Arbitration CAS 2012/A/2844 Gussev Vitali v. C.S. Fotbal Club Astra & Romanian Professional Football League (RPFL), award of 7 June 2013

Sole Arbitrator: Mr Hendrik Kesler (The Netherlands)

Football
Termination of a contract of employment
Reduction of salary as a disciplinary sanction imposed by a club on a player
Disciplinary sanction based on the player's low/poor performance
Termination of a contract based on sporting just cause
Obligation of the employer to pay the salaries
Duty to mitigate the damage
Calculation of interest in case of default

1. **In line with CAS case law, it is not justifiable that a player who is recovering from injury and then acts as substitute player during games can still be sanctioned with a 25% reduction of his salaries, due to an alleged sporting non-performance/low performance. Such a sanction shall be considered unreasonable and not in line with the FIFA and CAS jurisprudence regarding disciplinary sanctions imposed on players in case of sporting non-performance.**

2. **It is well established jurisprudence of the CAS that the performance of a player cannot be the reason for disciplinary sanctions imposed by the club unless misbehaviour of the player is proven. A report prepared by an employee of the club must meet very strict requirements regarding the circumstances and facts of the alleged misconduct of the player to form the basis for a disciplinary sanction.**

3. **Only a player and not a club can raise the grounds of sporting just cause to terminate an employment agreement, but even though he must provide substantial evidence that the following four requirements have been complied with: (i) that the player is an established professional; (ii) that he has played in less than 10% of the official matches in which his club was involved in the sporting season in question; (iii) the player's personal circumstances; and (iv) that he terminates his employment contract during the 15 days following the final official match in the season of the club with which he was registered.**

4. **The non-payment or late payment of remuneration by an employer does in principle – and particularly if repeated – constitute "just cause" for termination of the contract. This is because the employer's payment obligation is his main obligation towards the employee. If, therefore, the employer fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is**

irrelevant. The only relevant criteria are whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost.

5. **According to the jurisprudence of the Swiss Federal Tribunal, various criteria play a determining role when deciding or not to reduce excessive penalty clauses: the nature and duration of the contract, the gravity of the fault and the contractual violation, the economic situation of the parties as well as the potential independency between the parties.**

6. **If there is no contractually agreed interest rate in case of default, according to Art. 104 of the relevant Swiss Law a 5% interest rate can be lawfully added to the original monetary obligation, starting from the notification of the decision appealed to the CAS.**

1. THE PARTIES

1.1. Gussev Vitali (the "Player" or the "Appellant") is a football player from Estonia, born on 16 March 1983.

1.2. S.C. Fotbal Club Astra (the "Club" or the "Respondent") is a football club from Giurgiu, Romania, currently playing in the First League Championship of the Romanian Professional Football League (the "RPFL").

2. FACTUAL BACKGROUND

2.1. Below is a summary of the relevant facts and allegations based on the parties' accepted written submissions, pleadings and evidence adduced and 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 Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

2.2. On 23 February 2010 the Club and the Player signed an employment agreement valid until 30 June 2013 (the "Agreement").

2.3. Article V of the Agreement reads as follows:

"The price of the agreement is

- *5.000 EUR/month for the period 23 February 2010 – 30 June 2011;*
- *6.000 EUR/month for the period 1 July 2011 – 30 June 2012;*

- *7.000 EUR/month for the period 1 July 2012 – 30 June 2013.*

The sums will be paid in lei, at the Romanian National Bank's exchange rate of the day of payment".

2.4. On 6 July 2010 a surgical intervention on the Player took place at the Orto Sport Medical Clinic in Bucharest, Romania.

2.5. In agreement with the Club the Player went back to Estonia for recovery. This period ended on 28 January 2011.

2.6. On April 2011 the Player took part in the Club's trainings of the First Respondent and at the end of May he was on the bench during the matches against Unirea and Otelul Galati, teams of the first Professional League of Romania (the "League").

2.7. The League season 2010-2011 ended on 22 May 2011.

2.8. On June 2011, when the trainings for the new season started, the Player took part in the training session. However, before leaving for the training camp, the Club decided that the Player had to stay in Ploiesti and to train with the 3rd League Team.

2.9. On 1 June 2011 the parties opened proceedings before the legal bodies of the RFF and/or RPFL.

A. Proceedings before the Romanian Football Federation and the RPFL

2.10. The Club brought forward at first instance, two claims against the Appellant: one before the Romanian Professional Football League Disciplinary Committee (the "RPFL DC") and another before the RPFL Dispute Resolution Chamber (the "RPFL DRC").

2.11. Since the Player had been initially sanctioned by the Club's Executive Committee, by means of its decision nr. 1711 of 1 September 2011 (the "Club's Decision") the Club requested the RPFL DC to confirm its decision. Therefore, on 21 December 2011, by means of its Decision nr. 658 the RPFL DC ratified the sanction applied to the Player, namely a sporting sanction which implied in a reduction of 25 % of the Appellant's financial rights corresponding to the season of 2011-2012 (the "RPFL DC Decision").

2.12. As for the proceedings carried out before the RPFL DRC, the Club requested the termination of the Agreement with the Appellant, based on Article 18.10 let. b of the RPFL Regulations for the Status and Transfer of Players (the "RPFL RSTP").

2.13. The Player submitted a counterclaim before the RPFL DRC seeking the dismissal of the Club's main claim as unfounded, the termination of the Agreement as a result of non-paid outstanding salaries by the Club, as well as that the Club was considered having terminated the Agreement without just cause.

2.14. On 28 December 2011 the RPFL DRC issued the Decision nr. 581, which upheld the Club's claim and declared the termination of the Agreement with just cause (the "RPFL DRC Decision").

