Arbitration CAS 2013/A/3407 Green Gully Soccer Club v. Pedro Henrique Coelho de Oliveira, award of 20 June 2014

Panel: Mr John Boultbee (Australia), Sole Arbitrator

Football
Termination of employment contract
Applicable law
Termination of contract with just cause
No termination of contract with just cause without prior warning

1. **Article R58 of the Code was amended in 2013 to include the word *"subsidiarily"* in respect of the application of the rules of law chosen by the parties. This amendment provides that the applicable regulations have primacy over any other purported choice of law, or laws of the country of the relevant sports-related body.**

2. **Whether a certain conduct constitutes "just cause" under the terms of Article 14 of the FIFA Regulations for the Status and Transfer of Players is a matter for judgment by the CAS panel. CAS, as the deciding authority, has discretion to assess the facts and determine whether there was just cause for terminating a contract, on 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. CAS jurisprudence, having considered what constitutes just cause under Article 14 by reference to Swiss law, has noted that according to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning. In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties such as a serious breach of confidence. Furthermore, the seriousness and frequency of the breach, the circumstances under which it occurred and the club or player's attitude must also be considered in determining whether a party has just cause to terminate a contract.**

3. **A party will only be able to establish a just cause to terminate the employment contract if it had previously warned the other party of its unacceptable conduct or attitude.**

I. PARTIES

1. Green Gully Soccer Club (the "Appellant" or the "Club") is an Australian football club affiliated with Football Federation Victoria ("FFV") which is a State football federation that is a member federation of Football Federation Australia ("FFA"), which in turn is affiliated with FIFA.

2. Mr. Pedro Henrique Coelho de Oliveira (the "Respondent" or the "Player") is a professional football player holding Brazilian nationality.

II. FACTUAL BACKGROUND

A. Background Facts

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

4. On 19 May 2008 the Player and the Appellant concluded an employment contract (the "Contract") valid from that date to 29 April 2012. Prior to the execution of the Contract the parties had negotiated on the basis of a contract for one year, but the formal Contract was concluded for the longer term of four years, on the understanding of the Appellant that it was required to provide a contract which was for the same length of time as the Player's visa to enter Australia, namely four years.

5. In the Contract the Appellant and the Player agreed as follows (relevant extracts):

> ***"2 SCOPE OF CONTRACT AND MUTUAL OBLIGATIONS***
>
> *The Club and you agree: […].*
>
> *(c) that you are employed under this Contract as a skilled football player on a casual employment basis […];*
>
> *(d) that you will have main employment or be undertaking education or training:*
>
> *(e) to submit exclusively to the jurisdiction of the Grievance Resolution Regulations and to not attempt to resolve any Grievance in a court of law;*
>
> ***3 CLUB GENERAL OBLIGATIONS***
>
> *The Club must:*

(a) pay you the Payments in accordance with the Specification: […].

(c) if applicable under Australian legislation, pay superannuation contributions to a fund designated by you:

4 PLAYER GENERAL OBLIGATIONS

4.1 You must: […].

(b) play football in the Matches in which you are selected at the dates, times and venues nominated by the Club;

(c) play all Matches to the best of your ability and skill and in accordance with the Laws of the Game; […].

(e) punctually attend all Matches and official training sessions and functions; and

(f) comply with all reasonable directions of the Club in relation to transport and behaviour […].

5 INJURY AND FITNESS

5.3 You must: […].

(b) promptly submit to any fitness testing, medical examination or other testing in relation to your health and fitness as a professional footballer that the Club may reasonably require; […].

7 TERM, BREACH AND TERMINATION

7.1 This Contract starts on the date it is signed by you and continues for the Term, unless it is terminated earlier in accordance with this clause 7.

[…].

7.4 The Club may terminate this Contract by giving written notice to you only if you:

(a) are in breach of a material term of this Contract and fail to remedy that breach within 14 days after receiving written notice requiring you to do so;

(b) are found to be guilty of proven serious misconduct or otherwise in accordance with the FFA Statutes (including the Code of Conduct); […].

7.6 If a party disputes a notice of termination received in accordance with clause 7.3 or 7.4, that party may within 7 business days of receipt of that notice refer the purported termination to the Member Federation and this Contract shall not be terminated until the Grievance Resolution Regulations have been exhausted or terminated.

8 GENERAL

8.1 This Contract:

(a) is governed by the law applicable to the territory in which the Club is located;

SPECIFICATION

1.5 ***Payments***

A weekly Base Wage of $804.00 (Minimum $804 over 52 weeks) for 52 weeks (duration of Business Visa 457) (Club is responsible for PAYG Tax and Superannuation obligations and payments above net amount of $41,850)

1.6 ***Term of Contract***

(Minimum Term of a Visa Player Contract is one (1) year. Maximum Term is four (4) years)

Start date: *19 May 2008.* ***End date:*** *29 April 2012".*

6. Evidence was adduced of conversations and correspondence between the Club and the Player from the end of May 2008 until the purported termination of the Contract in January 2009, relating to his fitness, his performance and his attendance at training amongst other matters. The relevant evidence from the Appellant is as follows:

(a) On 4 June 2008 the Player was advised by telephone that he was required to do additional training with the Under 21 team (as well as with the Senior Team) so that he could adapt to the Club's training and improve his fitness. The Player commenced training with the Under 21 team as well as with the Senior Team.

