Arbitration CAS 2013/A/3109 FC Steaua Bucuresti v. Rafal Grzelak, award of 24 October 2013

Panel: Mr Vít Horáček (Czech Republic), Sole Arbitrator

Football
Contractual dispute between a club and a player
Failure to timely appeal a disciplinary sanction taken by the club
Use of the disciplinary sanction as "set-off"

1. **If a player has failed to timely appeal a disciplinary sanction taken by his club, the validity of such sanction cannot be assessed by a CAS panel in subsequent contractual proceedings between these two parties. The sanction is therefore presumed final and enforceable irrespective of whether it was just or proportionate.**

2. **The amount due by a player under a disciplinary sanction can be set-off against the amount due to this player under an employment contract if the following principles and conditions are met: (i) reciprocity of claims; (ii) similarity of the performances; (iii) due setting-off counterclaim; (iv) opportunity to claim the setting-off counterclaim in court; (v) absence of reasons of prohibition; and (vi) declaration or expression of set-off.**

I. PARTIES

1. SC Fotbal Club Steaua Bucuresti SA is a professional football club with its seat in Bucharest, Romania ("Appellant" or "FC Steaua Bucuresti"). It is registered with the Romanian Football Federation ("RFF").

2. Mr. Rafal Grzelak ("Respondent" or "Mr. Grzelak") is a professional football player from Łódź, Poland.

II. FACTUAL BACKGROUND

3. On July 1, 2009, FC Steaua Bucuresti and Mr. Grzelak executed an employment contract valid as from 1 July 2009 until 30 June 2010 (the "Contract"). The Contract included a "Professional Appendix," which entitled Mr. Grzelak to receive, among other things, an extra payment of EUR 500 per month for accommodation, automobile, and personal travel tickets. Moreover, the Contract included a "Financial Appendix," which provided for Mr. Grzelak's signing bonus of EUR 40,000, monthly remuneration for performance of the Contract in an amount of EUR 10,000, and various bonus monies based on team performance.

4. As of September 2009, however, FC Steaua Bucuresti stopped paying Mr. Grzelak under the Contract. So on 16 December 2009, Mr. Grzelak contacted FC Steaua Bucuresti requesting payment in the amount of EUR 32,500, which related to his salary as of September 2009 until November 2009, as well as 5 months accommodation allowance. FC Steaua Bucuresti did not respond.

5. Because FC Steaua Bucuresti did not answer such a claim, on 14 January 2010 Mr. Grzelak filed a claim against FC Steaua Bucuresti before the Dispute Resolution Chamber of FIFA ("FIFA DRC") for breach of the Contract.

6. On 17 May 2010, Mr. Grzelak sent a final notice of default to FC Steaua Bucuresti asking it to pay the amount of EUR 95,500, which related to his salary as of September 2009 until May 2010, as well as 11 months accommodation allowance (this final notice of default was later amended by Mr. Grzelak, noting that FC Steaua Bucuresti had actually only failed to pay nine months remuneration).

7. Sometime during the parties' contractual dispute, FC Steaua Bucuresti appointed a new coach, and Mr. Grzelak received no possibility to play with the team. FC Steaua Bucuresti then attempted to terminate the Contract upon mutual consent of the Parties.

8. During this time, FC Steaua Bucuresti, by and through the decision of its Administration Board No. 1 dated 3 February 2010, imposed upon Mr. Grzelak a financial sanction for alleged disciplinary offences equalling to 25% of his contractual remuneration, *i.e.* EUR 30,000 in total ("Disciplinary Sanction"). Mr. Grzelak asserts that he was not informed about said disciplinary proceedings, the Disciplinary Sanction, or his right to appeal the sanction imposed upon him.

9. Mr. Grzelak further asserts that such a sanction is disproportionate to the alleged offences, and that a fine of 25% of all contractual remuneration during a season is not provided for in the FIFA Disciplinary Code.

10. Throughout the course of the FIFA DRC proceedings, FC Steaua Bucuresti admitted that it owed Mr. Grzelak a total amount of EUR 95,500, but that only an amount of EUR 65,500 was outstanding because of the EUR 30,000 deduction resulting from the Adminstrative Board sanction.

11. On 25 October 2013, the FIFA DRC issued its decision requiring FC Bucuresti to pay Mr. Grzelak the amount of EUR 95,000 (the "Decision") within 30 days of the issuance of the Decision to the parties.

12. This Decision was appealed before CAS by FC Steaua Bucuresti.

13. In its Appeal Brief, FC Steaua Bucuresti asserted that it had already paid Mr. Grzelak the amount of EUR 65,000 on 26 January 2011, but disputed that it owed the remaining EUR 30,000 awarded to Mr. Grzelak under the Decision.