2.15. The Player appealed against the RPFL DC Decision and the RPFL DRC Decision, respectively on 21 and 28 December 2011 before the RPFL Appeal Committee (the "RPFL AC"). On its turn the Club also appealed against the RPFL DRC Decision.

2.16. The RPFL AC dealt with both appeals and rendered its decisions on 29 March 2012, under the reference numbers 79 and 80 (the "Challenged Decisions").

(i) The appeal against the RPFL DRC Decision

2.17. As a result of the parties' appeals against the RPFL DRC Decision, the RPFL AC issued the Challenged Decision nr. 79, which ruled as follows:

"- To uphold the appeal lodged by CS FC Astra, headquartered in Giurgiu, 8 Vasile Alecsandri St., Giurgiu County, against Decision no. 581/28.02.2012 passed by PFL's DRC;

- *To dismiss the appeal lodged by the player Gussev Vitali, with chosen residence at the player's agent Dirk Franke, Sweden, Hammarliden 20, SE 412 62 Göteborg, against Decision no. 581/28.02.212 passed by PFL's DRC;*
- *To partially reverse Decision no. 581/28.02.2012 passed by PFL's DRC;*
- *To compel the club CS FC Astra to the payment of 3.699 EUR to the player Gussev Vitali, as outstanding financial rights;*
- *To declare the contractual relations between the parties terminated starting with 26.10.2011".*

(ii) The appeal against the RPFL DC Decision

2.18. As a result of the Player's appeal against the RPFL DC Decision, the RPFL AC rendered the Challenged Decision nr. 80, which ruled as follows:

"To dismiss the appeal lodged by the player Gussev Vitali, with chosen permanent residence at the player's agent Dirk Franke, in Sweden, Hammarliden20, SE-412 62 Göteborg, versus CS FC Astra, headquartered in Giurgiu, 8 Vasile Alecsandri St., Giurgiu County, as unfounded".

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1. On 28 June 2012 the Appellant filed a Statement of Appeal before the Court of Arbitration for Sport (the "CAS") against the Challenged Decisions.

3.2. On 21 September 2011, the Appellant filed his Appeal Brief, after having been granted a time extension by the CAS Court Office.

3.3. On 26 July 2012, in view of the Respondents' silence regarding the nomination of a Sole Arbitrator and the content of the CAS Court Office's letter dated 9 July 2012, the parties were advised that the present proceedings would be submitted to a Sole Arbitrator and that, pursuant to Article R54 of the Code of Sports-related Arbitration (2012 Edition) (the "CAS Code"), the President of the CAS Appeals Arbitration Division, or his Deputy should proceed with his/her appointment.

3.4. On 27 September 2012 the CAS Court Office informed the parties that Mr Hendrik Willem Kesler, attorney-at-law in Enschede, The Netherlands, was appointed to decide the present matter as Sole Arbitrator. Such nomination was duly acknowledged by the parties when they have signed the Order of Procedure without any reservation (see below).

3.5. Following the receipt of the Appeal Brief at the CAS Court Office, the Appellant filed extra written submissions and requested that they should be included in the case file as a supplement to the Appeal Brief. Pursuant to Article R56 of the CAS Code and in the absence of an agreement between the parties as well as of any exceptional circumstances, the Sole Arbitrator decided not to admit the new documents.

3.6. In accordance with Article R55 of the CAS Code, the Club filed its Answer on 12 October 2012.

3.7. On 28 December 2012 the Appellant withdrew the Appeal against the RPFL.

3.8. Pursuant to Article R57 of the CAS Code and after consulting the parties, the Sole Arbitrator decided to hold a hearing and on 21 January 2012 the CAS Court Office informed the parties that a hearing would be held on 4 February 2013 in Lausanne (the "Hearing").

3.9. The Appellant attended the Hearing and was represented by Mr. Dirk Franke, licensed German football players' agent.

3.10. The Respondent attended the Hearing with Messrs. Costel Lazar, Club's Sport Director and Cosnin Lazar, Club's Manager. They were represented by their legal counsel, Mr. Stephan Bogan Lucan.

3.11. Both parties signed the Order of Procedure at the Hearing without any reservation or remarks, since they failed to send back by fax the signed orders to the CAS Court Office.

3.12. During the Hearing the parties had ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator. Before the Hearing was concluded the parties expressly stated that they did not have any objections with the way the procedure had been conducted and that their right to be heard had been duly respected by the Sole Arbitrator and the CAS.

3.13. The Sole Arbitrator confirms that he carefully took into account all of the submissions, evidence and arguments validly presented and filed by the parties, even if they have not been specifically summarized or referred to in the present Award.

3.14. At the end of the Hearing the Sole Arbitrator decided according to Article R57 of the Code to request the Appellant to clarify the difference between the grounds for relief as formulated in the Statement of Appeal and the Appeal Brief that followed afterwards. The Appellant and neither his agent could not answer this question because their lawyer was not attending the hearing and they lacked legal knowledge.

3.15. On 8 February 2013 the Appellant provided his comments concerning the interpretation as requested by the Sole Arbitrator.

3.16. On 25 February the Respondent provided its reply to the Appellant's comments.

4. SUBMISSIONS OF THE PARTIES

4.1. The following outline of the parties' positions is illustrative only and does not necessarily encompass every contention alleged by the parties.