(b) On 6 June 2008 the Player and his agent were advised by the senior coach that the Player needed to make sure that he went to training with the Under 21 team so that he could improve his fitness because he had not attended all the training sessions that he was required to attend.

(c) On 24 June 2008 the Player and his agent met with the President and General Manager of the Club who asked why he had not been attending training with the Under 21 team, to which the Player did not reply.

(d) On 12 July 2008 the Player received a red card in a match and was suspended for 4 matches for violent conduct. Up to his suspension the Player had been training with the Senior Team three nights a week and with the Under 21 team two nights a week.

(e) From 12 July 2008 to 18 August 2008 the Player did not attend any training with the Under 21 team.

(f) On 16 August 2008 the Player suffered a hamstring injury twenty minutes into a match. The Player in his witness statement said that he was then unable to play or train for a month.

(g) On 2 September 2008 the Club provided the Player with a gym membership of 10 sessions. The Player attended four gym sessions in September.

(h) On 11 September 2008 the Player and his agent met with the President and the General Manager of the Club, who informed him that he was expected to be at training. The Player was advised that the Club was considering terminating his Contract of employment. The President advised him that this was a warning, and that he was expected to train in the off season 3 days a week on Tuesday, Thursday and Friday. The season ended in late September 2008.

(i) On 12 September 2008 the Club wrote to the Player informing him that this constituted a warning and that he must attend training at the club 3 times a week, and noted that the Player and his agent had accepted the condition that he trained 3 times a week at the Club commencing 16 September. The Player acknowledged receipt of the letter in his witness statement.

(j) On 18 September 2008 the President and the General Manager of the Club met with the agent of the Player and advised him that the Player had not attended any training as required by the meeting of 11 September and the letter of 12 September.

(k) The Player did not attend training from 16 September to 7 October 2008. Attempts by the Club to contact the Player were unsuccessful. In his witness statement the Player indicated that he went to the Club to commence his training on 7 October 2008. He attended training on 9, 14, 16 and 21 October. His next attendance at training was on 11 November 2008.

(l) On 16 October 2008 the General Manager of the Club told the Player that he must attend training as required in the meeting of 11 September and that this constituted a further warning.

(m) The Player attended training on 11, 13 and 19 November 2008.

(n) On 25 November 20085, the Club wrote to the Player informing him that he had not attended the required amount of training sessions agreed on 11 September, and that he had attended only 8 of 33 training sessions, and had been previously warned. The letter indicated that the Club would make a decision on whether he would be retained for 2009. The Player in his witness statement acknowledged receipt of this letter.

(o) The Player did not attend training on 27 and 28 November 2008.

(p) On 27 January 2009 the Club decided to terminate the Contract of the Player on the grounds inter alia that *"he had been given every opportunity to improve himself and that he had continually failed to comply with the requests to attend training"*, that *"his actions may constitute a breach of his 457 Business Visa because he is not acting as a professional football player"*, that *"he has failed to keep himself in the best possible physical condition"* and that *"his conduct breaches his employment agreement"*.

(q) On 29 January 2009 the Club wrote to the Player advising him that his employment would cease on 2 February 2009. The letter referred to the Club's attempts to assist him to meet the required level of fitness, and that he had only attended 8 training sessions out of 36 in a 12 week period.

(r) The Club provided a flight for the Player to return to Brazil, which he did.

7. The Respondent sought to refer the matter of the termination of the Contract to the Australian Dispute Resolution Chamber (of the FFA). On 18 March 2009, the Respondent informed the Appellant that the FFA had advised that the Australian Dispute Resolution Chamber was not open to cases involving players in the State League, and that the Respondent would submit the matter to FIFA's Dispute Resolution Chamber.

8. Subsequent correspondence from FFA indicated that the FFA asserted that its tribunal *"is provided only for A-League players within the framework of the [A-League] Collective Bargaining Agreement"*, and that there was no relevant FFA tribunal for the hearing of such disputes in State Leagues.

9. The Respondent referred the matter to FIFA on 29 March 2009 and the Appellant was so informed by FIFA through the FFA on 2 June 2009. The Appellant wrote to FIFA through the FFA on 10 June 2009 advising that it would contest the claim, but only received a reply from FIFA on 26 July 2010. Correspondence between the parties and FIFA ensued up until 2 November 2012 when FIFA indicated that the Dispute Resolution Chamber (the "DRC") would consider the matter and make a formal decision.

10. On 11 January 2013, FIFA advised the parties that the DRC had made its decision on 18 December 2012, partially accepting the Respondent's claim, and requiring the Appellant to pay the sum of AUD 90,000 to the Respondent. On 14 January 2013 the Appellant sought a copy of the DRC's reasons for its decision, and these were received ten months later on 4 November 2013.

B. Proceedings before the FIFA Dispute Resolution Chamber

11. The Appellant submitted that it was not provided with either the initiating application or evidence relied on by the Respondent until the Respondent provided this documentation to the Appellant on 4 March 2014, only after these CAS proceedings had been instituted.