14. In his Answer, Mr. Grzelak insists on the payment of the total amount of EUR 95,500, plus interest as awarded in the Decision, and asserts that the Appellant's claim for a EUR 30,000 set-off for the Disciplinary Sanction is unwarranted, not provided for under the FIFA Disciplinary Code, and disproportionate to the alleged offense.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 13 March 2013, FC Steaua Bucuresti filed its Statement of Appeal against Mr. Grzelak and FIFA at the Court of Arbitration for Sport (the "CAS") against the Decision, pursuant to Article R48 of the Code of Sports-related Arbitration ("the Code"). In its Statement of Appeal, the Appellant proposed that the arbitration be handled by a Sole Arbitrator.

16. On 18 March 2013, FIFA wrote to the CAS Court Office requesting that it be excluded as the Second Respondent in the appeal as the arbitration relates only to a contractual dispute between FC Steaua Bucuresti and Mr. Grzelak.

17. On 19 March 2013, the Appellant wrote to the CAS Court Office and confirmed its agreement to withdraw its claims against FIFA only. Mr. Grzelak would remain as the only Respondent in this appeal.

18. On 31 March 2013, FC Steaua Bucuresti filed its Appeal Brief, requesting that CAS set aside the Decision.

19. On 24 April 2013, the Respondent filed his Answer to the appeal seeking to uphold the Decision.

20. On 25 April 2013, the Respondent informed the CAS Court Office that he agreed to submit this appeal to a Sole Arbitrator on submission of briefs only, without a hearing.

21. On 3 May 2013, the Appellant informed the CAS Court Office that it preferred to leave the decision on whether a hearing was appropriate to the Sole Arbitrator, pursuant to Article R57 of the Code.

22. On 7 May 2013, the Parties were informed that pursuant to Article R54 of the Code, the President of the CAS Appeals Arbitration Division appointed Mr. Vít Horáček as a Sole Arbitrator for this appeal.

23. On 3 June 2013, upon request of the Sole Arbitrator pursuant to Article R57 of the Code, FIFA provided the CAS Court Office with a copy of its file related to the present matter. Such file was duly sent to the Parties the next day. On 24 June 2013, the parties were informed that the Sole Arbitrator, having considered the entire file, deemed it unnecessary to have an oral hearing, pursuant to Article R57 of the Code, and to render an award on the basis of the written submissions.

24. On 26 June 2013, the Order of Procedure was signed by the representative for the Respondent. On 28 June 2013, the Order of Procedure was signed by the representative for the Appellant. Both parties expressly recognized that their right to be heard had been respected.

25. On 8 July 2013, the Sole Arbitrator, in accordance with Articles R29, R57, and R44.3 of the Code, issued specific questions and document requests from the parties.

26. On 15 July 2013, the Appellant issued its response to the Sole Arbitrator's requests. The Respondent, however, failed to provide any response.

IV. SUBMISSIONS OF THE PARTIES

A. Appellant's Submissions

27. FC Steaua Bucuresti's request for relief is as follows:

- *To accept the appeal formulated by FC Steaua Bucuresti against the player Grzelak Rafal;*
- *To set aside the decision issued by DRC on 25.10.2012;*
- *To reject the player Grzelak request regarding the FC Steaua Bucuresti obligation to pay the amount of 95.500 euro as unfounded;*
- *To ascertain the de jure compensation between the debt of EUR 30.000 that FC Steaua Bucuresti owes to the player Grzelak.;*
- *To order the player Grazelak to pay his arbitral costs as well as the attorney fees generated by the present dispute.*

28. FC Bucuresti's submissions, in essence, may be summarized as follows:

29. On 26 January 2011, the Appellant paid the Respondent EUR 65,500. However, the Respondent fails to acknowledge such payment. In this regard, the Appellant submits proof of payment, and asks the Sole Arbitrator to acknowledge payment in this Award.

30. As for the remaining EUR 30,000, the Appellant alleges that no money is outstanding because the Sole Arbitrator should credit the Appellant with the EUR 30,000 owed by the Respondent to the Appellant resulting from the Disciplinary Sanction applied by the club's Administrative Board.

31. According to the Appellant, Articles 1143-1145 of the Romanian Civil Code provide, in essence, that when two debts exists simultaneously between two parties, the mutual debts pay each other off, no matter their source. In other words, there should be a complete set-off on the monies owed by each respective party, and no further money is outstanding.

B. Respondent's Submissions

32. Mr. Grzelak's request for relief is as follows:

- *Reject the appeal against the player Grzelak in the entirety;*
- *Uphold the decision issued by FIFA DRC on 25 Octber 2012 in the entirety;*
- *Order the Appellant to bear all the costs of the appeal procedure including the Respondent's legal fees.*

33. Mr. Grzelak's submissions, in essence, may be summarized as follows:

34. The Respondent disputes that the EUR 30,000 imposed by the Administrative Board is valid as such penalty is not mentioned in, or prescribed within, the FIFA Disciplinary Code. As such, it is an impermissible penalty.