4.2. However, the Sole Arbitrator has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summaries.

A. The Appellant's submissions

4.3. The Appellant seeks the following relief:

"1. Annul the Decision no. 80 of 29 March 2012 rendered in the case file 4/CR/2012 and replace it with an award stating that:

a) The appeal formulated by the player Gussev Vitali against the Decision no. 658 from 21 December 2011 issued by the Disciplinary Commission of RPFL is fully admitted;

b) The application of the club FC Astra for the ratification of the 25% reduction from the contractual rights for 2011/2012 is rejected;

c) FC Astra is obliged to pay to the player Gussev Vitali the amount of 2.500 RON which represents the procedural fee paid by him for the appeal formulated before Appeal Commission of RPFL in the case file 161CD2011;

2. Annul the Decision no 79 of 29 March 2012 rendered in the case file 3/CR/2012 and replace it with an award stating that:

a) The appeal formulated by the player Gussev Vitali against the Decision no 581 from 28 February 2012 issued by the Dispute Resolution Commission of RPFL in the case file 203CSL2011 is fully admitted;

b) The application for the termination of contractual relationships lodged by the club FC Astra under the provisions of Article 18, Para 10, letter b), second sentence of RSTJF is rejected as unfounded;

c) The counterclaim of the player Gussev Vitali, formulated in the case file no. 203CSL2011, is admitted and, consequently:

- *Found that the club has denounced unilaterally and without just cause the contract no. 533/23.02.2010, by not paying the contractual rights for more than 90 days, pursuant to art. 18.10, letter a), Para. 2 of RSTJF;*
- *Found the termination of the contract between the player Gussev Vitali and the club FC Astra, pursuant the provisions of art. 18.10, letter a), Para. 2 of RSTJF;*
- *Establish that it is the fault of the club FC Astra for the termination of contractual relationships;*
- *FC Astra is obliged to pay to the player Gussev Vitali all the outstanding contractual rights due under the contract no. 533/23.02.2010 till his leaving on 26 October 2011, respectively the total net amount of 44.731 Euros;*
- *FC Astra is obliged to pay to the player the compensation of 132.000 Euros net provided by the Article 18.9.1, letter a) of RSTJF, respectively the total amount of financial rights that he was entitled to up to the expiry of the contract;*

d) FC Astra is obliged to pay to the player Gussev Vitali the amount of 2.500 RON which represents the procedural fee paid by him for the appeal formulated before the Appeal Commission of RPFL in the case file 203CSL2012;

3. Order the club to bear all the costs incurred for the player in the present procedure (administrative fee of CAS, costs of the arbitrators, expeditions, document translations and others)".

4.4. The Appellant's reliefs sought mainly to annul the 25% reduction of his salaries for the 2011-2012 season and to obtain his financial rights and due salaries that he was allegedly entitled to until the expiry of the Agreement, in a total amount of EUR 132,000.

4.5. The Appellant submits thereto that the 25% reduction was inappropriate because of his medical situation and, therefore, not in line with the applicable regulations of the RPFL.

4.6. With respect to the termination of the Agreement he submits that he was entitled to the termination himself with just cause, because the Respondent was in default with respect to the salary payments owed to the Player, which were 90 days overdue.

B. The Respondent's submissions

4.7. In its Answer the Respondent requested the Sole Arbitrator to order the following:

4.8. To reject the Appeal, in the first place based on the inadmissibility of the Appeal and for the substance, because of the correct legal considerations regarding the applicable regulations as set out in the challenged decisions of the RPFL dispute resolution bodies.

4.9. The Respondent submits therefore that according to Article R58 of the CAS Code it is not possible that the Appeal can be directed in one statement of appeal against two decisions of one legal body, in the case at hand the RPFL Appeal Committee.

4.10. As for the substance the Respondent submits that it fulfilled all requirements as set out in the internal regulations of the Club with regard to the performance and the conduct of the Player. Furthermore, the Respondent underlines that it followed correctly the applicable articles as set out in the RPFL RSTP.

4.11. The Respondent states that its sanction imposed on the Player, based on the Club's internal regulations, was not because of his lack of sportive performance but for the attitude the Player manifested regarding the training sessions he had to attend.

4.12 Furthermore the Respondent refers to Art. 18.10 RPFL RSTP that provides that a contract can be unilaterally terminated by a club in case a player does not participate in at least 10% of the official matches of the club's team. The Respondent states that this situation occurred in the present case.

5. ADMISSIBILITY

5.1. Article R49 of the CAS 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.

5.2. The Respondent contests in its Answer the admissibility of the present Appeal and the Sole Arbitrator shall now examine this objection.

5.3. The Respondent submits that there were two decisions before the RPFL committees, one of a disciplinary nature and another regarding financial claims related to the parties' requests for the termination of the Agreement.

5.4. The Sole Arbitrator first notes that the Appellant addressed in one statement of appeal two challenged decisions from the RPFL AC rendered simultaneously on 29 March 2012 under numbers 79 and 80.

5.5. In the following Appeal Brief the arguments were set out against those two challenged decisions of the RPFL AC.

5.6. The Sole Arbitrator has therefore to analyse carefully whether the factual nature of both decisions show that much connection that the Appellant could be allowed to formulate one Statement of Appeal against both decisions in order to avoid a second appeal with –again- the relevant costs.

5.7. The Sole Arbitrator finds that at least the discussions in both Challenged Decisions have their origin in the one and only existing Agreement signed between the Player and the Club.

5.8. Furthermore the Challenged Decisions relate to contractual disputes between the parties in which they dispute liability or not for allegedly due payments.

5.9. Finally, the Sole Arbitrator finds that the decision which imposed a reduction of 25% on the salaries of the Player – for the 2011/2012 season – could have an immediate effect on the second procedure held before the RPFL AC which both parties appealed against the RPFL DRC Decision and requested the termination of the Agreement with just cause. Any decision in this second appeal would, therefore, possibly be affected if the decision related to the Player's salaries' reduction was not rendered simultaneously.

5.10. In view of the above and the particular and exceptional circumstances of the present appeals proceedings, the Sole Arbitrator therefore concludes that the Player could appeal against the Challenged Decisions – rendered on the same date – within one CAS procedure. This leads to the fact that the present appeal is admissible.