12. Following notification of the decision in January 2013, but before the publication of the reasons, the Appellant sought to make submissions to FIFA to the effect that the DRC lacked jurisdiction, and seeking to have the Respondent's application to the DRC dismissed. This belated request to dismiss the Respondent's application was rejected by FIFA on 4 April 2013 on the basis that *"our Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (DRC) … do not include the possibility of review of decisions passed by our competent decision-making bodies"*.

13. The documentation provided by the Respondent to the Appellant on 4 March 2014 showed that the DRC had before it the following documents:

- a one and a half page outline of the Respondent's claim,
- an authority from the Respondent for his representatives to act on his behalf,
- a copy of the Contract between the parties,
- the letter of 29 January 2009 from the Appellant to the Respondent purporting to terminate the Contract,
- a copy of a Fitness Testing schedule of players including the Respondent.

The decision of the DRC also indicates that it had before it:

- a statement of defence from the Appellant,
- *"board of management meeting minutes"* held between 2 June 2008 and 27 January 2009 submitted by the Appellant,
- information from the Respondent about employment contracts covering the period from 12 May 2009 to June 2012, going to the question of mitigation of his loss.

14. The DRC noted in its Decision that the claim made to it by the Respondent was on the basis of the termination of the Contract being without just cause. In the outline of his claim, the Respondent submitted that *"The Termination Letter [of 29 January 2009] states that the Club is terminating the Player's contracts (sic) because it does not consider him to be sufficiently fit"* and that *"The Player passed his fit test at the Club"* and *"Even if the Player had not passed his fit test, the Contract does not permit termination on the basis of fitness"*.

15. In relation to the Appellant's statement of defence, the DRC outlined in its Decision that the Appellant alleged that the Respondent *"was in breach of contract for the following reasons:*

a) The [Player] did not comply with his employment requirement as defined in his business VISA 457. One condition for said VISA was being employed and as per the employment Contract with the [Club], the [Player] was obliged, inter alia, to participate in trainings, which the [Player] had allegedly failed to do so.

b) The [Player] did not comply with clause 4.1 e) of the Contract.

c) The [Club] was misrepresented and the Contract was falsely signed by a non-recognized agent. …….

d) The [Player] failed to maintain himself in best possible fitness/condition, in this respect the [Club] explained that the [Player] had been in a "fair physical form when he had arrived in Australia […] but after 2 months his physical condition was not appropriate for a football player".

e) The [Player] breached the player's code of conduct by acting in a violent manner. Consequently, he was also suspended by the Football Federation Victoria (FFV)".

16. The DRC decision does not indicate whether the question of the competence of the DRC to deal with the matter was in contention, but nevertheless confirmed that *"in accordance with art 24 par 1 in combination with art. 22 lit. b) of the Regulations on the Status and Transfer of Players (edition 2012), it is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a Brazilian player and an Australian club".*

17. In relation to the substance of the matter, the DRC asserted that the arguments of the Appellant regarding the misrepresentation of the Respondent by an unauthorised agent could not be followed and that the Appellant did not submit enough evidence. The Chamber *"took due note of the [Appellant's] argumentation that it had terminated the Contract with just cause in virtue of its clause 4.1 e). The Chamber remarked that according to the [Appellant], the [Respondent] had repeatedly not attended trainings, had shown a poor fitness condition and had been suspended for aggressive behaviour".*

The Chamber noted that the Appellant carried the burden of proof in this regard, but *"had only submitted the "board of management meeting minutes" in support of its allegations and remarked that such document was produced by the [Appellant] as well as that the persons who made the statements could, as employees of the club, not be considered as impartial witnesses. Consequently, the DRC decided that the respective argumentation of the [Appellant] could not be upheld by the Chamber.*

Additionally, the DRC deemed it appropriate to highlight that in any case a suspension to play a match(es) cannot be deemed as a valid and justified reason to terminate a contract since it is a current occurrence in football.

In continuation, the Chamber was eager to emphasize that only a breach or misconduct which is of a certain severity justifies the termination of a contract without prior warning. In other words, only when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, a contract may be terminated prematurely. Hence, if there are more lenient measures which can be taken in order for an employer to assure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can always only be an ultima ratio.

Taking into account all the above the Chamber concluded that the [Appellant] had terminated the Contract without just cause".

18. The DRC then calculated the amount of compensation for the breach of the contract by the Appellant in accordance with Article 17 (1) of the Regulations on the Status and Transfer of Players, taking into account the time remaining on the Contract until 29 April 2012, and decided that the Appellant had to pay to the Respondent compensation in the amount of AUD 90,000, but that the Respondent had failed to demonstrate that he was entitled to the amount of AUD 11,443.50 for superannuation payments.

19. The DRC did not specifically refer to the amounts that the Respondent had earned since the termination of the Contract by way of mitigation. Nor did the DRC consider the question of sporting sanctions under Article 17 (2) of the Regulations.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. The Appellant lodged its appeal to CAS against the decision of the FIFA DRC on 25 November 2013.

21. The Appellant filed its Appeal Brief on 6 January 2014.

22. Following the agreement of the parties, on 9 January 2014, the CAS office confirmed the appointment by the President of the Appeals Arbitration Division of Mr John Boultbee as Sole Arbitrator.

23. On 28 January 2014 FIFA informed the CAS that it renounced its right to request possible intervention in the arbitration.

