Arbitration CAS 2012/A/2698 AS Denizlispor Kulübü Dernegi v. Wescley Pina Gonçalves, award of 28 November 2012

Panel: Mr Rui Botica Santos (Portugal), President; Mr Efraim Barak (Israel); Mr Francisco Müssnich (Brazil)

Football
Termination of contract with just cause
Scope of review of the appealed decision
Notion of "just cause"
Examples of "just cause"
Compensation for breach of contract

1. **If a party has not appealed against the first instance decision but has merely requested that the other party´s appeal be dismissed and the decision be confirmed, the CAS panel´s scope of review is limited and cannot go beyond what was requested by the party in the CAS proceedings, for example by assessing additional requests that were submitted in the first instance proceedings.**

2. **Only material breaches of an employment contract are just cause for termination. The breach must be material in the sense that in the circumstances of the breach at stake the other party cannot be expected to continue the contract while the first party is in breach. A party will only be able to establish a just cause to terminate the employment contract if it had previously warned the other party of its unacceptable conduct or attitude. The seriousness and frequency of the breach, the circumstances under which it occurred and the club or player´s attitude must also be considered in determining whether a party has just cause to terminate a contract. The breach ought to have persisted for a long time, and/or the violations ought to have accumulated over a certain period of time and not been remedied in spite of the warning or warnings. Pursuant to Article 337 para. 3 of the Swiss Code of Obligations, the deciding authority has discretion to assess the facts and determine whether there was just cause for terminating the contract, on the merits of each particular case.**

3. **The situations contained in the FIFA Commentary are just examples of just cause, since the FIFA commentary *per se* is not considered to be a binding legal source. However CAS panels do refer to such circumstances and refer to the FIFA Commentary as a guiding source when determining whether a given situation was indeed a breach which meets the level of being a just cause and by this entitling the affected party to terminate the agreement due to the breach. A player who has not been paid for over 3 months may in general terms and in the absence of any proven facts that legally justify such delay, be entitled to terminate his contract on condition that he has served his club with a notice of default. In addition to the unpaid salaries,**

the club´s attitude of taking away the player´s accommodation, car insurance and preventing him from training and/or accessing the club´s facilities are additional factors which further justify the termination of the contract by the player.

4. It is evident from Article 17 para. 1 RSTP that the criteria are wide and the deciding body has discretion in assessing and determining the amount of compensation based on the specified criteria as well as on any other objective criteria. Based on the principle of restitution, compensation for unilateral termination of contact must be aimed at reinstating the injured party to the position it would have been had the contract been fulfilled to its end and based on the principle of the positive interest.

I. THE PARTIES

1. AS Denizlispor Kulübü Dernegi (hereinafter referred to as the "Appellant" or the "Club") is a Turkish professional football club and a member of the Turkish Football Federation (hereinafter referred to as the "TFF"). The latter is a member of the Fédération Internationale de Football Association (hereinafter referred to as the "FIFA").

2. Wescley Pina Gonçalves (hereinafter referred to as the "Player" or the "Respondent") is a professional football player of Brazilian nationality.

II. THE FACTS

3. This appeal was filed by the Club against the decision rendered by the FIFA Dispute Resolution Chamber (hereinafter referred to as the "DRC") passed on 15 June 2011 (hereinafter referred to as the "Appeal Decision"). The grounds of the Appeal Decision were notified to the Parties on 15 December 2011.

4. A summary of the most relevant facts and the background giving rise to the present dispute will be developed on the basis of the Parties' submissions and the evidence adduced during the hearing. Additional factual background may also be mentioned in the legal considerations of the present award. In this award, the Panel only refers to the submissions and evidence it considers necessary to explain its reasoning.

II.1 THE CONTRACTUAL RELATIONSHIP BETWEEN THE CLUB AND THE PLAYER

5. On 30 December 2008, the Club and the Player signed an employment agreement (hereinafter referred to as the "Contract") under which the Club employed the Player as from 5 January 2009 until 31 May 2011.

