and 63 of the FIFA Statutes as well as Article R47 of the Code.

6.3 Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law and may issue a new decision, *de novo*, superseding, entirely or partially, the appealed one. The parties confirmed its position by all signing the Order of Procedure in this matter.

6.4 The Sole Arbitrator noted that the relief sought by the Respondent amounted to a counter claim, which is not possible under the Code. Instead, as the Respondent noted himself, he would have had to appeal against the Appealed Decision too, which he did not do, as he acknowledged he was not in a financial position to do so. As such, all counter claims made by the Respondent are disregarded by the Sole Arbitrator, whose scope of jurisdiction is therefore limited to the prayers for relief of the Appellant to either overturn the Appealed Decision and find that the Appellant terminated the Contract with just cause or, in the alternative, to find that the Appellant did not terminate with just cause, but to reduce the amount of damages awarded by the FIFA DRC. As such, the request by the Respondent to increase the amount awarded by the FIFA DRC is outside of the scope of jurisdiction in the matter at hand.

7. APPLICABLE LAW

7.1 Article R58 of the Code provides the following:

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

7.2 Moreover, Article 62 paragraph 2 of the FIFA Statutes provides that:

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

7.3 The "Federation" in the sense of Article R58 of the Code is domiciled in Switzerland, a fact that also requires that Swiss law be applicable.

7.4 In the present matter, the parties did not agree on the application of any particular law in their written submissions. The Sole Arbitrator noted that the Appellant submitted that the case should be solved primarily by applying domestic Danish Employment Law and it also referred to the FIFA Regulations. The Appellant however also noted that Swiss Law may be applicable.

7.5 The Sole Arbitrator ruled that as the decision being appealed to the CAS was the Appealed Decision, the appeal is subject to the primary application of the FIFA Regulations, but that Swiss Law should also apply subsidarily. The Sole Arbitrator also noted that the original issue at hand is whether the conduct of the Player in the circumstances warranted a dismissal without notice which must also be viewed in accordance with the law applying to the Contract (Section 3A.1 of the Contract provides that *"The provisions of the Danish Salaried Employees Act*

(Funktionaerloven) with regard to disciplinary offences, unfair dismissal and gross breach of contract shall apply to the present Contract"), as such Danish Law shall be applicable to that particular issue.

8. ADMISSIBILITY

8.1 The Appeal was filed within the deadline provided by Article 63 paragraph 1 of the FIFA Statutes. The Appellant complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court office fee.

8.2 It follows that the Appeal was filed within the prescribed guidelines and is admissible.

9. MERITS OF THE APPEAL

9.1 The Sole Arbitrator had to determine the following:-

a) Was the conduct of the Player "gross misconduct"?

b) Was the Appellant bound to follow any procedure before terminating the Contract?

c) Could the Appellant have sanctioned the Player in any other way?

d) Was the Contract terminated with or without just cause?

e) What damages should be awarded, if any, for the termination of the Contract and how should the compensation be calculated?

f) Has the injured party an obligation to mitigate its position?

g) If so, has the injured party mitigated its position and to what extent?

a) Was the conduct of the Player "gross misconduct"?

9.2 The Sole Arbitrator noted the position of the Appellant who had asserted that it had terminated the Contract with just cause due to the gross misconduct of the Player (or *"gross breach of contract"* as the Appellant refers to it). Whilst the Appellant acknowledges that there is no prescribed list of offences in the Contract or in the Danish Salaried Employees Act which give rise to an employer's right to summarily dismiss an employee, an act of violence (or, two acts of violence) such as a head butt would, in its opinion, entitle the Appellant to summarily dismiss the Player. The Appellant cited from Kluwer Law International's "Labour Law in Denmark" (2nd revised edition – page 266) which stated *"… Behaviour that can be considered as indecent, rude or disrespectful, can under certain circumstances be considered as a breach of contract, entitling the employer to terminate the contract without notice. The same applies if the employee acts violently towards the employer or his representatives …"*.