24. The Respondent filed its Answer on 31 January 2014.

25. A pre-trial procedural teleconference was held on 3 April 2014.

26. Pursuant to directions made by the Sole Arbitrator on 3 April 2014, the Appellant filed Submissions in Reply on 22 April 2014 and the Respondent filed by the same date evidence of the contracts the Respondent had engaged in as a professional football player since the termination of his Contract.

27. The Appeal was heard in Melbourne, Australia, on 15 May 2014 in accordance with Article R57 of the Code of Sports-related Arbitration (2013 edition) (the "Code").

IV. SUBMISSIONS OF THE PARTIES

28. The following is the essence of the parties' requests for relief and positions and does not necessarily comprise every contention put forward by the parties. The Sole Arbitrator has, however, carefully considered all the submissions and evidence filed by the parties with the CAS, as well as the decision of the DRC, even if there is no specific reference to those submissions in the following summary.

A. The Appellant's Submissions

29. In its Statement of Appeal, and Appeal Brief, the Appellant requested the following relief from the CAS:

- That the decision of the FIFA DRC made on 18 December 2012 be set aside.

- Further or alternatively, the decision of the FIFA DRC made on 18 December 2012 be permanently stayed.

- The Respondent be enjoined from bringing any further claim in front of the FIFA DRC in respect to any matter arising out of his employment Contract with the Appellant.

- Such further or consequential orders or relief as the Court sees fit.

- Costs.

30. In support of its request for relief, the Appellant made the following submissions.

a) Jurisdiction/Competence

31. The Appellant submitted that the DRC did not have jurisdiction to determine the application before it under Article 22(b) of the FIFA Regulations on the Status and Transfer of Players because the dispute lacked an international dimension and because there was an independent tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs established at national level within the framework of the national association.

The first basis of the Appellant's submission was that the Appellant and the Respondent were both registered with the FFA at the time the dispute arose, and that therefore the dispute did not have an international dimension, and referred to the case of CAS 2010/A/2091.

The second basis was that FFA possessed an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs, as contemplated in the FFA Grievance Resolution Regulations.

32. The Appellant also submitted that the DRC ought to have declined to hear the matter because the employment Contract between the parties expressly provided in clause 2 (e) that the parties would submit exclusively to the jurisdiction of the (Australian) Grievance Resolution Regulations and that those Regulations themselves required the parties to submit all grievances to an FFA established Judicial Body.

33. However, the Appellant relied on Article 67 of the FIFA Statutes as conferring jurisdiction of the CAS. Article 67 provides:

"1. Appeals against final decisions passed by FIFA's legal bodies…..shall be lodged with CAS within 21 days of notification of the decision in question.

2. Recourse may only be made to CAS after all other internal channels have been exhausted".

b) Law to be applied

34. The Appellant submitted that the parties had chosen that the law of the State of Victoria, Australia, should apply in view of clause 8(1) of the Contract which provided that:

"This contract is governed by the law applicable to the territory in which the Club is located".

It further submitted that Article R58 of the Code was effective to establish that the matter should be determined according to Victorian law.

c) Termination of the Contract

35. The Appellant submitted that the DRC erred in finding that the Appellant had terminated the Respondent's employment Contract without just cause, and that the Appellant was entitled to terminate the Contract on the grounds that the Respondent breached implied and express terms of the Contract by:

- failing to follow reasonable and lawful directions of the Appellant to attend training sessions and improve his fitness,

- failing to maintain his fitness level to a reasonable standard necessary for the adequate performance of his obligations as a fully paid professional footballer,

- indicating through his conduct an intention to be no longer bound by the contract and therefore repudiating it.

36. The submission made was that the failure to obey reasonable orders about matters that go to the root of the Contract is repudiatory and justifies termination of the contract by the employer, and that this is particularly so if the failure is persistent and is coupled with an absence from work. As authority for this proposition the Appellant referred to the Australian cases of *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143 and *Nghia Van Tran v Calum Textiles Pty Ltd* (1997) 42 AILR 3-353, and Macken's *Law of Employment* (7th Edition) at 8.230-8.300.

37. A further submission made by the Appellant was that it is an implied term of every employment contract that the employee possesses the skills necessary for the job and that he or she will exercise such skill in performing his or her obligations, and that this goes to the root of the contract. It submitted that the Respondent lacked the skill level and fitness that he warranted by his accepting employment under a 457 skilled worker visa.

38. The breaches of these terms alleged by the Appellant included:

- Failing to attend training sessions with the Under 21 team in May and June 2008 despite being instructed to do so,

- Failing to attend the training sessions in August 2008 with the Under 21 squad during his period of suspension despite having been told to do so on several occasions,

- Failing to attend the extra training sessions in September, October and November 2008, despite the direction to do so given to him on 11 September, and in the letter dated 12 September 2008, and thus attending only 8 of the 33 sessions that he was directed to attend on 11 September,

- Failing to attend training sessions throughout October and November 2008, following the formal warning on 16 October 2008.

It submitted that his failure to attend training sessions that he was directed to attend amounted to unauthorised absence from work.

39. The Appellant submitted that the DRC erred in finding that the Appellant had terminated the Respondent's employment Contract without prior warning, and failed to give weight, or sufficient weight to the warnings given to the Respondent by the Appellant prior to terminating his employment. It further submitted that a warning should not be treated as mandatory, and that the circumstances of the employee's conduct leading to dismissal will dictate whether a warning should have been given. In circumstances where the employee over a protracted period of time persistently fails to follow the same lawful and reasonable directions of his or her employer, then a warning would be superfluous and unnecessary.