6. Under clause 3 of the Contract, the Player was entitled to the following payments:

"For the season 2008-2009 (05.01.2009 – 31.05.2009), the payments will be:

a) Denizlispor will pay $ 25.000 USD to the player as cash.

b) $16.000 USD in 31.01.2009

c) $16.000 USD in 28.02.2009

d) $16.000 USD in 31.03.2009

e) $16.000 USD in 30.04.2009

f) $16.000 USD in 31.05.2009 the total of $ 105.000 USD

For the season 2009-2010 (01.06.2009 – 31.05.2010), the payments will be;

a) Denizlispor will pay $ 50.000 USD to the player as cash.

b) $16.000 USD in 31.08.2009

c) $16.000 USD in 30.09.2009

d) $16.000 USD in 30.10.2009

e) $16.000 USD in 30.11.2009

f) $16.000 USD in 31.12.2009

g) $16.000 USD in 31.01.2010

h) $16.000 USD in 28.02.2010

i) $16.000 USD in 31.03.2010

j) $16.000 USD in 30.04.2010

k) $16.000 USD in 31.05.2010 the total of $ 210.000 USD

For the season 2010-2011 (01.06.2010 – 31.05.2011), the payments will be;

a) Denizlispor will pay $ 50.000 USD to the player as cash.

b) $16.000 USD in 31.08.2010

c) $16.000 USD in 30.09.2010

d) $16.000 USD in 30.10.2010

e) $16.000 USD in 30.11.2010

f) $16.000 USD in 31.12.2010

g) $16.000 USD in 31.01.2011

h) $16.000 USD in 28.02.2011

i) $16.000 USD in 31.03.2011

j) $16.000 USD in 30.04.2011

k) $16.000 USD in 31.05.2011 the total of $ 210.000 USD".

7. In addition to the above, the Club undertook to:

   a. provide an apartment for the Player and to pay for the rent and the fuel for the heating. Electricity, water, phone bills and other apartment expenses would be paid by the Player.

   b. provide a car for the Player and to pay the Player´s car insurance. The Player would be responsible for the gas and other expenses.

   c. provide the Player and his wife with 2 economy class tickets to travel to Brazil until May 2009; and

   d. provide the Player and his wife with 3 economy class tickets to travel to Brazil until May 2010; and

   e. provide the Player and his wife with 3 economy class tickets to travel to Brazil until May 2011 (cf. Clauses 4, 5 and 6 of the Contract).

II.2 THE DISPUTE

8. On 31 May 2009, after the end of the 2008-2009 Turkish football season, the Player, together with the rest of the team, left for vacations which were authorised by the Club.

9. On 25 June 2009, the Player returned to Turkey to attend the Club´s pre-season training.

10. On 30 June 2009, the Player travelled with the rest of the Club´s players to Sparta, where the Club held pre-season training until 11 July 2009.

11. On 13 July 2009, the Club left for Austria for further pre-season training. The Player was not part of the squad that travelled to Austria. During this period, the Player took part in the training activities organised by the Club´s youth squad in Denizli, Turkey.

12. On 27 July 2009, the Club returned to Denizli and continued its pre-season training. However, the Player did not attend any of the sessions and claims to have been prohibited from doing so by the Club.

13. Meanwhile, the Player´s April and May 2009 salaries totalling USD 32,000, together with USD 50,000 which fell due at the beginning of the 2009-20010 season had gone unpaid.

14. On 28 July 2009, the Player informed the Club that he had not received the *"(…) monthly salaries in connection with April and May/2009 (…) the amount of USD 50.000 (…) in the beginning of this season, which was not yet accomplished by Denizlispor either"*. The Player requested the Club to furnish its *"(…) written position in connection with the payment of the amounts due, all within 03 (three) days (…)"*.

15. According to the Player, the Club responded on 29 July 2009 by informing him that he would no longer be provided with housing and a car. On the same day, the Player reacted by informing the Club that its actions were contrary to clauses 4 and 5 of the Contract, and gave the Club a further 48 hours to state its position in relation to his contractual status.

