Arbitration CAS 2014/A/3527 Football Federation of Kazakhstan (FFK) v. Oliver Pelzer, award of 31 July 2015

Panel: Mr Sofoklis Pilavios (Greece), President; Mr Aliaksandr Danilevich (Belarus); Mr Michael Gerlinger (Germany)

Football
Termination of a contract of employment between a football club and a coach due to illness
Termination of a contract of employment without just cause
Consequences of the termination of a contract of employment without just cause

1. **Early termination of a contract cannot be based on every breach of obligation by the contract partner. Rather, the breach of contract must have a certain seriousness in order to justify "just cause". According to CAS case law, if the player does not provide the club with his working capacity, this constitutes a serious breach of duty which can justify unilateral termination of the contract, for example if the player does not even report for work. If, on the other hand, the player cannot provide the club with his working capacity due to illness or injury, this does not constitute a breach of duty and there is no "just cause" for unilateral termination of the contract.**

2. **Article 97(1) of the CO stipulates that: *"An obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damage, unless he can prove that he was not at fault"*. According to CAS jurisprudence, *"in principle the harmed party should be restored to the position in which the same party would have been had the contract been properly fulfilled"*.**

I. PARTIES

1. The Football Federation of Kazakhstan (hereinafter also referred to as the "Appellant") is the national governing body for the sport of football in Kazakhstan with its registered office in Astana, Kazakhstan. It is affiliated with the Fédération Internationale de Football Association (hereinafter also referred as "FIFA") since 1994.

2. Mr Oliver Pelzer (hereinafter also referred to as the "Respondent" or the "Coach") is a football coach of German 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 at the hearing. 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 Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 28 January 2011, the Football Federation of Kazakhstan entered into an employment agreement (hereinafter referred to as the "Agreement") with the Coach, hiring him as the Head Coach and football instructor for the Men's U17 National Team.

5. The Agreement included, *inter alia*, the following provisions:

"§1 Subject Matter, Tasks of the Coach

1. FFK shall hire the Coach on the basis of the provisions of the employment agreement (hereinafter "Agreement") as the Head Coach and football instructor for the Men's U17 National Team of FFK (referred to hereinafter as "National Team").

[…]

§2 Term

1. The Term of the Agreement begins on January 28, 2011. It will terminate on January 27, 2013.

2. This Agreement may be terminated without notice by one of the parties for a good reason if the other party commits a serious breach of contractual or legal obligations. Extraordinary termination on the part of the FFK vis-à-vis the Coach comes into consideration particularly in the following cases:

a) if the Coach loses his license as football coach or the Coach is denied or prohibited the exercising of his profession as a licensed coach for other reasons;

b) if the Coach does not act appropriately in the legitimate interests of the FFK and/or the National Team in public and/or in the press;

c) in the event of unprofessional conduct on the part of the Coach, this includes if the Coach is in severe or repeated breach of his obligations resulting from this Agreement, if the Coach is absent without an excuse at scheduled coaching or mentoring sessions or if the Coach passes the care and promotion of the National Team to the assistant Coach;

d) if the Coach otherwise counteracts the promotion and playing performance of the National Team.

3. In case of termination of this Agreement by FFK for good reason, all other rights of FFK inter alia the right to claim damages, shall remain unaffected.

[…]

§4 Renumeration [sic]

1. The Coach shall receive a basic fixed monthly salary in the amount EUR 8 000 for the first contractual year. In case Kazakhstan U17 National team leaded by the Coach entering UEFA U17 tournament elite round in 2011, the amount of monthly salary is to change to EUR 10 000 from January 1, 2012. In case Kazakhstan U17 National team does not enter UEFA U17 elite round in 2011 the Parties agreed to negotiate the Coach's monthly salary for the second contractual year in December 2011. If present Agreement is to be terminated by FFK by the reasons not indicated in § 2 (article 2.2), the Coach will continue to receive his salary till January 27, 2013 as compensation for extraordinary termination. If present Agreement is to be terminated by FFK by the reasons indicated in § 2 (article 2.2), the Coach will not receive compensation for extraordinary termination of Agreement.