40. Further, the Appellant submitted that the DRC erred in rejecting the evidence of persons employed by the Club on the basis of impartiality. It argued that the Respondent too could not have been an impartial witness on this basis.

d) Denial of natural justice

41. The Appellant claimed that it was denied natural justice in that :

- the Appellant was not provided with the details of the Respondent's claim to the DRC, and therefore did not have the ability to test the evidence and arguments of the Respondent in the matter before the DRC, and

- the Respondent's post-termination contracts were kept confidential from the Applicant and not disclosed to it.

It is to be noted that the Appellant had the material mentioned before it for the CAS hearing.

e) Amount of compensation

42. The Appellant submitted that the amount of compensation awarded by the DRC to the Respondent is excessive and that the DRC erred in awarding compensation on the basis of a 4-year employment Contract in the circumstances. It submitted that the parties had agreed on a one year contract, and that it was fortuitous and a mistake of the FFV that the eventual Contract was for four years, and that this should be taken into account in assessing the compensation.

43. Further it submitted that the compensation to which the Respondent might be entitled should be reduced taking into account the possibility that the Contract would be terminated before the end of the period without fault. The argument was that it was unlikely that the Respondent would have been selected to play in the Senior Team in 2009 and relied on CAS jurisprudence

to recognise the right of a player in those circumstances to terminate his Contract, and that the Respondent would likely have done so.

B. The Respondent's Submissions

44. In his Answer, the Respondent requested that the CAS:

(a) Reject the Appellant's appeal to set aside the decision of the FIFA DRC;

(b) Award the Respondent AUD 122,818, being;

(i) AUD 110,911 as the residual value of the Contract (less mitigation); and

(ii) AUD 11,907 being the superannuation payable under the Contract;

(c) Award interest on the amount in (b) at the prevailing rate awarded by the FIFA DRC, payable from 2 February 2009;

(d) Impose the appropriate sporting sanctions against the Appellant;

(e) Order the Appellant to cover all costs incurred in relation to the appeal; and

(f) Order the Appellant to bear all legal expenses of the Respondent in relation to the appeal.

45. The submissions made by the Respondent are the following:

a) Jurisdiction/Competence

46. The Respondent submitted that the DRC did have competence to hear and determine the dispute under Article 22 (b) of the FIFA Regulations for the Status and Transfer of Players because:

(a) the dispute was of an international dimension, as it involved a Brazilian player and an Australian Club. The Respondent relied on the FIFA Commentary on the Regulations for the Status and Transfer of Players which in relation to Article 22 (b) provides that: *"…the international dimension is represented by the fact that the player concerned is a foreigner in the country concerned…. The jurisdiction of FIFA is automatically established"*. and that therefore for the purposes of Article 22 (b) it is irrelevant whether the Club and the Player were both registered in Australia at the time the dispute arose;

(b) no independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs had been established at a national level within the framework of the Association and/or a collective bargaining agreement. The Respondent relied on evidence from FFA that the *"Australian Dispute Resolution Chamber is not open to cases involving state league players"* as was the situation of the parties in this case, and furthermore that the FFA Statutes and Regulations (Article 23(1)) to which

the FFA Grievance Resolution Regulations must accord provide that *"if a Member has or is involved in a dispute or grievance within the jurisdiction of FIFA Statutes…, that Member submits to the jurisdiction of FIFA… FIFA has jurisdiction on … international disputes, including disputes between parties belonging to different National Associations".*

The Respondent also relied on FIFA Circular Letter 1010 of 20 December 2005 and the National Dispute Resolution Chamber Standard Regulations approved by FIFA on 29 October 2007 requiring an express provision within the (national) Grievance Resolution Regulations providing for an independent arbitration tribunal meeting the requirements of Article 22 (b), and submitted that *"a clear reference to the competence of the national arbitration tribunal has to be included in the employment contract"* according to the FIFA Commentary on the Regulations for the Status and Transfer of Players.

(c) The Respondent relied on the letters from FFA dated 4 March 2013 and 18 March 2013 which were in evidence as confirming that FFA had only established a tribunal meeting the requirements set out in Article 22(b) for disputes between players and A-League clubs, pursuant to a Collective Bargaining Agreement, which only applied to A-League clubs and players. The Appellant and the Respondent were not in the A-League, but the Victorian Premier League.

(d) The Respondent also relied on the fact that the Appellant had not raised the question of the competence of the FIFA DRC prior to the decision of the DRC being made on 18 December 2012.

b) Law to be applied

47. The Respondent submitted that the Law to be Applied is governed by Article R58 of the Code which provides:

"Law Applicable to the Merits

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".

It submits that the applicable regulations include the FIFA Statutes (Article 66), under which the CAS authority to hear appeals from the DRC is founded.

"Article 66 Court of Arbitration for Sport (CAS)

1. FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FISA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players' agents.

2. 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".