5.11. The Challenged Decisions provide that any appeal shall be filed *"within 21 days since notification"*. Considering that the notification to the Appellant was made on 8 June 2012 and the Appeal was filed at the CAS on 28 June 2012, it follows that the appeal was filed in due time and is therefore admissible.

6. JURISDICTION

6.1. Article R47 of the CAS Code provides that:

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

6.2. Articles 57 (3) and 58 (3) of the Statutes of the Romanian Football Federation provide as follows:

"57 (3) – Decisions delivered by the Board of Appeal within RFF can be contested before the Court of Arbitration for Sport from Lausanne;

[…]

58 (3) – The Court of Arbitration for Sport from Lausanne has the capacity to resolve any litigation between FIFA, UEFA, regional confederations, national federations, leagues, clubs, players, officials, players' agents or licensed match agents, if the Statutes of FIFA/UEFA/RFF do not foresee otherwise".

6.3. The Sole Arbitrator noted that the parties did not therefore dispute the jurisdiction of the CAS. Further the jurisdiction of the CAS was confirmed by the Order of Procedure signed by both parties.

6.4. Based on the foregoing, it follows that CAS has jurisdiction to decide on the present dispute.

7. APPLICABLE LAW

7.1. Article R58 of the CAS 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 c*ase*, the Panel shall give reasons for its decision".*

7.2. In addition, within the meaning of article 187 (1) PILA, the rules of law chosen by the parties do not need to be national laws, but can be non-governmental regulations (P. LALIVE/POUDRET/REYMOND, Droit de l'arbitrage interne et international en Suisse, Lausanne, 1989, pp. 399-400), such as in particular the rules and regulations of International Sport Federations. It is common for the CAS to primarily apply the various rules and regulations of such Federations (TAS 92/80, Digest of CAS Awards I, p. 287, 292).

7.3. In their submissions the parties refer to the applicability of the Statutes and Regulations of the Romanian Football Federation (RFF) and the RPFL.

7.4. The Agreement provides in Article VIII, section 2:

"The price of this agreement includes the assignment of the federative rights of the player in favour of C.S. FOTBAL CLUB ASTRA PLOIEŞTI (SPORTS CLUB ASTRA PLOIEŞTI FOOTBALL CLUB) who, in accordance with the regulations of FIFA, UEFA, FRF, LPF, AJF, may use them during the execution of the present agreement".

7.5. In light of this contractual provision, the Sole Arbitrator understands that the parties agreed that the regulations of FIFA are also applicable to the Agreement and even in the event of disputes between the parties.

7.6. In addition to the application of the RFF Regulations, the Sole Arbitrator finds therefore that the FIFA regulations are applicable to the present case subsidiarily, as the parties are affiliated to the RFF and the RFF itself is a member of FIFA.

7.6. The Sole Arbitrator concludes thus the FIFA regulations and Swiss law are subsidiarily applicable.

8. MERITS

8.1 Given the parties' submissions, the Sole Arbitrator has in principle to answer the following main questions:

a. Was the disciplinary sanction imposed on the Player of 25% salary reduction for the 2010-2011 season justified or not?

b. Was the disciplinary sanction imposed on the Player of 25% salary reduction for the 2011-2012 season justified or not?

c. Who breached the Agreement and when?

d. Was such a breach with or without just cause?

e. If any compensation is due, how should it be calculated?

i. In particular, is there any valid liquidated damages clause? If not, how should the compensation be calculated?

ii. Has the injured party an obligation to mitigate its position?

f. Should any interest accrue on any compensation?

a. Was the disciplinary sanction imposed on the Player, i.e. 25% salary reduction for the 2010-2011 season, justified or not?

8.2. Starting with answering the above-mentioned questions, the Sole Arbitrator finds it is undisputed that the Agreement was signed by the parties on 23 February 2010, ending on 30 June 2013.

8.3. The Sole Arbitrator finds it is also undisputed that the 2009-2010 season ended on 22 May 2010, as well as that the Player undertook surgical intervention on 6 July 2010 at the Orto Sport Medical Clinic in Bucharest.

8.4. Although the Sole Arbitrator could not understand why the Club could or would not contribute to the recovery of the Player in Romania, he finds it again undisputed that the Player left Romania to go to his home country, Estonia, for further recovery procedures, with express consent of the Club. In this respect, the Club did not contest that they bought the Player a flight ticket to Estonia.

8.5. The Player stayed in Estonia from 12 October 2010 until 28 January 2011, when he returned to Romania. By that date the 2010-2011 season was still closed, due to the winter pause.

8.6. The Player's allegations that he was on the bench during the League matches against the teams of Unirea and Otolul Galati at the end of the 2010-2011 season, was not contested by the Respondent in its Answer and neither at the Hearing, when asked thereto by the Sole Arbitrator.

8.7. The Sole Arbitrator, therefore, concludes that the Club's coach considered the Player capable to act as a substitute during the previously mentioned matches.

8.8. The Sole Arbitrator further notes that the 2010-2011 League championship ended at the end of May 2011, which again is undisputed.

8.9. The Sole Arbitrator understands that the Club clearly sanctioned the Player with a 25% reduction of his salaries related to the 2010-2011 season, as acknowledged by the RPFL DC Decision and subsequently confirmed by the Challenged Decision nr. 80.

8.10. The Sole Arbitrator notes that the Player left Romania and flew to Estonia on 12 October 2010, having stayed there until 28 January 2011.

8.11. In view of the above, the Sole Arbitrator finds it unjustifiable that a Player who was recovering from injury in Estonia until 28 January 2011 and who then acted as substitute player during games at the end of the 2010-2011 season can still be sanctioned with a 25% reduction of his salaries, due to an alleged sporting non-performance/low performance.