[…]

3. The monthly salary of the Coach is to be transferred to Coach's bank account opened in Kazakhstan bank not later than 5th day of the following month. With regards to the Contract between the Coach and the FA, salary paid to the Coach shall be net of any income or like tax whatever (sic). […]

§5 Illness

1. The Coach is entitled and obliged to insure himself and his family against illness during the period of their staying in Kazakhstan. The FFK shall reimburse the Coach the premiums paid for health insurance as well as the treatment costs confirmed or incurred by a Kazakhstan physician chosen by the Coach in exchange for proof hereof.

2. The Coach shall promptly notify the executive board of the FFK each time an inability to work is at hand and to submit a doctor's note within three days.

3. In the event of an inability to work due to an accident or illness as well as in the event of the Coach's death, the FFK commits to continue to pay the salary of the Coach for a period of six months. […]

§7 Miscellaneous

1. The contact person for the Coach on the executive board of the FFK and as such, the representative of the FFK vis-à-vis the Coach is the Secretary General.

[…]

3. The Coach affirms and commits to observing all applicable legal regulations for the duration of this Agreement. In particular, he also subjects himself to the FIFA and UEFA rules, the statutes and ordinances of the FFK, and applicable legal regulations. The Coach furthermore commits to observe the regulations of the FFK with respect to clothing and/or restrictions on the part of the FFK due to sponsorship agreements.

[…]

7. This Agreement is subject to the laws of Kazakhstan. In the event of disputes resulting from or in connection with this Agreement the Parties shall first negotiate a mutual solution in good faith. All disputes resulting from or in connection with this Agreement shall be brought before the UEFA court of arbitration for football coaches. The venue for arbitration proceedings shall be Nyon".

6. On 3 June 2011, the Coach sent an email to Mr Khamitzhanov, General Secretary of the Appellant, informing him that he had to leave Kazakhstan and return to Germany because of the condition of his health and the impending expiry of his visa. By means of the same email, the Respondent also provided Mr Khamitzhanov with a medical certificate, which was issued by a German doctor and stated his inability to work between 3 and 19 June 2011.

7. On 14 June 2011, Mr Khamitzhanov responded:

"Mr Oliver Pelzer

Within the context of your absence from Kazakhstan U17 team and the fact of not fulfillment of the duties of head coach of mentioned team from 03/06/2011 till present day we kindly ask you to provide us with written explanation of the following issues by 15/06/2011:

1 What was the reason of your absence from workplace (Kazakhstan U17 team) during the period mentioned above?

2 Why didn't you coordinate your departure from Kazakhstan with me – your contact person, according to the conditions of our agreement?"

8. On 15 June 2011, the counsel for the Respondent replied to Mr Khamitzhanov's letter by referring to the explanations provided by the Coach to the Appellant in his email of 3 June 2011. He also notified Mr Khamitzhanov about the delay in paying the Respondent's outstanding salary for May 2011.

9. Since his medical condition was apparently not improving, the Coach remained in Germany and by letters of 22 June and 5 October 2011 provided the Appellant with several consecutive medical certificates further extending his inability to work until three weeks after 26 September 2011.

10. On 11 July 2011, Mr Khamitzhanov sent another letter to the counsel for the Respondent maintaining that the Respondent had been informed by representatives of the Federation on the options available for extending his visa, however *"Mr Pelzer flatly declined all proposals, and finally, while referring to unfounded reasons (illness and expiry of visa), left Kazakhstan without permission. In the situation as it has developed, Kazakhstan Men's National Team (U-17) was forced to go to the international tournament in Baku (Azerbaijan) without Mr O. Pelzer, which certainly affected its general physical and psychological state, and in the long run resulted in its negative performance. The above-mentioned circumstances give the FFK ground to apply the provision of sub-clause "d" in paragraph "2" of the agreement about coach's prevention of the promotion and playing performance of the National Team and to terminate the agreement unilaterally, while reserving a right to demand compensation and other indemnity".*

11. In said letter Mr Khamitzhanov further contends that on the grounds of Kazakhstani law, which applies on the basis of §7(7) of the Agreement, *"[m]edical documents issued by Germany clinics and presented by Mr O. Pelzer may be and are a reason to release from work in the territory of Germany, but they cannot be accepted in our country. Also, that the said medical certificates do not indicate diagnosis of Mr O. Pelzer illness is not quite clear as well as the absence of documents confirming powers of these clinics in the sphere of medicine in the territory of Germany"* (sic).