The Respondent therefore submits that the law is that surrounding the FIFA regulations, within the jurisprudence of the DRC and of CAS, and where required, Swiss law.

c) Termination of the Contract

48. In submitting that the termination of the Contract was not justified, and not for just cause, the Respondent's submissions were:

- The FIFA Regulations for the Status and Transfer of Players defends the principle of contractual stability, and the Commentary stipulates that *"a contract between a player and a club may therefore only be terminated on expiry of the contract or by mutual agreement. Unilateral termination of a contract without just cause, especially during the so-called protected period, is to be vehemently discouraged".*

- The only reasons for which the Appellant may terminate the Contract are set out in clause 7.4 of the Contract and that there was no breach of a material term of the Contract by the Respondent, no serious misconduct under the Code of Conduct and no mutual consent to terminate.

- The Appellant's action of terminating the Contract on the basis that the Respondent had been absent from additional training sessions is inconsistent with the approach taken by the DRC, in that the DRC has determined that the Respondent may have been entitled to take appropriate disciplinary actions against the Respondent, but that terminating the Contract for non-attendance at training for anything less than an extended period of time does not amount to just cause for the purposes of Article 14 of the FIFA Regulations for the Status and Transfer of Players.

- The performance of the Respondent cannot be used as grounds for terminating the Contract, and the Appellant's reliance on the Respondent's lack of fitness was not justified.

- The FFA Code of Conduct required the Appellant to take disciplinary action against the Respondent for failure to follow reasonable directions with respect to attending training and performance, which it failed to do, and furthermore that the Code of Conduct only permitted the Club to terminate the Contract for a breach of that Code provided that it had already enforced sanctions against the Respondent on at least 3 separate occasions. Also, the Code of Conduct required that the Respondent should receive warnings and be provided the opportunity to be heard in relation to the infringement and the sanction. No official warning was given under the Code of Conduct.

d) Denial of natural justice

49. The Respondent submitted that the claim before the DRC was forwarded by FIFA to the FFA on 28 May 2009 requesting the FFA to forward the correspondence to the Appellant,

which it did on 2 June 2009. Therefore the Appellant was aware of the claim, and engaged in correspondence with FIFA thereafter and provided documentation to FIFA. It had the opportunity to seek a copy of the DRC claim and did not do so.

50. The Respondent submitted that the Appellant had been provided details of the contracts of employment entered into by the Respondent on the question of mitigation, and it was not necessary to provide the Appellant with full copies of those contracts which were confidential.

e) Amount of compensation and other consequences of the termination

51. The Respondent submitted that the amount of compensation should be the total residual value of the Contract at the time of termination, less the amount which the Respondent had indicated he had subsequently been paid as a footballer in mitigation of his loss.

52. The Respondent submitted that the Appellant in terminating the Contract without just cause within the protected period had not respected the principle of contractual stability and should be subject to strong sporting sanctions as outlined in Article 17(4) of the FIFA Regulations for the Status and Transfer of Players, including a ban on registering new players.

V. EVIDENCE OF THE PARTIES

53. The evidence adduced by the Appellant consisted of the following:

- The Contract entered into between the Appellant and the Respondent,

- Witness statements of several officials and coaches of the Appellant attesting to the factual matters of the Respondent's attendance and non-attendance at training session, discussions held between officers of the Appellant and the Respondent and his agent, together with exhibits to those statements, being letters written by the Appellant to the Respondent, records kept by the Appellant of meetings with the Respondent, records kept by the Appellant of the Respondent's attendance at training sessions, and a record of a fitness test of the Respondent,

- A witness statement from another player in the team with the Respondent, who also lived with the Respondent,

- Correspondence between the Appellant on the one hand, and the Respondent's lawyers, FIFA, FFA, and VFA on the other.

54. The evidence adduced by the Respondent consisted of:

- A witness statement of the Respondent,

- Correspondence between the FFA and the Appellant,

- The FFA Code of Conduct,

- Details of the contracts entered into by the Respondent following the termination of the Contract by the Appellant, and of termination of those contracts, as evidence of mitigation of his loss.

VI. ADMISSIBILITY

55. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

56. Article 67 of the FIFA Statutes provides:

Jurisdiction of CAS

1. Appeals against decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.

57. The decision of the DRC was communicated to the Appellant on 4 November 2013 and the Application to CAS was lodged on 25 November 2013, and is therefore within the time limit required both by the FIFA Statutes and Article R49 of the Code.

58. With respect to the Respondent's counterclaim, the Sole Arbitrator notes that such counterclaim is not allowed under Article R55 of the Code considering that the Respondent did not pay any advance of costs and must therefore be declared inadmissible.

VII. JURISDICTION

59. 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.

60. The FIFA Statutes by Article 66 referred to above provide for the dispute to be referred to CAS, and there are no other remedies available to the Appellant under FIFA regulations to which it could have had resort. The letter from FIFA to the Appellant dated 4 April 2013 confirmed that the remedies within FIFA had been exhausted.

61. It follows that the CAS has jurisdiction to decide on the present Appeal.

62. Under Article R57 of the Code, CAS *"has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*.

It is apparent that CAS has before it significantly more material than was made available to the DRC by either party.

VIII. APPLICABLE LAW

63. Article R58 of the 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

64. The Appellant submitted that the parties had chosen Victorian (Australian) law through clause 8.1(a) of the Contract, whereas the Respondent relied on Article 66 of the FIFA Statutes which stipulates that CAS *"shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*.