8.12. In order to substantiate this understanding, the Sole Arbitrator refers particularly to the well-established CAS jurisprudence under number CAS 2009/A/1784, CAS 2009/A/1932 and CAS 2010/A/2049.

8.13. The Sole Arbitrator finds therefore that the sanction on the Player for the 2010-2011 season is not acceptable and shall be considered unreasonable and not in line with the FIFA and CAS jurisprudence on disciplinary sanctions on players in case of sporting non-performance. In this regard, it must be highlighted that the principle of contractual stability must be respected by clubs and it shall not be dependent on the performance of a player.

8.14. The Sole Arbitrator further notes that a player's low performance does not constitute a valid reason to terminate unilaterally an employment contract. In this respect, the lack of objective criteria when establishing a player's possible low performance and, hence, for the sake of the legal security the Sole Arbitrator must emphasize that this particular reason invoked by the Respondent to reduce the Appellant's salaries cannot be endorsed and specially does not constitute a just cause to terminate an employment contract. This understanding is substantiated not only by the FIFA DRC jurisprudence, but specially the CAS case law, as stated below:

"There are no established precedence either in national nor international transfers that players, who perform poorly compared to their previous season with another club, would suddenly become a player of less professional quality. Such precedence is in fact unheard of in the entire professional sports world, in which transfer of players

from one club to another takes place. The consequences would be quite destructive to the entire transfer system if a club would refuse to pay the remaining instalments of a transfer sum based on a vague and unsubstantiated allegation that the player's professional quality was inferior than expected. Such a scenario would in fact deteriorate the efforts of maintaining contractual stability, which has been a main focus of FIFA, since the FIFA Regulations for the Statues and Transfer of Players were introduced in 2001" (CAS 2010/O/2156).

b. Was the disciplinary sanction imposed on the Player, i.e. 25 % salary reduction for the 2011-2012 season, justified or not?

8.15. Concerning the sanction imposed on the Player in connection with the 2011-2012 season, the Sole Arbitrator notes that the basis for this disciplinary sanction was found in the report drafted by Mr. Costel Lazar, the Club's coach, on 14 August 2011 (the "Costel Lazar Report").

8.16. The Costel Lazar Report refers to the fact that *"the Player at the beginning of his training on 14 July 2011 until the date of drafting of the report showed insufficient preparation and low efficiency and not being able to comply with the request and performance objectives set by the club".*

8.17. The Sole Arbitrator notes, therefore, that the scope of the Costel Lazar Report contains at the maximum a period of one month, starting on the 14 July 2011, when said report was presented on 14 August 2011.

8.18. In light of the above, the Sole Arbitrator firstly underlines that he does not take into account in his reasoning of the question (a) above the period before 14 July 2011 for following reasons:

- After a rather severe injury the Player was on the bench at the end of the 2010-2011 season, i.e. at the end of May 2011.
- When the preparations for the new season 2011-2012 started, it was the Club's decision to ban the Player and send him to the 3rd League Team of the Club, where no doctor or massage therapists were present.

8.19. With regards to the Costel Lazar Report, the Sole Arbitrator finds it remarkable that this report refers to the salary of the Player and in particular that his salary shall be considered as one of the highest in the Club.

8.20. The Sole Arbitrator considers this fact as irrelevant for a disciplinary decision. Both parties drew up the Agreement by free will and the Club therefore knew that they had an expensive Player under contract.

8.21. The Costel Lazar Report furthermore notes that the Player did not participate in any official match of the 2011-2012 season League and was not part of the 1st team squad of 18 players in any matches played until the end of said season.

8.22. In this regards, the Sole Arbitrator considers this as irrelevant as well, because the mere fact that the Player did not play in the current championship, which started around 14 August 2011, cannot serve as a legal argument and, therefore, this reasoning lacks any sense of reality.

8.23. The Costel Lazar Report cannot refer to the previous season (2010-2011), because the Player was then seriously injured and only returned to the first squad at the end of that season (2010-2011), when he was undisputedly sitting on the bench with the 1st team squad during two League matches.

8.24. It is well established jurisprudence of the CAS that the performance of players cannot be the reason for disciplinary sanctions unless misbehaviour of the player is proven.

8.25. The Sole Arbitrator finds that a report prepared by an employee of a club as the basis for a disciplinary sanction must of course meet very strict requirements regarding the circumstances and facts about any misconduct of a player.

8.26. The Sole Arbitrator concludes that the Costel Lazar Report does not meet these requirements as set out above, so it cannot serve the purpose of disciplinary sanctions, particularly if one considers the period – one month at the maximum – the report refers to.

8.27. In light of the arguments above, the Sole Arbitrator considers the Club's Decision dated 1 September 2011 null and void. Consequently, the Sole Arbitrator finds that the Challenged Decision nr. 80 from 29 March 2013 shall be set aside, since there was no justified reason for the 25% reduction of the Player's salary for the 2011-2012 season.

8.28. The submissions brought forward by the Appellant against the Club's Decision, namely referring to the lack of formalities, can therefore be considered as irrelevant.

8.29. The Sole Arbitrator further considers that the Club's Decision is not founded on proper facts and legal arguments that could justify the severe sanction of a 25% reduction on the Player's salaries for the 2011-2012 season.

8.30. As set out above there is a clear connection between the Challenged Decisions numbers 79 and 80. The financial consequences of the Challenged Decision nr. 80, which relates to the reduction of the Player's salaries, will be further detailed in the reasoning related to the Challenged Decision nr. 79 concerning the termination of the Agreement.

c. Who breached the Agreement and when?