12. In the meantime, the Coach obtained a new visa for Kazakhstan on 25 August 2011 in order to return as soon as his health would allow it.

13. On 7 September 2011, the Coach emailed Mr Khamitzhanov stating *inter alia*:

"Dear Mr General Secretary,

thank you for your answer. As you surely can imagine I try to continue my work as soon as possible.

Unfortunately I have to inform you, that the doctor checked me and extended the certificate of illness (please see the attachment). End of September I'll have an appointment again and hopefully everything will be fine then. If I have any news I'll inform you immediately.

Regarding the documents I would like to inform you, that you already have all Originals on your Mail. But if it is necessary I'll provide you of course with the papers again. The diagnosis is: Somatoforme Störung.

Official paper for your documents will be prepared from the doctor.

At the same time I would like to remind you again to transfer the outstanding amount of salary and health insurance (24000,00 € and 9902,00 €). Also please transfer the salary for May (8000 €) to my German account, because it is not possible to get the money easily from the account in Kazakhstan.

For me there is no reason for not paying my salary and without my international health insurance I cannot travel anywhere.

[…]".

14. On 5 October 2011, the counsel for the Respondent wrote another letter to the General Secretary of the Appellant enclosing a doctor's report in German language which mentioned the diagnosis for Mr Pelzer's condition (*"Somatisierungsstörung"*) and confirmed his inability to work until three weeks after 26 September 2011. The letter also contained a request for the payment of EUR 32,000 as outstanding salary and EUR 9,902 as compensation for the insurance commission, until 14 October 2011.

15. On 10 October 2011, the counsel for the Respondent received a letter of the Appellant dated 6 October 2011 by which Mr Pelzer was notified of the Appellant's decision of 4 October 2011 to terminate the Agreement. It stated *inter alia*:

"HEREBY ORDER:

1. *From 4 October 2011 to cancel the labor agreement with Head coach of U-17 team Oliver Pelzer dated by 28 January 2011 on the ground of Article 54, paragraph "1", subparagraph "17" of Labor Code of the Republic of Kazakhstan (absence from work more than two months in a row as a result of temporary disability)*

2. *For Accounting Department to pay all amounts due for hours worked (from 28 January to 4 October, 15 days)*

[…]".

16. On 13 October 2011, the counsel for the Respondent sent a letter to Mr Khamitzhanov stating *"that the termination is not reasonable and uneffective"* and requesting payment of EUR 37,329.31 for outstanding salaries, health insurance and travelling, accommodation and visa expenses and EUR 118,933.33 as compensation for unilateral termination of the Agreement without just cause.

17. On 1 November 2011, Mr Khamitzhanov responded *inter alia* that Kazakhstani labour law provides for a list with certain illnesses allowing an employee to be absent from work for more than two months and that somatoform disorder is not included in it. Therefore, Mr Pelzer is not entitled to any other payment or compensation.

B. Proceedings before the FIFA Players' Status Committee

18. On 15 December 2011, the Coach lodged a claim against the Appellant before FIFA maintaining that the Appellant had terminated their contractual relationship without just cause and he requested payment of EUR 33,066.67 corresponding to his salary between 1 June and 4 October 2011; EUR 126,933.32 corresponding to his salary between 5 October 2011 and January 2013; EUR 3,410.72 corresponding to the costs of his health insurance between 1 June and 4 October 2011; and EUR 851.92 for travel, visa and accommodation costs.

19. By way of its response dated 20 March 2012, the Football Federation of Kazakhstan rejected the Coach's claim arguing that they had just cause to terminate the contract in accordance with Kazakhstani labour law.

20. On 28 August 2013, the Single Judge of the FIFA Players' Status Committee (hereinafter also referred as to the "Judge of the PSC") decided to partially uphold the Coach's claim. The operative part of this decision reads as follows:

"1. The claim of the Claimant, Oliver Pelzer, is partially accepted.

