Arbitration CAS 2014/A/3597 AC Omonia Nicosia v. Iago Bouzon Amoeda, award of 22 August 2014

Panel: Mr Stuart McInnes (United Kingdom), President; Mr Pentelis Dedes (Greece); Mr Rui Botica Santos (Portugal)

Football
Termination of employment contract
Scope of FIFA DRC jurisdiction
Burden of proof in case of termination of employment contract by mutual agreement or with just cause
Mitigation of damage

1. **The FIFA DRC is competent to determine matters other than employment related disputes of an international dimension provided however that those matters are expressly included in an employment contract with international dimension. A party contending jurisdiction of the FIFA DRC based on the allegation that another judicial body has jurisdiction to decide the respective case has to provide evidence of the other judicial body's jurisdiction.**

2. **A party alleging to have terminated an employment contract by mutual agreement with the other party of the employment contract has to provide respective evidence, even more so if the wording of the termination notice unequivocally suggests unilateral termination. The same applies to a party alleging to have terminated an employment contract with just cause.**

3. **A party terminating an employment contract without just cause cannot argue that the other party to the employment contract should have sought to obtain a more remunerative alternative employment contract to further mitigate its loss, following the termination of the contract of employment without just cause. The obligation to mitigate derives from equity and it is for the competent judicial body to assess the appropriate extent of that obligation having regard to particular circumstances of the case.**

INTRODUCTION

This appeal is brought by AC Omonia Nicosia (hereinafter referred to as "the Appellant" or "AC Omonia"), against a decision of the FIFA Dispute Resolution Chamber ("the FIFA DRC") dated 17 January 2014 (hereinafter referred to as "the Appealed Decision"), concerning the alleged breach of

a contract of employment concluded between AC Omonia and Iago Bouzon Amoedo (hereinafter referred to as "the Respondent" or "Mr Bouzon").

I. THE PARTIES

1. AC Omonia Nicosia is a Cypriot football club, affiliated with the Cyprus Football Association, which in turn is affiliated with Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

2. Iago Bouzon Amoedo is a professional football player of Spanish nationality, born on 16 March 1983, currently resident in Córdoba, Spain, who was contracted to play as a professional footballer for the Appellant under a contract of employment dated 1 July 2010.

II. FACTUAL BACKGROUND

3. The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the written submissions of the Parties, the exhibits filed, and the Appealed Decision. Additional facts may also be set out, where relevant, in the legal considerations of the present award.

4. On 1 July 2010, the Appellant and Respondent entered into a fixed term employment contract, valid from that date until 31 May 2013. Under the terms of the contract, the Appellant agreed to pay the Respondent a total net amount of EUR 600'000, payable in 35 monthly instalments of EUR 17'143.

5. On 2 July 2010, the Appellant and Respondent subsequently entered into an Image Rights Contract, under which, in consideration of the Respondent assigning to the Appellant all his image rights during his employment with the Appellant for the sum of EUR 1, the Appellant agreed to pay to the Respondent a further sum of EUR 700 per month as accommodation expenses, two two-way return air-tickets for his country of origin for the Respondent and his immediate family and the free use of a saloon car for the duration of his employment with the Appellant.

6. Clause 11 of the Image Rights Contract confirms that *"This agreement is part of the employment agreement between the parties dated 01/07/2010"*.

7. By letter dated 4 August 2012, the Appellant terminated, with immediate effect, the Respondent's employment contract, claiming that the contract was *"terminated for just cause and for reasons relating to the conduct and/or behaviour of the player"*.

8. The letter stated that:

> *"… The player behaved in an insulting and degrading manner towards the Club and its officials, showed disrespect and generally behaviour that cannot be tolerated by an employee of the Club and professional football player. More specifically even though the player was offered full settlement of his past salaries he unreasonably*

refused to receive them demanding termination of his contract and payment of an excessive amount of money as compensation. In addition he has conspired with his agents forcing the club to accept payment of interest on alleged debt knowing that this was illegal and had no contractual basis. Even though the Club officials acted in good faith trying to resolve the matter amicably, the player and/or his agents behaved in an insulting, unprofessional and unethical manner. The Club reserves its right to refer in detail to the reasons of termination in the appropriate forum".