65. The appeal was submitted to CAS in November 2013 and therefore it is governed by the 2013 edition of the Code, which came into effect on 1 March 2013. The applicable FIFA regulations are the FIFA Statutes and the FIFA Regulations for the Status and Transfer of Players, and in particular Articles 14, 17 and 22 of those Regulations as in force in 2008 and 2009.

66. Article R58 was amended in 2013 to include the word *"subsidiarily"* in respect of the application of the rules of law chosen by the parties. This amendment provides that the applicable regulations, namely, the FIFA Statutes and Regulations, have primacy over any other purported choice of law, or laws of the country of the relevant sports-related body. The applicable regulations referred to in Article R58 specify the application of Swiss law. The very provision of the FIFA Statutes (Article 66) which confers jurisdiction on the CAS, which jurisdiction the Appellant has utilised to lodge this appeal, itself requires the application of the FIFA regulations and Swiss law as a condition to the conferring of that jurisdiction and therefore to the right of appeal.

67. The parties have subjected themselves to the FIFA Statutes and the Code both of which appear to lead to this conclusion. The reasoning in the CAS decision 2008/A/1517, even though it refers to an earlier edition of Article R58, which does not include the word "subsidiarily", is an analysis of the question of applicable law in such cases as the current case. On this basis there is strong authority for the law applying to the merits in this case to be the regulations of FIFA and, additionally, Swiss law.

68. However, there is a contrary conclusion that could be drawn from the FIFA Rules Governing the Procedure of the Players' Status Committee and the Dispute Resolution Chamber, where they relate to the law to be applied in matters before the DRC. Article 2 of those Rules provides:

"Article 2 Applicable Material Law

In their application and adjudication of law, the Players' Status Committee and the Dispute Resolution Chamber shall apply the FIFA Statutes and regulations whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport".

69. Thus there is an element of uncertainty as to the law applicable to the merits in cases such as this which come before the DRC and then later to the CAS on appeal. In this particular case, the Sole Arbitrator is of the view that the application of Swiss law, and the application of Victorian law would lead to the same conclusion on the merits. The Victorian authorities referred to in paragraph 36 above and the CAS cases that have dealt with the question of "just cause" applying Swiss law where appropriate, and which are referred to in paragraphs 78 to 83 below, lead to the same conclusion on the facts of the present case.

IX. MERITS

A. Competence and jurisdiction of the FIFA DRC

70. The Sole Arbitrator accepts the submissions made by the Respondent and outlined in paragraph 46 and that the FIFA DRC had jurisdiction under Article 22 (b) of the Regulations for the Status and Transfer of Players. It is clear from the FIFA Commentary that *"the international dimension is represented by the fact that the player concerned is a foreigner in the country concerned…. In these cases the jurisdiction of FIFA is automatically established".* This has been confirmed by CAS 2008/A/1517 para 31. Whereas the case relied on by the Appellant, CAS 2010/A/2091, is not a case under Article 22 (b) of the FIFA Regulations for the Status and Transfer of Players, but a case under the FIFA Players' Agents Regulations, where the Association with which both parties (the player and his agent) were registered was relevant, rather than their nationality.

The letters from FFA make it clear that this is not a case where *"an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the Association and/or a collective bargaining agreement".* The letter dated 18 March 2013 states that *"Football Federation Australia (FFA) has established an arbitration tribunal composed of members chosen in equal number by players and clubs with an independent chairman but this is provided only for A-League players within the framework of the [A-League] Collective Bargaining Agreement".* The current dispute does not concern an A-League Club, and thus the FFA tribunal cannot be invested with a jurisdiction which does not arise from the relevant Collective Bargaining Agreement.

71. On this basis it is ruled that the DRC had competence to hear and determine the dispute which was properly before it.

B. Termination of the Contract

72. The principal question in this Appeal is whether the Appellant had just cause to terminate the Respondent's Contract under Article 14 of the FIFA Regulations for the Status and Transfer of Players which provides:

> *"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".*

In the main there is a dispute whether the failure by the Respondent to attend training sessions amounted to just cause to terminate the Contract, although other grounds for termination have also been the subject of submissions and evidence by the parties.

73. The evidence of the Appellant establishes that the Respondent did not attend a large number of training sessions to which he had been directed to attend as outlined in detail in paragraph 6 above.

74. The Respondent's statement does not dispute the evidence of non-attendance. He refers to the sessions which he did attend, but does not touch on the sessions which he did not attend. The relevant statements by the Respondent are that *"in May 2008… I followed the direction given by the Club and began training with both the senior and under 21 teams",* that *"in early June 2008… I continued to train with the senior team three times per week and the under 21 team twice a week"* and that *"on 24 June 2008… I then continued to train with both the senior and under 21 teams and play matches for the under 21 team".* He stated that in August 2008 after an injury he was not able to train or play for approximately one month, and his next statement about training was that *"I returned to the Club on 7 October 2008 to commence my training"* and that *"On 16 October 2008 when I attended training at the Club I was told that I had put on approximately seven (7) kilograms in body weight …. Accordingly, I attended the Club to partake in training, played social football, went running in a local park and visited a gym close to my accommodation…".*

75. The evidence of the Appellant, taken together with the evidence of the Respondent leaves no doubt that over a protracted period from May 2008 to late November 2009 the Respondent did not attend a substantial number of training sessions, to which he had been directed to attend. The Appellant bore the onus to establish these facts which it has discharged. There is no apparent reason not to accept the accuracy of the records kept by the Appellant's officers, particularly when they are not disputed by the Respondent.