35. The Respondent also disputes that it did not contest the decisions of the jurisdictional bodies of the Romanian Football Association (RFA) at CAS. The Respondent states that it had no clear information from the RFA about its appellate rights against their decision.

36. The Respondent also argues that the Appellant's claim for EUR 30,000 for alleged disciplinary actions was simply an attempt to avoid the money owed to Mr. Grzelak, and such claim was only filed after Mr. Grzelak filed his claim before the FIF Dispute Resolution Chamber. Moreover, such a financial penalty is clearly disproportionate to the alleged infringement.

37. Finally, the Respondent disputes that there is any mutual debt owed between the parties, as the only debt between the parties is the debt owed by the Respondent to Mr. Grzelak in the amount of EUR 95,000 (as award in the Decision).

V. ADMISSIBILITY

38. Article R49 of Code of Sports-related Arbitration (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".

39. According to Article 67, para 1 of the FIFA Statutes, the Decision may be appealed against before the CAS within 21 days of receipt of notification of the decision

40. The appeal was filed within the deadline as stipulated in Article 67 para. 1 of the FIFA Statutes, and it complied with all the other requirements as per Article R48 of the Code. It follows that the appeal is admissible.

VI. JURISDICTION

41. 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 CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

42. The jurisdiction of CAS, which is not disputed, derives from Article 67 of the FIFA Statutes, in conjunction with Article R47 of the Code. It is further confirmed by the Order of Procedure duly signed by the parties.

VII. APPLICABLE LAW

43. Article R58 of the Code provides as follows

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

44. Pursuant to Article 66 para. 2 of the FIFA Statutes, *"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*. In addition, the Sole Arbitrator notes that in their respective submissions, the parties refer, with regard to the issues at stake, to the applicable regulations of FIFA.

45. Separately, Article 16.1 of the Contract provides that Romanian law is applicable to any dispute arising out of the Contract.

46. The Sole Arbitrator acknowledges that in accordance with the above-mentioned provisions, on one side, the Appellant and the Respondent have agreed to respect and follow the regulations of the football bodies, among others, FIFA. However, on the other side, it seems that the Appellant and the Respondent have also agreed to call for the applicability of Romanian law.

47. The Sole Arbitrator is of the opinion that given (i) the parties have only expressly agreed to apply Romanian law to the interpretation of, and issues arising out of, the Contract; (ii) there is no real dispute under the Contract because the Appellant does not dispute that it owes the Respondent the EUR 30,000 remaining under the Contract; (iii) the only remaining issue relates to the EUR 30,000 set-off, which is based on the Disciplinary Sanction imposed by the Appellant against the Respondent; and (iv) the parties, in fact, have relied on and availed themselves of the applicability of the FIFA rules, the present dispute shall be decided in accordance with the FIFA Statutes and, subsidiarily, Swiss law.

VIII. MERITS

48. It is clear from the file and also from the FIFA file that the Contract between FC Steaua Bucuresti and Mr. Grzelak was duly executed and no Party has contested its validity and effectiveness. Based on the Contract, both Parties have rights and obligations which have been and not have been fulfilled due to different circumstances to be further discussed.

49. It is clear and uncontested, but even confirmed by FC Steaua Bucuresti, that total remuneration to be paid based on the Contract to Mr. Grzelak amounted to EUR 95,500. Of this amount, the Sole Arbitrator is satisfied that FC Steaua Bucuresti paid EUR 65,000 to Mr. Grzelak on January 26, 2011. Mr. Grzelak failed to submit any evidence to the contrary, and moreover, failed to set forth any evidence or facts which would establish that he was not, in fact, paid.

50. The only point in dispute is whether the club shall pay the remaining EUR 30,000 to the Respondent. In this respect, FC Steaua Bucuresti does not dispute that this money is due under the Contract, but rather it argues that it is entitled to a set-off in the amount of EUR 30,000 against the remaining EUR 30,000 owed based upon the Disciplinary Sanction against Mr. Grzelak in the amount of EUR 30,000.

51. Mr. Grzelak disagrees, and argues that EUR 30,000 is due and owing irrespective of his alleged debt to FC Steaua Bucuresti, which he argues is disproportionate and unjust.

52. As an initial matter, the Sole Arbitrator notes that it is undisputed that Mr. Grzelak failed to timely appeal the Disciplinary Sanction. Therefore, the validity of such a debt is not before him. For that matter, the Sole Arbitrator cannot express a position on whether it was a just or proportionate sanction. Therefore such a sanction is presumed final and enforceable.