9. The letter also recorded that :

"… the club has paid yesterday to the Cyprus Football Association all the salaries owed (sic) to the player up to 30/06/12 which equal to €143,964. This sum includes the money owed (sic) following the agreement 30/03/12 [i.e. payment of cheque numbered 97640770 (Iago Bouzon) and 97640769 (Sidefloor Ltd)], payment for the salary of April 2012 (€171430) and €11,621 as prim and bonuses for 2012. The player will also be paid the salaries for May, June, and July 2012 i.e. €17,143 per month following the provisions as to grace period of the above contract of employment".

10. On 14 August 2012, the Cyprus Football Association made payment by bank transfer of the sum of EUR 143'964 to the Respondent.

11. On the same date, the Respondent signed an employment contract with the Spanish club Xerez C.D., valid from that date until 30 June 2014, under which the club was to pay the Respondent EUR 110'000 gross for the 2012/2013 season payable in 11 monthly instalments of EUR 10'000.

12. On 8 January 2013, the Respondent filed a claim before the FIFA Dispute Resolution Chamber, ("the DRC") alleging that the Appellant had terminated his contract of employment dated 1 July 2010 without just cause on 4 August 2012 and sought compensation for breach of contract in the sum of EUR 178'430, based on the remaining salary payable under such contract, for the period 1 August 2012 until 31 May 2013 and accommodation expenses for the period 1 August 2012 until 31 May 2013. The Respondent also claimed unpaid salary and accommodation expenses for the months May, June and July 2012 in the sum of EUR 53'529.

13. On 6 May 2014, the Parties were notified by FIFA, the findings of the decision passed by the FIFA DRC on 17 January 2014 as follows:

The claim of the Claimant, Mr Iago Bouzon Moedo, is partially accepted.

1. *The Respondent Omonia Nicosia Athletic, has to pay to the Claimant outstanding remuneration in the amount of EUR 53,529,* ***within 30 days*** *as from the date of notification of this decision.*

2. *The Respondent Omonia Nicosia Athletic, has to pay to the Claimant compensation for breach of contract in the amount of EUR 78,430,* ***within 30 days*** *as from the date of notification of this decision.*

3. *In the event that the aforementioned sums are not paid within the stated time limits, interest at the rate of 5% p.a. will fall due as of the date of expiry of the stipulated time limits and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for its consideration and a formal decision.*

4. *Any further claim lodged by the Claimant is rejected.*

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

III. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

14. On 14 May 2014, the Appellant filed an appeal against the decision of the FIFA DRC dated 17 January 2014 with the CAS and nominated Mr Pentelis Dedes, Attorney–at-law in Athens, Greece, as arbitrator.

15. The Statement of Appeal contained the following requests:

1. *We appeal to your court in order to ask you to quash and annul the decision of the Dispute Resolution Chamber of FIFA regarding the case with Reference 13-00396, which is totally false.*

2. *The respective decision orders our client's Club falsely to pay to the Respondent the amount of €53,529 as outstanding remuneration and €78,430 as compensation for the breach of contract plus interest at 5% as of expiry of the fixed time limit…….*

3. *[…]*

4. *We are asking your Court to relief us from the pronouncement of the decision above, which is wrong and not competent with the Regulations of FIFA and the provisions of the Law as well as regarding with the provisions of the contracts between the parties.*

5. *Moreover, we are asking CAS to stay the proceedings against the Club because we think that the respondent would not be in a position to guarantee remittance of payment in case the Club succeeds in the present appeal.*

6. *We are asking you to provide this order for the following reasons:*

   a) *The decision is obviously false and against the Rules and Regulations of FIFA concerning the status and transfer of the professional football players, as well as to the provisions of the contract of employment, the agreements and the Internal Regulations.*

   b) *The decision wrongfully decided that the DRC was competent to deal with the image rights agreement.*

   c) *The decision wrongfully decided that the image rights agreement was in fact an additional agreement to the employment contract.*

   d) *The decision falsely decided that the termination of the Club was without just cause.*

e) The decision falsely decided that the Respondent did not prove that the amount of €143,964 have been paid for the benefit of the applicant player to the Cyprus Football Association.

f) The decision mistakenly took into consideration that the new employment of the Respondent was suitable employment, and decided to reduce only the amount of €110,000 gross and granted consequently the balance as compensation for the Respondent.