8.31. Considering the termination of the Agreement, the Sole Arbitrator finds the following facts as relevant for his decision on this matter. In this respect, he first notes that the Agreement does not stipulate any clauses related to its termination and consequences of such termination, as penalty clauses or liquidated damages, except the clause in paragraph III of the Agreement,

under *'Rights and obligations of the parties'* 1. sub (h) which states as follows with respect to the Club's obligations:

To inform the player of any intent of unilateral termination of the agreement by sending a 15 days prior written and motivated notice, in accordance with the regulations of FRF (Romanian Football Federation).'

This clause is understood as an obligation of the Club towards the Player.

8.32. Under item 2. sub (h) it states as follows with respect to the Player's obligations:

To immediately inform the club of the incidents between him and the other players, trainers and other technical experts, as well as of any complaints regarding the execution of the present sporting services agreement.

8.33. The Challenged Decision nr. 79 reads as follows:

By the request sent by fax on 01.06.2011 and registered on the roll of CSL under Number 716/29.09.2011, CS FC Astra Ploiesti requested the finding of the contract termination between them and the Player Gussev Vitali under article 18.10 let. b. (thesus 2 of the RSTFP) ….

In motivating on the request, the Claimant (Club) has shown that in the competitive season 2010-2011, the Player did not performed even one minute for the Club's team, reason for what is entitled to require the contract termination for just cause.'

8.34. The file does not show whether the Club notified its intention to do so to the Player, according to the Agreement.

8.35. The Sole Arbitrator notes that the Club based this request on the provisions of Article 18 para 10 of the RPFL RSTP, allowing a club to terminate an employment contract in case a player participates in less than 10% of the matches corresponding to a competition year.

8.36. On 25 October 2011, the Appellant formulated his response and a counterclaim before the RPFL AC by means of which he requested to (i) reject the main request as unfounded and the admission of the counterclaim; (ii) consider the Agreement termination between the parties under Article 18.10 let. a para 2 of the RPFL RSTP; (iii) rule that the unilateral denunciation of the Agreement was made without just cause by the Club, since no payment of the salaries was made for more than 90 days under Article 18, 10 (a) para 2 of the RPFL RSTP; (iv) rule that the party at fault at the contractual termination is the Club; and (v) compel the Club to pay all the outstanding financial compensation in amount EUR 35,500.

8.37. On 22 November 2011, the Player submitted a clarification to the RPFL AC and admitted that the Club paid him contractual rights in the amount of EUR 59,372 and that the remaining to be paid was EUR 44,731. The Respondent did not dispute this clarification at any time.

8.38. The Sole Arbitrator notes in any case that the Respondent did not appeal against the Challenged Decision nr. 79, which also dealt with this calculation.

8.39. The Sole Arbitrator notes, furthermore, that both the Club and the Player requested the termination of the Agreement. The Player did so more specifically on 26 October 2011.

8.40. The Sole Arbitrator finds, therefore, that the Agreement was in any case terminated on 26 October 2011. This is the decisive date for calculating any outstanding amount to be paid according to the Agreement, or according to the RFF Regulations.

8.41. Before continuing with addressing the issue whether the termination by one of the parties was with or without just cause and the possible issue related to the due compensation, the Sole Arbitrator firstly addresses the financial winding up of the Agreement until the end of its termination, i.e. 26 October 2011.

8.42. As already stated above it is undisputed that the financial obligations from the Club towards the Player until 26 October 2011 were in total EUR 104,103 and that he had received payments from the Club amounting to EUR 59,372. Therefore, the Player has still to receive EUR 44,371.

8.43. It is also undisputed that the Player provided the RPFL AC on its request with a calculation of the sums he had still to receive under the Agreement, namely EUR 44,731, a calculation which was not disputed by the Respondent, as a consequence of the acceptance of the Challenged Decision nr. 79. Considering that the Respondent paid under this decision the amount of EUR 3,699 to the Appellant, there is still the remaining amount of EUR 41,032 to be paid to the Player.

8.44. As the Sole Arbitrator decided that the reductions from the salary of the Player on the basis of disciplinary sanctions was unacceptable and, therefore, legally unjustified, it follows that the amount of EUR 41,032 has to be paid by the Club to the Player as a result of the outstanding amount as from the termination date of the Agreement, i.e. 26 October 2011.

8.45. Having concluded that the contractual obligations of the parties towards each other have been terminated on 26 October 2011, the next question that arises is who actually terminated the Agreement and whether with or without just cause, as well as if this termination was justified in view of any financial compensation due to any of the parties.

8.46. As a general rule, in case of a termination with just cause, there is no compensation due and in case the termination was without just cause compensation is due, as a general rule, that can however be adjusted according to the specific circumstances on a case by case basis.

8.47. As stated above, the Sole Arbitrator understands that the RFF Regulations and more specifically, the RPFL RSTP is primarily applicable to the case.

8.48. The Sole Arbitrator further observes that although Romanian law and the RFF Regulations are primarily applicable, the FIFA Regulations, i.e. the FIFA RSTP, are also applicable at the

present case, especially if there is no contractual clause foreseen in the Agreement that deals with the consequences of the termination.

8.49. It is undisputed that the Club filed a claim before the RPFL DRC on 1 June 2011, by means of which it requested the termination of the Agreement on the basis of Article 18.10, b), thesus II of the RSTP.

8.50. The Respondent submits that there was no manifestation of will on its behalf to terminate the Agreement.

8.51. The Sole Arbitrator, however, considers the Club's request by filing the claim of summons as an act directed to terminate the Agreement, which of course could or would have been withdrawn by the Club when the RPFL DRC would have concluded that the termination was without just cause, because then compensation would be due to the Player.

8.52. Within its Answer, the Club repeated the Article 18.10 letter b), thesus II of the RPFL RSTP, which briefly summarized, indicates that a contract with a player who plays less than 10% of the matches in one championship season can be terminated for just cause.

8.53. The Sole Arbitrator, therefore, rejects this submission of the Respondent alleging that there was no manifestation of will on behalf of the Club to terminate the Agreement, because the Club was the first to file a claim that could result in a successful termination.