2. The Respondent, Football Federation of Kazakhstan, has to pay to the Claimant, Oliver Pelzer, outstanding remuneration in the amount of EUR 36,011 as well as compensation for breach of contract in the amount of EUR 128,000 ***within 30 days*** *as from the date of notification of this decision.*

3. Any further claims lodged by the Claimant, Oliver Pelzer, are rejected.

4. If the aforementioned sums are not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of the expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

5. The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, Football Federation of Kazakhstan, ***within 30 days*** *as from the notification of the present decision as follows:*

[…]".

21. On 24 February 2014, FIFA communicated to the parties the grounds of the decision of the Judge of the PSC, following a request of the Football Federation of Kazakhstan.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 13 March 2014, the Appellant decided to appeal the abovementioned decision of FIFA (hereinafter referred to as "the Appealed Decision") before the CAS and filed its statement of appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (hereinafter referred to as "the Code").

23. With its statement of appeal, the Appellant also filed a request for a stay of the execution of the Appealed Decision and nominated Dr. Aliaksandr Danilevich, Attorney-at-law in Minsk, Belarus, as arbitrator.

24. On 19 March 2014, the CAS Court Office acknowledged receipt of the statement of appeal. It advised with respect to the Appellant's request for a stay of execution of the Appealed Decision that, according to CAS jurisprudence, a decision of a financial nature issued by a private Swiss association is not enforceable while under appeal. It further advised that the Appealed Decision can, therefore, not be stayed and that an application in this respect – being moot – would be dismissed. The CAS Court Office invited the Appellant to inform it whether it maintains or withdraws its request in view of the aforementioned.

25. On 20 March 2014, the Appellant filed its appeal brief requesting from the CAS:

"To revise the decision made by Geoff Thompson, the single judge of the FIFA Players' Status Committee on 28 August 2013, and to cancel paragraphs 2 and 5 that relate to payment to O. Pelzer of the salary in the amount Euro of 36,011, compensation for breach of the Contract totaling Euro 128,000 and CHF 20,000 as the cost of proceedings with the Players' Status Committee of FIFA as to the unsuccessful party".

26. On 2 April 2014, the Respondent nominated Dr Michael Gerlinger, Attorney-at-law in Munich, Germany, as arbitrator.

27. On 8 April 2014, the Appellant filed a petition for challenge of the nomination of Dr Gerlinger pursuant to Article R34 of the Code, stating that they object to his nomination *"due to the fact that the Respondent and the Arbitrator are residents of the same country, therefore [they] consider that neutrality of disposition of the case is doubtful. […]".*

28. On 10 April 2014, and because of the change of the seat of the counsel for the Respondent prior to the commencement of the present proceedings, the CAS Court Office forwarded to the Respondent again all correspondence exchanged in this proceedings until that time, along with a copy of the statement of appeal and appeal brief, granting him a period of 20 days for filing his answer.

29. On 17 April 2014, the Respondent requested that the Appellant's request for a stay of the Appealed Decision is rejected after the Appellant failed to declare whether it maintains or withdraws its request for a stay of execution of the Appealed Decision.

30. On 2 May 2014, the Respondent filed his answer including the following requests for relief:

"1. To reject the Appellant's application for appeal and to uphold the FIFA Player's (sic) Status Committee decision dated 28 August 2013.

2. To order that the Appellant shall bear all costs of the procedure including the Respondent's legal fees".

31. On 5 May 2014, the Respondent informed the CAS Court Office that he agreed to the Panel rendering an award based on the parties written submissions without hearing if the Panel deemed itself sufficiently well informed.

32. Following written submissions by the Respondent and the observations of the arbitrators, on 5 December 2014, the Board of the International Council of Arbitration for Sport issued its Decision on the Appellant's petition for challenge of an arbitrator, ruling as follows:

"1. The petition for challenge to the nomination of Dr Gerlinger filed on 8 April 2014 by the Association of Legal Entities "Association of Football Federations of Kazakhstan" is rejected".