16. By letter dated 16 May 2014, the CAS Court Office, in addition to giving directions to the Appellant for the future conduct of the appeal, informed the Appellant that according to CAS Jurisprudence *"a decision of a financial nature issued by a private Swiss association is not enforceable while under appeal. It may not, therefore, be stayed and an application in that respect - being moot - would in principle be dismissed"*.

17. By letter dated 19 May 2014, the Appellant withdrew the application for a stay of execution of the Appealed Decision of FIFA.

18. By letter dated 23 May 2014, the Respondent nominated Mr Rui Botica Santos, Attorney-at-law in Lisbon, Portugal, as arbitrator.

19. On 3 June 2014, the Appellant filed its Appeal Brief.

20. On 16 June 2014, the CAS Court Office notified FIFA of the appeal filed by the Appellant and confirmed that the appeal had not been directed at FIFA but invited FIFA to indicate within 10 days whether it intended to participate in the action pursuant to Articles R54 and R41.3 of the Code of Sports-related Arbitration ("the Code").

21. On 20 June 2014, the Respondent filed its Answer.

22. By letter dated 23 June 2014, the Appellant indicated its preference that the Panel issue an award based solely on the Parties' written submissions.

23. On 24 June 2014, the CAS Court Office notified the Parties of the constitution of the Panel as follows:

President:	Mr Stuart McInnes, Solicitor in London England
Arbitrators:	Mr Pantelis Dedes, attorney–at-law in Athens, Greece
	Mr Rui Botica Santos, attorney-at-law in Lisbon Portugal

24. By letter dated 25 June 2014, the Respondent indicated his preference that the Panel issue an award based solely on the Parties' written submissions.

25. By letter dated 27 June 2014, FIFA informed the CAS Court Office that it renounced its right to request possible intervention in the proceedings pursuant to Articles R54 and R41.3 of the Code.

26. By letter dated 7 July 2014, the CAS Court Office notified the Parties that Panel had decided to issue an award based solely on the Parties' written submissions pursuant to Article R57 of the Code.

27. On 17 July 2014, the Respondent signed the Order of Procedure.

28. On 21 July 2014, the Appellant signed the Order of Procedure.

IV. POSITION OF THE PARTIES

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

IV.1 AC OMONIA NICOSIA

30. The Appellant's position on the merits is summarised in its Appeal Brief and is the following:

- The FIFA DRC was competent only to determine any matter regarding employment related disputes of an international dimension.

- The FIFA DRC falsely and wrongly decided that it had jurisdiction to try the matter when the provision of the contracts stipulate the jurisdiction of the Cyprus authorities and the Dispute Resolution Chamber of the Cyprus Football Association.

- The FIFA DRC falsely and erroneously decided to award compensation to the Respondent based on the Image Rights Contract notwithstanding that the Image Rights Contract had no bearing on the Respondent's employment by the Appellant and that the FIFA DRC does not have competence to determine claims deriving from an Image Rights Contract under Articles 22 and 24 of the FIFA Regulations on the Status and Transfer of Players.

- That the Appellant and Respondent mutually agreed to terminate their employment relationship in July 2012 and entered negotiations with the Respondent's agents to find a solution on the payment of salaries and compensation.

- That the Respondent and his agents applied unfair pressure on the Appellant to finalise outstanding claims for unpaid salary and compensation due to the Appellant, other players and the agent at a time when they were aware that the Appellant had to finalise its submission to UEFA for licensing in June 2012.