9.3 The Respondent does not deny that he did head butt (twice) his former team mate, Kenneth Fabricius. He does explain why and that is to be examined in more detail below.

9.4 The Sole Arbitrator does not condone any form of violence, but notes there was a *"quarrel"*, as Mr Gregersen put it (which, to use his words, *"is not uncommon"* in football) between two players. They both used acts of violence against each other (both were pushed, one head butted the other, who kicked him back or possibly beforehand). The Sole Arbitrator takes the view that a head butt can certainly be treated as an act of gross misconduct, but that it could also be treated as misconduct – to re-quote Kluwer Law International's "Labour Law in Denmark" *"… under certain circumstances …"* is the important part of the test that any employer in this position must apply. The violence can be sufficient to be treated as "gross misconduct" per se, but the circumstances behind it must be examined by the employer before coming to the decision as to whether it amounts to gross misconduct and therefore it can dismiss the employee without notice.

9.5 The Respondent has submitted that the true reason for the dismissal was the fact that he was injured and was a higher earner (or the highest paid) at the Club. The Appellant submitted that the Player was not injured at the time of the incident; if he was then he would not have taken part in the training session that led to the incident. Also, the Appellant explained that there were 5 players who earned more than the Player and that the Player's salary was the sixth highest in the squad of 21 players. The Sole Arbitrator is satisfied that the root of the dismissal was the act of violence that occurred during the training session on 26 March 2008.

b) Was the Appellant bound to follow any procedure before terminating the Contract?

9.6 The Sole Arbitrator notes with the test set out in Magrath and Martins "A Practical Guide to Disciplinary, Grievance and Performance Management" (page 219-220) which the Appellant appended to its appeal brief: *"… the correct test is to establish whether a fair investigation had been undertaken by the employer, whether the subsequent disciplinary procedure was fairly conducted, and thereafter, on the basis of the facts as the employer reasonably believed them to be, was the decision to dismiss within the range of responses open to a reasonable employer …"*. Whilst this is an English Law test (and English Law is not the applicable law in the matter in hand), the Danish Law authorities quoted by the Appellant also refer to the circumstances of each case. Hasselbalch's "Labour Law In Denmark" (p88) states: *"… The problem of whether certain behaviour can be considered as a breach of contract, and, if so, whether the breach of contract is of such a serious nature that a party is entitled to terminate employment without notice, must be decided in each case by a specific judgment on the circumstances of the case …"*. As such, the Sole Arbitrator reviewed the steps the Appellant took to analyse the circumstances of this incident, before arriving at its decision.

9.7 The Respondent submitted that he was provoked by racial taunts. He did not deny head butting Mr Fabricius, but did state, in his letter to the NFF dated 9 July 2008, that it was Mr Fabricius that provoked him and made racist taunts and that Mr Fabricius started the fight and struck the first blow – a kick to the Player's left knee.

9.8 The Respondent submitted that the Appellant failed to allow him to be heard and that it failed to investigate the incident in full. He stated in his written statements that he was surprised the

Sports Director did not interview him after the game, but confirmed that Mr Fabricius did speak with Mr Gregersen. The Player's version of the meeting between himself and Mr Gregersen was that he was simply told his Contract had been terminated and that he was then asked to sign a termination of contract form, but refused to do so. The Player maintained if he had been given the opportunity to be heard, he would have mentioned the racist taunts.

9.9 The Sole Arbitrator noted that the Appellant asserted that it did indeed investigate and that no individual, including the Player, stated during that investigation that there had been any racial abuse. Further, it was noted that allegations of racist abuse were not put forward by the Player until the matter was referred to FIFA.