53. Instead, the Sole Arbitrator must treat the Disciplinary Sanction for what it is, namely an enforceable decision in the amount of 25% of the Appellant's remuneration rights for his playing contract for the season 2009-10 (*i.e.* EUR 30,000) rendered by the FC Steaua Bucaresti Administration Board, which was ratified by in Decision No. 167 by the Professional Football League Disciplinary Commission on 15 March 2010.

Can the Disciplinary Sanction be used as "set-off" against the EUR 30,000 the Appellant owes the Respondent?

54. The compensation or "set-off" of claims between an employer and an employee in an employment relationship is governed by the general provisions of Article 120 *et seq.* of the Swiss CO as well as by the specific provision of Article 323b para. 2 of the Swiss CO, in accordance with the following principles and conditions (cf. TERCIER P., Le droit des obligations, 4th ed., Zurich 2009, n. 1520 *et seq.*; WYLER R., Droit du travail, 2nd ed., Bern 2008, p. 269; STAEHELIN/VISCHER, Zürcher Kommentar, Vol. V2c, Der Arbeitsvertrag, Article 319-330a OR, 4th ed., Zurich 2006, n 8 *et seq.* ad Art. 323b):

- The reciprocity of claims: each party must be at the same time obligee and obligor of the other;
- The similarity of the performances: the performances must be of the same kind (usually, monetary claims);
- The setting-off counterclaim must be due: although Article 120 para. 1 *in fine* Swiss CO seems to require that both claims be due, Swiss scholars and case law admit that the claim to be set-off can be only likely to be performed;
- The opportunity to claim the setting-off counterclaim in court: Article 120 para. 1 Swiss CO does not expressly set up this condition; however, it conveys the principle according to which a party shall not because of the set-off lose the benefit of the defences (set-off is an objection, cf. ATF 63 II 133, JdT 1937 I 566) that it could oppose to its obligee;
- The absence of reasons of prohibition: set-off is not permitted if ruled out or limited (i) by law (art. 125 CO, which refers to Article 323b para. 2 CO as one of the limitations), or (ii) by the agreement of the parties (art. 126 CO).
- The declaration or expression of set-off: according to Article 124 para. 1 Swiss CO, the obligor (here, the Appellant) must demonstrate to the obligee (here, Mr. Grzelak) that

he wishes to take advantage of his right to set-off, either by express statement or by conclusive act (for instance by paying only the difference between the two debts). In other words, the expression of set-off is a unilateral act which, under Swiss law, does not have to comply with any formal requirements and can even result from conclusive act (cf. Swiss Federal Tribunal, Decision of 23 March 2011, 4A_23/2011 at consid. 3.2, with further references; GAUCH P., Schweizerisches Obligationenrecht, Zurich, 2008, 9th ed., n. 3248 *et seq.*).

55. Based on the evidence produced by the parties, the Sole Arbitrator is satisfied that the requirements for a set-off mentioned above were met. In particular, the Sole Arbitrator notes that parties to the debt (as well as the similarities of the debt) are the same (*i.e.* both debts are monetary), and that the Appellant has provided sufficient evidence that the amount of its set-off is due and owing. Likewise, Mr. Grzelak has never argued that such a set-off would cause a situation insufficient for him to live, and it is noted that the Appellant paid the rest of the undisputed money owed to the Respondent.

56. In addition, the Appellant has always shown that such debt is collectable, and that it intends to perform on the enforcement of the Disciplinary Sanction. Moreover, FC Steauna Bucuresti has, at all times, withheld the amount of the Disciplinary Sanction in an effort to set-off this debt against any more it owes to Mr. Grzelak. Based on the foregoing, the Sole Arbitrator deems the set-off appropriate.

57. Consequently, the Sole Arbitrator is of the opinion that

i) Payment of EUR 65,000 was made by the Appellant;

ii) The proportionality or fairness of the Disciplinary Sanction issued by the Administrative Board/FC Steaua Bucuresti is not a matter before the Sole Arbitrator on appeal. Therefore, it is deemed a binding debt owed by the Respondent to the Appellant;

iii) The Appellant is able to set-off the amount owed under the Disciplinary Sanction (*i.e.* EUR 30,000) against the amount it owes the Respondent under the Contract, and no amount is due from either party.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by FC Steaua Bucuresti is upheld and the Dispute Resolution Chamber of FIFA decision from October 25, 2012, is hereby amended as follows:

   The Appellant is permitted to set-off EUR 30,000, which represents the money owed by the Respondent to the Appellant as a result of the Disciplinary Sanction, against the EUR 30,000 the Appellant owes to the Respondent under the Contract.

(…)

4. All further and other claims for relief are dismissed.