- That on or about 2 August 2012, the Appellant deposited a cheque in the sum of EUR 143'964 with the Cyprus Football Association in respect of monies due to the Respondent which was later transferred to the Respondent.

- That the Appellant terminated the Respondent's contract of employment with just cause due to the Respondent's unprofessional conduct and/or unethical and/or insulting behaviour.

- That the Respondent failed to mitigate his losses in failing to find alternative employment at a higher rate of remuneration and that the DRC erred in finding that the Respondent's mitigation of loss should be limited to EUR 100'000.

IV.2 IAGO BOUZON AMOEDO

31. The Respondent's position can be summarised as follows:

- Articles 22 and 24 of the FIFA Regulations on the Status and Transfer of Players accord competence to the FIFA DRC to determine disputes related to the maintenance of contractual stability between professionals and clubs which are of an international dimension.

- That the dispute between the Parties is a dispute that relates to the early termination of the Respondent's Contract of Employment.

- The Images Rights Contract dated 2 July 2010 contains elements which related properly to an employment contract and that the FIFA DRC accordingly has competence to include those elements in its determination of losses.

- That there is no evidence adduced by the Appellant that the Contract of Employment was terminated by mutual agreement but instead, that the Appellant's letter dated 4 August 2012 confirmed that it unilaterally terminated the contract with just cause for reasons related to the conduct and/or behaviour of the Respondent.

- That the reasons alleged by the Appellant justifying unilateral termination with just cause are invalid and unsubstantiated by the Appellant in evidence.

- That the deposit of EUR 143'964 made by the Appellant with the Cyprus Football Association was in respect of outstanding salaries due to the Respondent before May 2012 and were not the subject the Respondent's claim before the FIFA DRC.

- That the Appellant terminated the Respondent's Contract of Employment without just cause and that the FIFA DRC is entitled to calculate the appropriate level of compensation having regard to Article 17 of the FIFA Regulations on the Status and Transfer of Players.

- That the Respondent took all necessary steps to find alternative employment with Xerez CD and that it is not for the Panel to determine whether the Respondent should have sought a position with another club at a higher level of remuneration.

V. THE PARTIES' REQUESTS FOR RELIEF

32. The Appellant's requests for relief are the following:

1. *That the CAS states that the FIFA DRC should have consider (sic) the decision as false and should dismiss it.*

2. *That the CAS quashes any decision against the Club for any amount against the Club.*

3. *That the CAS then accepts and the club's appeal and quashes the FIFA DRC decision.*

4. *That the CAS grants to the Appellant, ex aequo et bono, an amount in order to contribute to his legal costs and defence.*

33. The Respondent's requests for relief are the following:

1. *Confirm the decision taken by the DRC on 17th January 2014:*

   1.1. *Confirm FIFA (DRC) Jurisdiction*

   1.2. *Confirm the termination without just cause*

   1.3. *Confirm the outstanding remuneration (53.529€)*

   1.4. *Confirm the compensation for breach of contract (78.430€)*

2. *Reject all claims submitted by the Appellant.*

3. *To condemn the Appellant to pay 5% annual interest on the amount awarded by Court of Arbitration for Sport from the date of the decision rendered by Disputes Resolution Chamber (this means 17 th January 2014).*

4. *To request the Appellant to pay all the legal costs (including expenses for the defense). In addition, to order the Appellant to pay all administration costs and Panel fees.*

VI. JURISDICTION OF THE CAS

34. Pursuant to Article R47 of the Code:

> *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 his appeal, in accordance with the statutes or regulations of the said sports-related body.*

35. The jurisdiction of the CAS to hear this dispute derives from Articles 66 and 67 of the FIFA Statutes and was confirmed by the Parties when signing the Order of Procedure. The Jurisdiction of the CAS in the present case was not disputed by the Parties.

36. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a *de novo* decision superseding, partially or entirely the Appealed Decision.