33. By letters of 10 and 19 December 2014, the CAS Court Office consulted the parties whether they preferred the Panel to render an award exclusively based on the parties' written submissions or whether they preferred that a hearing be held.

34. On 22 December 2014, the Appellant wrote to the CAS stating that *"we want a hearing to be held as soon as possible, but inclusive of time essential for visa execution".*

35. In accordance with Article R57 of the Code, the Panel decided that a hearing shall be held and by facsimile letter of 19 January 2015, also notified by courier to the Respondent on 23 January 2015, the CAS Court Office summoned the parties to appear at the hearing at the Hotel Lausanne Palace in Lausanne, Switzerland, on 27 February 2015. In that same letter, the CAS Court Office also advised that any party requiring visa assistance in the form of a letter from the CAS should request such letter without delay.

36. By e-mail of 20 January 2015, the Appellant confirmed receipt of the convocation of 19 January 2015.

37. On 30 January 2015, the Appellant informed the CAS Court Office that Messrs Gazimur Alimov, head of the legal department, Vladimir Nidergaus and Tulpar Mansurov would represent the Appellant at the hearing.

38. On 19 February 2015 the CAS Court Office issued an order of procedure, which was signed and returned only by the Respondent on 24 February 2015.

39. On 27 February 2015, a hearing took place at the Lausanne Palace Hotel in Lausanne, Switzerland.

40. The Panel sat in the following composition:

President: Mr Sofoklis P. Pilavios, Attorney-at-law in Athens, Greece
Arbitrators: Dr. Aliaksandr Danilevich, Attorney-at-law in Minsk, Belarus
Dr. Michael Gerlinger, Director of Legal Affairs of FC Bayern München AG, Germany

The Panel was assisted by Mr Christopher Singer, CAS Counsel.

The Respondent was represented by Mr Tom Eilers, Baumann & Baumann, Ober-Ramstadt, Germany and also attended the hearing in person.

41. Despite having been duly called for such purpose, the Appellant did not appear at the hearing. Before starting the hearing, the CAS Court Office called the Appellant's in-house counsel, Mr Soltan Kozhakmetov, by telephone several times without obtaining any answer from him. In the end, Mr Kozhakmetov informed the CAS by email that he was no longer in charge of the present proceedings and that none of the announced representatives would appear at the hearing *"due to problems with visas"*, without further specifying such visa problems. Pursuant to article R57 (4) of the CAS Code, the Panel decided to proceed with the hearing.

42. At the hearing, the Panel heard the testimony of the Respondent and the statements made by his counsel.

43. At the outset of the hearing the Respondent raised no objection to the composition of the Panel and confirmed that his right to be heard had been respected during it. The Appellant has not expressed any complaint on the way by which proceedings had been conducted.

44. On 10 March 2015, the CAS Court Office informed the Appellant that the Panel, in view of the fact that the Appellant had been duly summoned on 19 January 2015 proceeded *in absentia* of the Appellant, in accordance with Article R57 (4) of the Code and that it would render an award in due course.

45. The Appellant remained silent ever after its above-mentioned correspondence of 27 February 2015.

46. In view of the above, the Panel is of the conviction that the Appellant's right to be heard has been respected despite its unspecified claim that *"visa problems"* were hindering it from

attending the hearing. The CAS Court Office summoned the parties on 19 January 2015 leaving them ample time to take the necessary steps for obtaining a visa. Furthermore, the CAS has never received any request from the Appellant with regard to assistance in obtaining a visa. The Panel believes that if the Appellant had indeed encountered any difficulty with procuring visas for its representative, then, it could and should have informed the CAS Court Office earlier than on the day of the hearing and before the Respondent and members of the Panel themselves had travelled to Lausanne.

47. Regarding the Appellant's request for a stay of execution of the Appealed Decision, the Panel notes that FIFA, constituted under Swiss Private Law and having its seat in Zurich, Switzerland, is a private Swiss association and that, thus, pursuant to the CAS' incessant jurisprudence (see for instance case CAS 2004/A/780) and the Appealed Decision being a decision of a financial nature issued by a private Swiss association, the Appealed Decision was not enforceable – rendering the Appellant's request for a stay moot.