9.10 The Sole Arbitrator noted the difference between the parties as to exactly what happened during and after the incident, but even if the Sole Arbitrator takes the Appellant's position at its height – there was no racist taunting; this was a "quarrel" between two players; and one head butted the other for no good reason – then was the investigation by the Appellant (which was carried out on the day by Mr Gregersen) sufficient to reasonably arrive at the conclusion this was an act of "gross misconduct" that justified a dismissal without notice?

9.11 The Sole Arbitrator notes that Mr Gregersen spoke with some of the players and other staff at the training ground – he was not present at the time of the incident and arrived later, having left another meeting; he only spoke to Mr Fabricius by telephone, but did so before he saw the Player; his written statement and that of Mr Blond and Mr Fabricius were produced after the incident, so were not relied upon before he took the decision to terminate the Contract; he also stated that fights between players *"are not uncommon"* in training; yet upon confirmation from the Player that there was a head butt, he *"fired"* him.

9.12 The FIFA DRC were of the opinion that *"only … misconduct which is of a certain severity justifies the termination of a contract without prior warning …"* and if the Sports Director was contemplating such a sanction, then the level of investigation should, in the opinion of the Sole Arbitrator, have been more thorough.

9.13 Whilst the Appellant states that under Danish law for "gross misconduct" it could not suspend the Player, that presupposes the categorising of the misconduct as "gross". The Sole Arbitrator determines that the proper course of action would have been to have suspended the Player for his conduct; then to have fully investigated the incident – taking written statements from all present and from the Player; then to have held a disciplinary hearing in which the Player could be heard and could address the allegations made against him, but having alerted the Player of the possibility of a dismissal without notice following from such hearing.

9.14 It is clear that the Sports Director took the decision to dismiss the Player when he met him, with little by way of an investigation and after the dismissal then spoke again with the head coach and other players, who may have stated they were glad or that the Player would be difficult to train or to play with, but none of those conversations had any bearing on a decision that had already been taken. He also consulted with Club officials, but before he had spoken with the Player. It seems that the decision to label this as "gross misconduct" and to terminate the Contract may have been taken by Mr Gregersen and the officials in advance of seeing the Player.

9.15 The questions as to whether there was any racist taunting, who started the fight and the like can be left unanswered; if a proper procedure had been followed, the answers to these questions might have still lead the Appellant to categorise the conduct as "gross misconduct" or perhaps not.

c) Could the Appellant have sanctioned the Player in any other way?

9.16 According to the Appellant it was unable to fine or suspend the Respondent for the *"gross breach of contract"* as this would have contradicted the Danish Salaried Employees Act and collective bargaining agreement which both applied to the Contract.

9.17 The Sole Arbitrator noted that only the most serious of breaches or misconduct is of a certain severity which may justify the termination of the contract without prior warning. The Sole Arbitrator noted that Danish Salaried Employees Act did not appear to prevent the Appellant from sanctioning the Player by way of a fine or suspension for misconduct. The Appellant had simply labelled the incident as "gross misconduct" however it may well be considered to be misconduct, had the appropriate investigations been carried out.

9.18 The academic authorities the Appellant has provided as appendices to its submissions refer to investigations and suspensions in the circumstances and it appears to the Sole Arbitrator that the Player could have been suspended whilst a proper investigation took place and if, as a result of that investigation, the conduct was found to be "gross misconduct", under Danish Law the Player could have been dismissed without notice; if the investigation had shown he was guilty of misconduct, short of "gross misconduct", he could have been fined and/or warned.

9.19 The Sole Arbitrator also noted that clause 3B.1 of the Contract provides *"if the Player is guilty of misconduct or breaks any of the Clubs training rules or disciplinary regulations or is in breach of any of the provisions of this contract, the Club can make a salary deduction up to a maximum of 2 weeks basic salary or suspend the Player from the Club for a maximum of 14 days. The Club must give the Player written notice of the decision, stating its reasons …. If either party is guilty of gross or repeated breach of this Contract, the other party shall be entitled to terminate the contract immediately and claim compensation, if relevant"*. As such, the Contract clearly contemplates the ability of the Club to fine the Player.

d) Was the Contract terminated with or without just cause?