VII. ADMISSIBILITY

37. The decision appealed against was notified to the Parties on 6 May 2014. The Statement of Appeal was filed on 12 May 2014, i.e. within the time-limit prescribed by Articles 67 of the FIFA Statutes and R49 of the Code for Sports-related Arbitration (hereinafter referred to as the "CAS Code").

38. Consequently, the appeal shall be deemed admissible.

VIII. APPLICABLE LAW

39. Article R58 of the Code provides that 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.

40. In its Appeal Brief, the Appellant did not address the issue of the applicable law. Likewise, in his Answer the Respondent did not address the issue of the applicable law.

41. Article 66 paragraph 2 of the FIFA Statutes provides that the CAS shall primarily apply the various Regulations of FIFA, and additionally Swiss law. The Panel therefore decides that the FIFA Regulations (and Swiss Law, subsidiarily) apply to this dispute. As the present matter was submitted to FIFA on 8 January 2013, the 2010 version of the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the "RSTP") is applicable. Those Regulations shall thus apply primarily, together with the other applicable rules of FIFA. Swiss law would be applied complementarily.

IX. MERITS

42. The following sections refer to the substance of the Parties' allegations and arguments. In its discussion of the case and its findings on the merits, the Panel has examined and taken into account all of the Parties' allegations, arguments and evidence on record, whether or not expressly referred to in what follows.

IX.1 THE COMPETENCE OF THE FIFA DRC

43. The Panel notes that the Appellant has not objected the competence of the FIFA DRC to handle the termination of the Player's employment contract dated 1 July 2010. However, the Panel also notes that the Appellant contested the competence of the FIFA DRC to handle the Image Rights Contract dated 2 July 2010.

44. The Panel finds that having regard to the nature of the provisions of the Images Rights Contract dated 2 July 2010 and in particular to the specific wording of Article 11 which states that *"This agreement is part of the employment agreement between the Parties dated 01/07/2010"*, the FIFA DRC were correct to consider such Image Rights Contract as a part of the Respondent's employment contract and include the Appellant's financial obligations in that agreement in determining issues of compensation.

45. Furthermore, the Panel notes that the Appellant submitted in its Appeal Brief that *"the contracts provided jurisdiction to the Cyprus authorities and the DRC of the Cyprus Football Association"*. The Appellant did not exhibit the contracts to either its Statement of Appeal or Appeal Brief and the Respondent exhibited only the Image Rights Contract dated 2 July 2010, which makes no reference to dispute resolution. Thus in the absence of evidence to the contrary and taking into account that the Image Right Contract was in reality part of the Respondent's employment contract, the Panel finds that, in accordance with Article 22 b of the FIFA Regulations on the Status and Transfer of Players, the FIFA DRC was the appropriate forum for determination of the dispute involving an international dimension.

IX.2 TERMINATION OF THE CONTRACT OF EMPLOYMENT DATED 1 JULY 2010

46. The Appellant asserts that the contract of employment was terminated by mutual agreement between the Parties. No independent evidence of such mutual agreement is adduced to the Panel by the Appellant. The only document submitted to the Panel by the Appellant in support of this contention is the Appellant's letter dated 4 August 2012, which provides: *"The player is an employee of the Athletic Club Omonia Nicosia by virtue of an employment contract dated 01/07/2010 which is hereby terminated for just cause and for reasons relating to the conduct and/or behaviour of the player. For the avoidance of any doubt the contract of employment is terminated with immediate effect"*. The Panel finds that the wording of the letter is unequivocal and supports the finding of the FIFA DRC that the contract of employment was not terminated by mutual agreement of the Parties but was unilaterally terminated by the Appellant.

47. In submissions and in the letter dated 4 August 2010, the Appellant asserts that the contract of employment was terminated with just cause for reasons related to the conduct and/or behaviour of the Respondent and other parties associated with him. The Appellant does not substantiate that allegation or adduces evidence to support it. Likewise allegations of illegality, bad faith or conspiracy made by the Appellant are not supported by evidence and the Panel finds that the Appellant has failed to discharge the burden of proof necessary to establish conduct of such severity that would justify varying or setting aside the finding of the FIFA DRC that the contract of employment was terminated by the Appellant without just cause.