16. On 30 July 2009, the Player availed himself for the Club´s morning training. He however claims to have been prohibited from taking part in any of the Club´s training sessions and facilities. On the same date, the Player reacted by informing the Club that by doing that, and by defaulting in paying his salaries, the Club was in breach of the Contract. The Club was given 24 hours to rectify this situation.

17. On 31 July 2009, the Club informed the Player that it would soon file proceedings against him before FIFA, on the grounds that he had *"(…) not participated* [in] *the training in Wien, Austria between the date 14.07.2009 – 27.07.2009 before the season 2009-2010, without taking the written authorization of the (…) club (…) and without showing reason. Furthermore, he doesn't participate to the training in our country since the time of our return from the camp that is to say since 27.07.2009".*

18. On 31 July 2009, the Player responded by informing the Club that he had insistently tried to attend the training sessions, only to be restrained by the Club´s director, Mr Osan. He stated that the Club´s allegations in its letter dated 31 July 2009 were baseless and aimed at justifying its breach of the Contract. The Club was granted 48 hours within which to state its position in relation to the Contract and the Player´s financial status.

19. On 5 August 2009, the Player informed the Club that he had always been at its disposal, only for the Club to prohibit him from attending the training sessions and from accessing its facilities. The Club was granted 24 hours within which to state its position regarding the unpaid salaries and its position in relation to the continuation of the Contract.

II.3 THE TERMINATION

20. On 6 August 2009, the Club issued a notice terminating the Player´s Contract, citing the following grounds:

> *"(…)*
>
> *Dear Wescley Pina GONÇALVES,*
>
> *You did not attend the camp program organized for 2009-2010 football season in Vienna, Austria (…) between 14.07.2009 and 27.07.2009. You have also not attended training programs after returning the camp (on 27.07.2009) up to now without a written approval. Since you did not fulfil the provisions of the contract executed between you and the club, Professional Player Contract was terminated unilaterally on 05.01.2009.*
>
> *(…)".*

21. On 7 August 2009, the Player informed the Club that he had terminated the Contract, stating the following:

"Reference is made to our notifications dated 28, 29, 30 (…) 31 July and 05 August 2009 (…).

(…) although Mr Gonçalves has always been at the Club´s disposal in order to accomplish his contractual obligations, the club has impeded the Player to enter into the Club´s facilities in order to participate of the training sessions or any physical activity, also representing the failure to pay two monthly salaries and worked days in connection with April, May and August 2009, added to the bonus of USD 50.000,00.

(…) this morning the player was forced by the Club to leave his accommodation, was ordered to leave the country and received a flight ticket unilaterally issued today by Denizlispor.

In view of the above and considering Denizlispor Kulubu´s [gross] breach of the employment contract entered by the parties, this is to terminate any and all contractual relationship existing between the parties, without prejudice to any further legal action to be promptly taken before FIFA competent body.

(…)".

II.4 THE PLAYER´S NEW CLUBS

22. On 31 August 2009, the Player signed an employment contract with the Brazilian club Ceará Sporting Clube valid from 31 August 2009 until 10 December 2010 on a monthly salary of 2,000 Brazilian Reals, approximately USD 1,052.

23. On 13 January 2010, the Player signed an employment contract with the Brazilian club Atletico Clube Goianiense valid from 13 January 2010 until 30 May 2010 on a monthly salary of 3,000 Brazilian Reals, approximately USD 1,578.

24. On 26 May 2010, the Player signed an employment contract with the Brazilian club Clube Nautico Capibaribe valid from 26 May 2010 until 30 November 2010 on a monthly salary of 5,000 Brazilian Reals, approximately USD 2,630.

III. THE FIFA DRC PROCEEDINGS

25. On 8 September 2009, the Player submitted a claim against the Club before the DRC.

26. During the DRC proceedings, it was the Player´s submission that he terminated the Contract with just cause because the Club had (i) failed to pay his April and May 2009 salaries, together with USD 50,000, which fell due between 1 June and 31 July 2009 and (ii) barred him from its facilities and training sessions. The Player requested that the Club be sanctioned for breaching the Contract during the protected period.