IV. SUBMISSIONS OF THE PARTIES

48. The Appellant's submissions, in essence, may be summarized as follows:

- The Respondent did not consult with anyone from the Football Federation of Kazakhstan prior to his departure from Kazakhstan on 3 June 2011 and ignored the instructions he received as to his visa extension.

- During his absence he provided the Appellant with scanned copies of medical certificates, the authenticity of which was impossible to verify and which did not indicate a diagnosis or the competence of the issuing doctors.

- In addition, the Respondent showed no interest for the U17 National Men's Team during his absence indicating that he was not willing to continue providing his services in accordance with the Agreement.

- The Respondent notified the Appellant of the diagnosis of his medical condition (somatoform disorder) by email on 8 September 2011.

- In accordance with §7(7) of the Agreement, Kazakhstani law is applicable.

- Article 54(1.17) of the Kazakhstani labour code justifies the termination of an employment contract in the event of continuous absence of an employee for more than two months as a result of a temporary disability, excluding maternity leave or diseases included in a list approved by the Government of the Republic of Kazakhstan by Decree No 1171 of 4 December 2007. Somatoform disorder was not included in that list.

- The Respondent did not consult a doctor in Kazakhstan and did not follow the procedure provided for in Kazakhstani legislation, *i.e.* he did not gather reporting documentation or

request payment of disability allowances for the period of his absence or obtain a sick leave by the public health authorities of Kazakhstan.

- The Appellant was therefore entitled to prematurely terminate the Agreement due to the Respondent's fault (unauthorised absence and impossibility to perform his duties under the Agreement).

49. The Respondent's submissions, in essence, may be summarized as follows:

- The Respondent provided the Appellant in time with scanned copies of medical certificates confirming his inability to work for the entire period of his absence (3 June 2011 until mid-October 2011).

- At the hearing the Respondent further maintained that he tried to inform his contact person at the Appellant (Mr Khamitzhanov) of his illness before his departure, but he was never available on the telephone.

- The Respondent contends that the Appellant does not dispute the fact that the Respondent was temporarily not in the condition to perform his duties under the Agreement for medical reasons.

- The Agreement does not provide for an obligation of the Respondent to seek medical treatment in Kazakhstan or to issue certificates by local doctors.

- Pursuant to §5(3) of the Agreement the Respondent is entitled to receive his full remuneration during his absence caused by illness, as such period does not exceed the period of six months provided for in the Agreement.

- The Respondent contends that the Appellant does not dispute the amounts awarded to the Respondent by the Appealed Decision as outstanding remuneration.

- The Respondent extended his visa during his stay in Germany in order to be ready to return to Kazakhstan.

- The Appealed Decision was correct to reject the application of Kazakhstani labour law. In any event, Article 56(1) of the Kazakhstani labour code stipulates that the employer must provide one month's notice in writing to the employee before terminating the contract on the basis of Article 54(1.17).

- The Appellant thus terminated the Agreement without just cause and the Respondent is entitled to compensation in the amount of his salary until January 2013 as stipulated in §4(1) of the Agreement.

V. JURISDICTION

50. The jurisdiction of the CAS to decide on the present case arises out of Article 67 of the FIFA Statutes and Article R47 of the CAS Code. 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".

51. In addition, acceptance of the jurisdiction of the CAS is impliedly accepted by the Appellant by filing an appeal with the CAS and expressly accepted by the Respondent by having signed the order of procedure on 23 February 2015.

52. Therefore, the Panel considers that the CAS is competent to hear the present dispute.

VI. ADMISSIBILITY

53. 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".

54. The grounds of the Appealed Decision were communicated by FIFA to the parties on 24 February 2014 and the Appellant filed his statement of appeal on 13 March 2014. The appeal is therefore admissible.

VII. APPLICABLE LAW

55. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, 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".

56. The Panel notes that the issue of the applicable law in this arbitration is in fact debated between the parties: on the one hand the Appellant contends that Kazakhstani law finds exclusive application as a result of a choice made by the parties and on the other hand the Respondent contends that specific provisions of the Kazakhstani labour law in relation to absence from work are not applicable in the matter at hand as the Agreement did not expressly make reference to such provisions.