8.54. The Sole Arbitrator further notes that the Player was on the bench during the last championship matches during May 2010 – which season ended on 25 May 2010 – and that only a couple of days afterwards the Club promptly filed a request for termination of the Agreement before the RPFL DRC on the basis of the Article 18.10, b) thesus II of the RPFL RSTP.

8.55. This particular regulation has to be handled with ultimate care and under the light of the FIFA RSTP, namely its Article 15, which provides as follows:

"An established professional who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. Due consideration shall be given to the player's circumstances in the appraisal of such cases. The existence of a sporting just cause shall be established on a case-by-case basis. In such a case, sporting sanctions shall not be imposed, though compensation may be payable. A professional may only terminate his contract on this basis in the 15 days following the last official match of the season of the club with which he is registered".

8.56. The Sole Arbitrator notes that there is no similar article in the FIFA Regulations which entitles the Club to this termination with sporting just cause and that is comprehensible: a club could easily instruct the coach not to field the player because the club wants – for whatever reasons – to terminate an agreement with a specific player.

8.57. It is well-established jurisprudence of the CAS that only a player can raise the grounds of sporting just cause to terminate an employment agreement, but even though he must provide substantial evidence that the following four requirements have been complied with: (i) that the player is an established professional; (ii) that he has played in less than 10% of the official matches in which his club was involved in the sporting season in question; (iii) the player's personal circumstances; and (iv) that he terminates his employment contract during the 15 days following the final official match in the season of the club with which he was registered (2005/A/940; 2007/A/1369).

8.58. The Sole Arbitrator finds that unless the Club could satisfactorily prove severe misconduct of the Player which could justify a termination of a contract with just cause, this is not a provision which can be upheld against the Player, because it is clearly not in line with the FIFA Regulations, the FIFA DRC and neither CAS jurisprudence.

8.59. The Respondent also requested subsidiarily, that the termination of the Agreement, started as from 25 November 2011 for unjustified absence from trainings and from the official games for a period of more than 30 (thirty) days, a submission that was highlighted by the coach of the Club within the Costel Lazar Report, stating that the Player was absent from the Club's team training for the period between 17 October 2011 until 23 November 2011.

8.60. This argument, raised before the RPFL AC, was however not repeated in the Respondent's Answer before the CAS and can, therefore, be left unaddressed.

d. Was such a breach with or without just cause?

8.61. In light of the foregoing, the Sole Arbitrator concludes that the Respondent's claim submitted on 1 June 2011 to the RPFL DRC for the termination of the Agreement was made without just cause because there were no valid legal arguments brought forward to justify this termination.

8.62. The Player on his turn, also sought termination of the Agreement, as from 26 October 2011, being – at that time – not properly paid during a period of more than 90 days, under article 18.10 letter a), para II of the RPFL RSTP.

8.63. According to CAS jurisprudence, it can be mentioned that the obligation to pay salaries towards players in a proper and timely manner has been long protected under the FIFA RSTP. In this respect the Sole Arbitrator refers to the following decisions:

"The Panel notes that the Romanian RSTP provides for specific regulations on the contractual stability. The Panel finds in particular that under those regulations, the Respondent [the player] had the right to terminate the contract with cause if outstanding amounts are due "for a period longer than 60 days" (article 18 nr. 10 lit. a) second paragraph first sentence RRSTP). The Panel notes that the Appellant could not benefit from the relief provided under article 18 nr. 10 lit. a) second paragraph second sentence RRSTP as the Player had not received on 29 January 2010 at least 75% of the outstanding contractual rights for the season in question (the

Player had received EUR 151,415 on 29 January 2010 out of an outstanding amount due at that time of EUR 203,905, i.e. 74.25%)" (CAS 2010/A/2289).

"The non-payment or late payment of remuneration by an employer does in principle – and particularly if repeated as in the present case – constitute "just cause" for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; CAS 2003/O/540 & 541, non-public award of 6 August 2004); for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be "insubstantial" or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract (see also CAS 2005/A/893; CAS 2006/A/1100 marg. no. 8.2.5 et seq.)" (CAS 2006/A/1180).

8.64. Furthermore, in case of termination of the Agreement by the Player, the Sole Arbitrator has to investigate whether the Player was diligent enough to notify the Club of the default in fulfilling its financial obligations.

8.65. The Sole Arbitrator refers to the well-established CAS jurisprudence that in each particular case the surrounding circumstances need to be considered separately and objectively on a case-by-case manner.

8.66. In this respect, the Sole Arbitrator refers to Article 337 of the Swiss Code of Obligations, which reads as follows:

A valid reason is considered to be, in particular, any circumstances under which if existing the terminating party can in good faith not expected to continue the employment relationship.

8.67. Looking at the specific circumstances in this case at stake the Sole Arbitrator finds it justified that the Player – already involved in legal proceedings – did not give the legal notice as indicated in the Agreement.

e. If any compensation is due, how should it be calculated?

(i) In particular, is there any valid liquidated damages clause? If not, how should the compensation be calculated?

8.68. Considering the reasoning above, the Sole Arbitrator finally has to examine whether any penalty clauses, liquidated damages or other compensation are applicable in this case.

8.69. The Sole Arbitrator observes that – although the Player and the Club are both Romanian – Clause VIII of the Agreement stipulates that *"The price of this agreement includes the assignment of the federative rights of the player in favour of C.S. FOTBAL CLUB ASTRA PLOIEŞTI (SPORTS CLUB ASTRA PLOIEŞTI FOOTBALL CLUB) who, in accordance with the regulations of FIFA, UEFA, FRF, LPF, AJF, may use them during the execution of the present agreement"*. Therefore, as stated before, the FIFA Regulations are applicable at the present case, as well as if there is no clause foreseen in the Agreement that deals with the consequences of the termination.