IX.3 QUANTUM OF DAMAGES

48. In the absence of any liquidated damages provision in the contract of employment, the Panel upholds the approach adopted by the FIFA DRC in calculating the quantum of damages payable by the Appellant to the Respondent and as compensation for the breach of contract by reference to Article 17 of the FIFA Regulations on the Status and Transfer of Players and in accordance with the constant practice of the FIFA DRC.

49. Specifically, the Panel notes that in its letter dated 4 August 2012, the Appellant admitted that salaries due to the Respondent for the months May, June and July 2012 remained unpaid and that for the same period the Appellant had failed to discharge the agreed remittance for accommodation under the terms of the Image Rights Contract. The Panel supports the importance of the general legal principle of *"pacta sunt servanda"* and agrees that the Appellant should discharge all financial obligations outstanding under the terms of the contract of employment and Image Rights Contract, at the time of the breach, and agrees with the award of damages in this respect namely the sum of EUR 53'529 being three months' salary of EUR 17'143 plus three months' accommodation allowance of EUR 700.

50. The Panel also supports the FIFA DRC method of computation of the award of compensation. Specifically, the Panel believes that the appropriate measure of loss equating to the Respondent is the benefit payable under the terms of the contract of employment and the Image Rights Contract from the date of termination on 4 August 2012 until expiration of the respective contract terms on 31 May 2013. This represented a period of 10 months and is quantified in the sum of EUR 178'430. The Panel also supports the practice adopted by the FIFA DRC in obliging the Respondent to mitigate his loss by giving credit for remuneration under any new contract of employment in calculating the compensation for breach of contract. This mitigation was assessed as EUR 100'000 and the Panel considers the award of compensation in the sum of EUR 78'430 to be reasonable and justified.

51. The Panel expressly rejects, and considers outrageous, the submission made by the Appellant that the Respondent should have sought to obtain a more remunerative alternative employment contract to further mitigate his loss, following the termination of the contract of employment without just cause. The obligation to mitigate derives from equity and it is for the determining forum to assess the appropriate measure of that obligation having regard to particular circumstances of the case. The Panel observes that the Appellant has benefitted from the Respondent obtaining alternative employment and has no grounds to challenge the value of that mitigation.

52. Finally the Panel rejects the submission made by the Appellant that the deposit of EUR 143'964 made with the Cyprus Football Association should be taken into account in assessing the damages payable to the Respondent. In its letter of 4 August 2012, the Appellant expressly states that *"this sum includes the money owed (sic) following the agreement 30/03/2012 [i.e. payment of cheques numbered 97640770 (Iago Bouzon) and 97640769 (Sideflor Ltd)]. Payment for the salary of April 2012 (€17,143) and €11,621 as prim and bonuses for 2012. The Player will also be paid the salaries for May, June and July 2012 i.e. €17,143 per month following the provisions as to grace period of the above contract of employment"*. The Panel views this payment as the discharge of prior obligations arising before

the breach of contract which cannot be taken into account in the assessment of damages for the subsequent breach of contract.

X. CONCLUSION

53. Having taken into consideration all the facts, evidence and legal arguments, even if not directly referred to in the present award, made by the Parties in their written submissions, the Panel considers that the Appellant has failed to prove that the contract of employment was terminated by mutual agreement of the Parties and that the unilateral termination of the contract was made with just case.

54. The Panel concludes that the Respondent was entitled to be compensated in damages for the Appellant's unilateral breach of contract without just cause and that the award of damages made by the FIFA DRC was fair and reasonable and proportionate to the loss sustained by the Respondent. Accordingly the Appellant's appeal shall be dismissed and the decision of the FIFA DRC dated 17 January 2014 shall be upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by AC Omonia Nicosia on 12 May 2014 against the decision issued by the FIFA Dispute Resolution Chamber on 17 January 2014 is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 17 January 2014 is confirmed.

(…)

5. All other claims are dismissed.