57. Article R58 of the Code indicates how the Panel must determine which substantive rules/laws are to be applied to the merits of the dispute. This provision recognizes the pre-eminence of the *"applicable regulations"* to the *"rules of law chosen by the parties"*, which apply only subsidiarily. Article R58 of the Code does not admit any derogation and imposes a hierarchy of norms, which implies for the Panel the obligation to resolve the matter pursuant to the regulations of the relevant *"federation, association or sports-related body"*. Should this body of norms leave a lacuna, it would be filled by *"the rules of law chosen by the parties"*.

58. In solving the question of the applicable law in accordance with Article R58 the Panel has to consider that:

- The parties agreed to include in §7(7) of the Agreement a choice-of–law clause in favour of Kazakhstani law.

- §7(3) of the Agreement further specifies that *"the FIFA and UEFA rules"* are also applicable to the employment relationship between the parties.

- The appeal in the matter at hand is directed against a decision issued by the Single Judge of the FIFA PSC and is based on Article 62(2) of the FIFA Statutes (2010 edition), which mandates the application of *"the various regulations of FIFA and, additionally, Swiss law"*. CAS jurisprudence has consistently interpreted FIFA Statutes to contain a choice of law in favour of Swiss law governing the merits of the disputes.

59. Therefore, in the present case and with respect to the applicable substantive law, subject to the primacy of the applicable FIFA regulations, Swiss law shall apply to the extent warranted. Kazakhstani law is applicable "subsidiarily" only.

60. Considering that the case at hand was submitted to the FIFA DRC on 15 December 2011, the Panel notes that the 2010 edition of the FIFA Regulations on the Status and Transfer of Players is applicable, on the basis of the transitional provision contained in Article 26 of said FIFA Regulations.

VIII. MERITS

61. In light of the facts of the case and the arguments of the parties, the Panel shall firstly examine whether the Appellant terminated the Agreement with just cause or not and, secondly, shall deal with the financial consequences, if any, resulting from the termination of the Agreement.

A. The termination of the Agreement by the Appellant

62. The first issue to be resolved is whether the Appellant terminated the Agreement with just cause or not.

63. According to Article 14 of the FIFA Regulations, *"A contract may be terminated unilaterally by either party without consequences, where there is just cause"*. Nevertheless, the FIFA Regulations do not

define what constitutes "just cause". Therefore, there is a need to look into the relevant provisions of the applicable law and the case law developed by the CAS on this question.

64. In this regard, Article 337(2) of the Swiss Code of Obligations (CO) provides that:

"In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice".

65. As a result, early termination of a contract cannot be based on every breach of obligation by the contract partner. Rather, the breach of contract must have a certain seriousness in order to justify "just cause".

66. Furthermore, there is now a considerable body of CAS case law on this question (see HAAS U., Football Disputes between Players and Clubs before the CAS, in RIGOZZI/BERNASCONI (eds.), *Sports Governance, Football Disputes, Doping and CAS Arbitration*, Berne 2009, p. 232). It has for instance been considered that if the player does not provide the club with his working capacity, this constitutes a serious breach of duty which can justify unilateral termination of the contract, for example if the player does not even report for work (see CAS 2006/A/1082 & 1104, para. 69 et seq.). If, on the other hand, the player cannot provide the club with his working capacity due to illness or injury, this does not constitute a breach of duty and there is no "just cause" for unilateral termination of the contract (see HAAS U., *op. cit.*, p. 232 and authorities cited in footnote 93).

67. In addition, in application of Article 8 of the Swiss Civil Code, concerning the burden of proof, it has been considered that it is up to the party invoking a "just cause" to establish the existence of the facts founding this "just cause" (see IBARROLA J., La jurisprudence du TAS en matière de football – Questions de procédure et de droit de fond, in BERNASCONI/RIGOZZI (eds.), *The Proceedings before the Court of Arbitration for Sports*, Berne 2007, p. 252).

68. In the present case, the Panel is clearly of the opinion that the Appellant did not establish the existence of a just cause. The Panel does not consider that the Appellant has produced convincing evidence to that regard.