76. The undisputed evidence also establishes that the Appellant has established that the Respondent was directed and/or warned about attending training on:

4 June 2008,

6 June 2008,

24 June 2008,

11 September 2008,

12 September 2008 (in writing),

18 September 2008 (through his agent),

16 October 2008,

25 November 2008 (in writing).

77. Failing to attend training is a breach of the player's obligations under the Contract clause 4.1 (e) to *"punctually attend all Matches and official training sessions…"*, and failing to comply with directions to attend training is most likely a breach of the obligations under Clause 4.1 (f) *"comply with all reasonable directions of the Club…"*. The Appellant's argument is that these persistent failures constituted a breach of the material obligations owed by any employee to his employer anyway, irrespective of the terms of the written Contract, namely to attend the workplace and to follow reasonable directions.

78. Whether this constitutes "just cause" under the terms of Article 14 of the FIFA Regulations for the Status and Transfer of Players is a matter for judgment by the CAS as advised by established jurisprudence under this Article. As far as Swiss Law is concerned, CAS 2012/A/2698 at para 114 is authority for the point that pursuant to Article 337.3 of the Swiss Code of Obligations, referred to also in Article 14.2 of the FIFA Commentary, the deciding authority has the discretion to assess the facts and determine whether there was just cause for terminating the contract, on the merits of each particular case.

79. FIFA's Commentary on its Regulations does not have the same authority as cases decided by the DRC or CAS but is instructive or a "guiding source" and is reflective of decisions of the DRC in particular. The Commentary provides that *"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"*. An example in the Commentary (as a guiding source) of a player's unjustified absence for a period of two weeks is given as justifying sanctions, but not termination. The Commentary goes on to state *"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"*.

80. CAS jurisprudence has further considered what constitutes just cause under Article 14 by reference to Swiss law, and has noted that *"According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning…. In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit to expect a continuation of*

the employment relationship between the parties such as a serious breach of confidence…" (CAS 2006/A/1180, para 8.4 and CAS 2008/A/1517, para 56.).

81. The Panel in CAS 2012/A/2698, para 112 noted that *"The seriousness and frequency of the breach, the circumstances under which it occurred and the club or player's attitude must also be considered in determining whether a party has just cause to terminate a contract (CAS 2011/A/2567). As specified in Article 14.2 of the FIFA Commentary, the breach ought to have persisted for a long time, and/or the violations ought to have accumulated over a certain period of time and not remedied in spite of the warning or warnings".*

82. In the current case the persistent non-attendance at training constitutes objective criteria, especially as it is not disputed by the Respondent, and the evidence of warnings and discussions with the Respondent made it clear that the relationship had developed to a level where there was a serious breach of confidence, which could reasonably be expected. The evidence is sufficient to enable the Sole Arbitrator to conclude that the violations of the terms of employment identified above have been persistent and cumulated over a long period of several months.

83. There is also considerable authority that a party will only be able to establish a just cause to terminate the employment contract if it had previously warned the other party of its unacceptable conduct or attitude (CAS 2007/A/1233 & 1234, CAS 2004/A/587, CAS 2011/A/2567 and CAS 2012/A/2698). It is to be noted that in the current case the Contract was not terminated without prior warning. The evidence of there being several warnings is mentioned in paragraph 76.

84. Therefore the Sole Arbitrator rules that the Appellant terminated the Respondent's contract with just cause as contemplated by Article 14 of the FIFA Regulations for the Status and Transfer of Players.

85. It is unnecessary to deal with the other grounds relied on by the parties as constituting or not constituting just cause, such as the alleged breach of the warranty in relation to the skill possessed by the player, or breaches alleged due to lack of fitness or performance. However, the Respondent had placed significant reliance on the FFA Code of Conduct to submit that the Appellant had not complied with the terms of that Code as required by the Contract, and therefore was precluded from terminating the Contract. The Sole Arbitrator has concluded that the Appellant did not substantially rely on the Code of Conduct as the main basis for its termination of the Contract, and that therefore the procedural provisions of that Code were not called into operation.

C. Denial of Natural Justice

86. The evidence establishes that the Appellant was made aware of the proceedings before the DRC, and it remains unexplained why it did not obtain the documents which had been submitted by the Respondent from either FIFA, the FFA or the Respondent. Whilst it is also not explained why none of those bodies provided the documents to the Appellant before the decision of the DRC was made, it was nevertheless in the power of the Appellant to obtain the documents, and in those circumstances the Sole Arbitrator rules that there was no

supervening denial of natural justice to the Appellant. In any case, the Appeal to CAS has remedied any such issue.

D. Compensation and other Consequences

87. In light of the ruling that the Appellant had just cause to terminate the Contract under Article 14 of the FIFA Regulations for the Status and Transfer of Players, Article 17 does not apply, and no compensation or other sanctions are applicable.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Green Gully Soccer Club on 25 November 2013 is upheld.

2. The decision of the FIFA Dispute Resolution Chamber made on 18 December 2012 is set aside.

(…).

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