9.20 The question whether the Contract was terminated with or without just cause is to be viewed in accordance with the FIFA Regulations. The FIFA Regulations provides that a contract can be terminated with just cause, if there is a valid reason.

9.21 The Sole Arbitrator noted that the FIFA Commentary on Article 14 provides:

> *"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 the 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 accumulated 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"*.

9.22 The Sole Arbitrator is comforted further by the express reference by FIFA for the Club to have considered the *"merits of each particular case"*, which the Appellant did not adequately do in this instance. But, even if it had and had come to the conclusion that this was "gross misconduct", would it be sufficient to terminate the Contract without notice – would this be "with just cause" under the FIFA Regulations? The Sole Arbitrator noted that the FIFA Commentary provides examples of when a contract can be terminated for just cause.

9.23 The Sole Arbitrator noted that one of the examples states:

> *"Player A, employed by Club X, has displayed an uncooperative attitude ever since his arrival at the Club. He does not follow the directives given by the coach, he regularly argues with his team mates and often fights with them. One day, after the coach informs him that he has not been called up for the next championship fixture, the player leaves the club and does not appear for training on the following days. After two weeks of unjustified absence from training, the club decides to terminate the Player's contract. The Player's uncooperative attitude towards the Club and his teammates would certainly justify sanctions being imposed on the Player in accordance with the clubs internal regulations. The sanctions should, however, (at least in the beginning) be a reprimand or a fine. The club would only be justified in terminating the contract with the Player with just cause if the Player's attitude continued, together with the Player disappearing without a valid reason and without the express permission of the Club"* (Emphasis added).

9.24 In light of the example provided by the FIFA Commentary, the Sole Arbitrator noted that the example explicitly provides an example of a player who regularly argues and often fights with teammates. The Sole Arbitrator noted that in the example it was the player's persistent misconduct/breaches that enabled the Club to terminate the contract with just cause. It was not one incident of fighting with teammates that allowed the club to terminate the contract.

9.25 In light of the above, the Sole Arbitrator determined that the Appellant did not have just cause to terminate the Contract with the Respondent since the Appellant did not adequately investigate the cause of the evidence and even if it had been exactly as the Appellant labelled it, in the light of the FIFA Regulations, it would not be sufficient to warrant a dismissal without notice, the Appellant could have sanctioned the Player with a fine and/or final warning. Therefore the Appellant by terming the Contract on 26 March 20089, did so without just cause.

e) What damages should be awarded, if any, for the termination of the Contract and how should the compensation be calculated?

9.26 The Sole Arbitrator noted that the Contract did not provide a mechanism for calculating the compensation for a breach of contract. As the Contract had been terminated without just cause, and as the Contract does not provide a mechanism for calculating compensation, this is a matter where Article 17 of the FIFA Regulations is of assistance.

9.27 In accordance with Article 17 of the FIFA Regulations, the starting point for any compensation where the breach is by the Club, would be the balance of monies due under the Contract that remains unpaid, which amounts to the sum of DKK 532,000.

9.28 The Sole Arbitrator notes again that the Respondent's additional claims in its answer, his counterclaims, are not admissible in this matter in accordance with R55 of the Code, as counterclaims are not possible in appeal proceedings.

9.29 The Sole Arbitrator noted that although the Contract was terminated without just cause, the termination occurred because of the misconduct of the Respondent. Article 17 of the FIFA Regulations does not expressly consider the contributory acts of a player, however Swiss Law does.