69. In particular, the Panel rejects the Appellant's argument that the medical certificates provided by the Respondent were not valid in Kazakhstan, noting that there is no element in the file which corroborates the Appellant's submission.

70. Moreover, the Appellant submits that it was entitled to prematurely terminate the Agreement on the basis of Article 54(1.17) of the Kazakhstani labour code because somatoform disorder was not included in an exhaustive list of medical conditions, which, in accordance with Decree No 1171 of 4 December 2007 of the Government of Kazakhstan, may justify an employee's absence from work due to temporary disability for more than two months. The Panel, however, finds that the parties did not expressly agree to include such list in the conditions of the Agreement and the Appellant's argument is therefore rejected.

71. Further than that, it is important to highlight that the reasons for termination provided for under §2(2) of the Agreement do not include the Respondent's temporary inability to work due to illness, whereas at the same time §5(3) of the Agreement provides specifically that:

"In the event of an inability to work due to an accident or illness as well as in the event of the Coach's death, the FFK commits to continue to pay the salary of the Coach for a period of six months".

72. It is obvious that the latter provision makes no reference whatsoever to a right of the Appellant to terminate the Agreement on the basis of a Coach's inability (temporary or not) to work due to an accident or illness.

73. Lastly, the Panel notes that the Respondent has been regularly providing the Appellant with medical certificates confirming his inability to work and that he renewed his visa while in Germany, showing his intention to return to Kazakhstan as soon as the condition of his health would allow it.

74. Consequently, the Panel is of the opinion that the Appellant failed to evidence the existence of a just cause and considers this to be sufficient ground to reject the appeal.

B. The consequences of the termination of the Agreement without just cause

75. The Panel has no hesitation to confirm the Appealed Decision on this point, which ruled that the Coach was entitled to claim payment of outstanding remuneration in the amount of EUR 36,011 as well as compensation for breach of contract in the amount of EUR 128,000.

76. With respect to the payment of the Coach's outstanding remuneration, the Panel notes that §5(3) of the Agreement specifically provides that an absence of the Coach due to an accident or illness cannot be considered reason to cease the payment of his remuneration, at least during a period of six months.

77. As far as the matter of the Coach's compensation is concerned, according to Art. 17 of the FIFA Regulations, a player has to be compensated for the damages caused by the unlawful termination of the employment contract. Article 97(1) of the CO also stipulates that:

"An obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damage, unless he can prove that he was not at fault".

78. Moreover, according to CAS jurisprudence, *"in principle the harmed party should be restored to the position in which the same party would have been had the contract been properly fulfilled"* (CAS 2005/A/801, para 66; CAS 2006/A/1061, para. 15; and CAS 2006/A/1062, para. 22).

79. The Panel further notes that in the event of an employee's termination without just cause, Article 337c(1) of the CO provides that:

"Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration".

80. At this stage, the Panel confirms that no deduction is to be operated, as the Respondent did not sign any other employment agreement with another club or federation until the end of his fixed term contract with the Appellant, that is to say January 2013.

81. Lastly, the Panel notes that it remained undisputed throughout the proceedings before the FIFA PSC Single Judge as well as in the present appeal arbitration proceedings that the Appellant did not pay the amounts of outstanding remuneration requested by the Coach.

82. Taking into account the abovementioned provisions of the Agreement, the FIFA regulations and of the Swiss Code of Obligations, as well as the relevant CAS jurisprudence, the Panel considers that under Swiss Law the Respondent is entitled to payment of outstanding remuneration and to the entire amount he could have expected under the Agreement, as compensation for its early termination, as follows:

a) EUR 32,000 as outstanding remuneration (salary for the months June, July, August and September 2011);

b) EUR 3,300 as compensation for health insurance costs for the months June, July, August and September 2011;

c) EUR 711 as compensation for the Respondent's flight ticket to Germany and the costs of his visa extension;

d) EUR 128,000 as compensation corresponding to the Respondent's salary between October 2011 and January 2013 (16 months x EUR 8,000).

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the Football Federation of Kazakhstan on 13 March 2014 against the decision issued on 28 August 2013 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.

2. The decision issued on 28 August 2013 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

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