8.70. Article 17.1 of the RSTP of FIFA serves as a guideline in cases like the present one to assist the calculation of the compensation, which has to be done on a case-by-case basis, depending on the specific circumstances of the case. In this respect, the Sole Arbitrator refers to the consolidated CAS jurisprudence, in special the case CAS 2011/A/2662:

"As a consequence, the Sole Arbitrator turns his attention to the FIFA RSTP. If a party breaches the contract without just cause, the consequences under Article 17 of the FIFA RSTP apply. This provision provides that "the party in breach" is obliged to pay compensation. In view of the protective purpose of these provisions, it makes no difference whether a party simply backs away from a contract in the form of unlawful termination of the contract or whether – through a serious breach of duty – he removes the basis of trust necessary for continuing the contract. The addressee of the obligation to compensate in Article 17 (1) FIFA RSTP is therefore both a party who terminates unlawfully as well as whoever provided the "just cause" for lawful termination of the contract (see also CAS 2005/A/876 Mutu v/Chelsea, award of 15 December 2005, p. 17 and Prof. Dr. Ulrich Haas, Football Disputes between Players and Clubs before the CAS, page 235 in Sport Governance, Football Disputes, Doping and CAS Arbitration, 2nd CAS & SAV/FSA Conference Lausanne, M. Bernasconi and A. Rigozzi, Lausanne 2009, Editions Weblaw, Berne 2009). As a result, the Sole Arbitrator assesses that the Club is obliged to pay compensation to the Player should the FIFA RSTP be applicable".

8.71. In light of the CAS case law, the Sole Arbitrator noted that the Agreement did not provide a mechanism for calculating the compensation for a breach as under para III sub 1 under h) of the Agreement.

8.72. It must also be highlighted that under the Romanian regulations, the Player had the right to terminate the Contract with just cause because it is established that the Player did not receive his contractual rights *"for a period longer than 90 days since the date they were due"* (Article 18.10 sub a, second paragraph, first sentence RPFL RSTP).

8.73. Although not foreseen in the Agreement, the Sole Arbitrator determines that the starting point for any compensation would be the balance of money due under the Agreement that remains unpaid, which amounts to the sum of EUR 132,000.

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

8.74. Looking at the specific circumstances of the case, the Sole Arbitrator finds that there are reasons to reduce this amount of compensation.

8.75. It is beyond any doubt that the Player was not contributing to the sporting ambition of the Club. Furthermore, the Player was aware that the Club wanted to terminate the contract at the beginning of the season 2011-2012, because the Club started proceedings before the RPFL DRC to terminate the Agreement, already on 1 June 2011.

8.76. The Sole Arbitrator further notes that the total of outstanding amounts due by the Club to the Player when proceedings started before the legal bodies of the RPFL, looking from the Club's perspective, were at least 25% lower.

8.77. Considering the above-mentioned scenario one can infer that the Player knew, as from the beginning of the season 2011-2012 that his future would certainly not be at the Club.

8.78. The Sole Arbitrator refers therefore to article 163 (3) of the Swiss CO provides that:

"3. At its discretion, the court may reduce penalties that it considers excessive".

8.79. The Sole Arbitrator knows that the Swiss Federal Tribunal holds that various criteria play a determining role, such as the nature and duration of the contract, the gravity of the fault and the contractual violation, the economic situation of the parties as well as the potential independency between the parties.

8.80. Taking this into account, the Sole Arbitrator concludes that the season 2012-2013 should be left outside of the compensation as the Player had the opportunity to look for other clubs as from June 2011, knowing that his future would very likely not be with the Club. The player had the opportunity during three transfer windows, to look for alternatives as a player, using therefore as usual his agent.

8.81. In light of the above, the Sole Arbitrator calculates that the compensation to be paid as result of the unilateral breach of the contract by the Club as per the 26 October 2011 has to be calculated as follows:

•	Period: 26 October – 31 October 2011	EUR	968.-;
•	Period: November 2011 – 30 June 2012 (8 x EUR 6,000)	EUR	48,000.-;
•	Total	EUR	48,968.-

The season 2012/2013 is therefore not part of the calculation of the compensation.

f. Should any interest accrue on the compensation as calculated above?

8.82. As to the interest rate: in the present case there is no contractually agreed interest rate in case of default. By virtue of Art. 104 of the relevant Swiss Law (*Loi fédérale complétant le Code civil Suisse, Livre cinquième: Droit des obligations, du 30 mars 1911*) a 5% interest rate can be lawfully added to the original monetary obligation. Therefore, the Sole Arbitrator finds it reasonable

that interests at a rate of 5% per annum shall accrue as from per 30 days from the notification of the decisions of the Appeal Committee of the DRC, i.e 26 June 2012.

Conclusion

8.83. The appeal filed by Mr. Gussev Vitali is partially upheld and both decisions issued by the Appeal Committee of the Romanian Professional Football League, dated 29 March 2012, are set aside and shall be replaced by this award.

8.84. FC Club Astra is liable to pay Gussev Vitali an amount of EUR 90,000 (48,968 + 41,032) as outstanding salary and compensation with interest at 5% per year from 26 June 2012.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The statement of appeal filed on 28 June 2012 by Mr. Gussev Vitali is partially upheld.

2. The Decision nr. 79 issued on 29 March 2012 by the Appeal Committee of the RPFL is set aside.

3. The Decision nr. 80 issued on 29 March 2012 by the Appeal Committee of the RPFL is set aside.

4. C.S. Fotbal Club Astra is ordered to pay to Mr. Gussev Vitali the amount of EUR 90,000 with interest at 5% per annum as from 26 June 2012.

5. (…)

6. (…)

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