9.30 The Sole Arbitrator notes that a claim for compensation under Article 337c para. 1 of the Swiss Code of Obligations (hereinafter referred to as the "the CO") cannot be reduced on the basis of any contributory negligence of the Respondent (see WYLER R., Droit du travail, Berne 2008, p. 516; TERCIER/FAVRE, Les contrats spéciaux, 4th edition, 2009, p. 564 para. 3773; PORTMANN W. in Basler Kommentar, Obligationenrecht I (Art. 1-529 OR), 4th edition, Basle 2007, Article 337c para. 4). This follows from Article 362 para. 1 CO, according to which no deviation in the employment contract shall be made from Article 337c para. 1 CO to the detriment of the employee. More fundamentally, this has been expressly confirmed by the Swiss Federal Tribunal (Swiss Federal Tribunal BGE 120 II 243 at p. 248):

"On peut donc déduire du texte et de la systématique de l'art. 337c CO que la faute concomitante est un facteur de réduction ou de suppression de l'indemnité de l'al. 3 de l'art. 337c CO, mais non pas de la créance due en application de l'al. 1 de ce même article. Dès lors qu'elle est confirmée par le texte absolument clair des travaux préparatoires, cette interprétation doit être retenue. Partant, le grief tiré de la violation des art. 337c al. 1 et 44 CO n'est pas fondé".

Free translation:

"We can deduce from the wording and the logic of Article 337c CO that contributory negligence is a factor of reduction or of elimination of the indemnity payment under paragraph 3 of Article 337c CO, but not of the claim for compensation under paragraph 1 of the same article. Since it is confirmed by the absolutely clear text of the preparatory works, this interpretation must be adopted. Therefore, the ground for a complaint on the basis of a violation of paragraph 1 of Article 337c and Article 44 of the CO is not established".

9.31 Therefore the Sole Arbitrator noted that although the Contract was terminated, without just cause, because of the Respondent's misconduct, this could not be taken into account when assessing the damages payable.

9.32 The Sole Arbitrator notes that his scope of jurisdiction is limited to the DKK 250,000 awarded by the FIFA DRC, however are there any reasons to award less than this sum? Whilst the Appellant has requested in the alternative that the amount awarded is reduced, no legal reasoning has been advanced, for example, no submissions on the *"other objective criteria"* or argumentation relating to the *"specificity of sport"* both as foreseen by Article 17 of the FIFA Regulations. Therefore, the Sole Arbitrator sees no reason to depart from the amount awarded by the FIFA DRC in this instance.

f) Has the injured party an obligation to mitigate its position?

9.33 Concerning the question whether the Respondent was obliged to mitigate, the Sole Arbitrator noted that this question was somewhat largely irrelevant as the Player was now employed as a cleaner in Denmark and therefore earning a minimal amount.

9.34 The Sole Arbitrator referred to the CO, particularly Art. 163, as the FIFA Regulations did not provide any guidance on mitigation. Whilst within Art. 337b of the CO, there is no "set-off" limb, the Panel notes the position of previous CAS panels (such as in CAS 2006/A/1180 and TAS 2008/A/1491) which apply the wording of Art. 337c, by analogy:

"The employee must permit a set-off against this amount for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn".

g) If so, has the injured party mitigated its position and to what extent?

9.35 The Sole Arbitrator noted that following the termination of the Contract the Respondent stated he has yet to sign a new professional contract as a footballer. Further, the Appellant has not been able to demonstrate whether the Respondent has received any offers of employment or signed contracts as a professional football player for other clubs. The Player had stated that he had signed as an amateur with another Danish club.

9.36 The Sole Arbitrator therefore finds that the Respondent has not mitigated his position to a material extent and disregards any remuneration earned as a cleaner.

10. CONCLUSION

10.1 The Sole Arbitrator therefore determines to reject the appeal and to uphold the Appealed Decision entirely and, therefore all other prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Sønderjysk Elitesport A/S on 28 September 2011 against the decision of the FIFA Dispute Resolution Chamber dated 13 October 2010 is dismissed and the said decision of the FIFA Dispute Resolution Chamber is upheld.

2. (…).

3. (…).

4. All other or further claims are dismissed.