27. On its part, the Club maintained that it terminated the Contract with just cause on 6 August 2009 due to the Player´s absence from the training camp between 14 and 27 July 2009, and from the Club´s training facilities from 27 July 2009 without approval. The Club claimed to have notified the Player of such breaches on 31 July 2009. The Club acknowledged having not paid the Player´s April and May 2009 salaries of USD 32,000 but rejected his claim for USD 50,000 for the 2009-2010 season, stating that the Contract had been terminated.

28. On 15 June 2011, the DRC issued its decision, partially upholding the Player´s claim by finding that his termination of the Contract was justified, and that the Club was liable for the said termination. The Club was condemned to pay the Player´s outstanding remuneration of USD 85,733 within 30 days plus an annual interest rate of 5% until the effective date of payment. It was also ordered to pay the Player an additional compensation of USD 300,000 for breach of contract within 30 days plus an annual interest rate of 5% until the effective date of payment. The Player´s request for disciplinary sanctions was dismissed.

29. The DRC decision was based on the following grounds:

a. The Club had acknowledged owing the Player his monthly salaries for April and May 2009,

b. Whereas the Contact did not specify the exact date for paying the instalment of USD 50,000 for the 2009-2010 season, this amount was considered payable by the Club between 1 June and 31 July 2009 because it was part of the Player´s remuneration for the 2009-2010 season, and the first out of the ten monthly salary payments only fell due as from 31 August 2009.

c. The Club´s assertions that the Player had absented himself from the training camp in Austria, and subsequently from the Club´s activities as from 27 July 2009 without approval were rejected because it was only on 31 July 2009 when the Club sent its first notice to the Player, and this notice was sent in response to the Player´s letters sent prior to this, asking the Club to stop breaching the Contract.

d. Even if the Player had absented himself without the Club´s authorisation, such absence would in any case have been valid because the Club had not paid his April and May 2009 salaries, and the instalment of USD 50,000.

e. In view of the above, the Club was already in breach of Contract even before it sent its notice of termination on 6 August 2009 and the Player´s termination on 7 August 2009 was justified.

f. The Player´s unpaid salaries for April and May 2009 (total USD 32,000), the USD 50,000 instalment, plus USD 3,733 as salary for 7 days in August 2009 totalled to USD 85, 733. This amount was to be paid by the Club.

g. The remuneration due under the Contract amounted to USD 366,267, and this served as the basis for determining the final amount of compensation. However, the Player entered into new employment contracts with other clubs after the termination, namely:

- Ceará Sporting Clube valid from 31 August 2009 until 10 December 2010 on a monthly salary of 2,000 Brazilian Reals, approximately USD 1,052;
- Club Atletico Clube Goianiense valid from 13 January 2010 until 30 May 2010 on a monthly salary of 3,000 Brazilian Reals, approximately USD 1,578; and
- Club Clube Nautico Capibaribe valid from 26 May 2010 until 30 November 2010 on a monthly salary of 5,000 Brazilian Reals, approximately USD 2,630.

h. The total remuneration received by the Player under the new contracts from September 2009 to November 2010 was USD 27,878.

i. However, the Player failed to mitigate his damages during one registration period between December 2010 and May 2011 as there was no information pertaining to his employment situation.

j. Pursuant to the discretion contained in Article 17.1 of the FIFA Regulations on the Status and Transfer of Players edition 2008 (hereinafter referred to as the "RSTP"), the Player´s obligation to mitigate his damages was considered, and the Club was exempted from paying the entire residual value of the Contract. The Club was ordered to pay only USD 300,000, which was deemed reasonable and appropriate as compensation for the breach.

IV. THE ARBITRAL PROCEEDINGS BEFORE THE CAS

30. On 4 January 2012, the Appellant filed its Statement of Appeal at the Court of Arbitration for Sport (hereinafter referred to as the "CAS") in French and nominated Dr Thomas Bach as arbitrator. It also requested a stay of the execution of the Appeal Decision. The Appellant was represented by Mr Seyh Samil Çaglar, Attorney-at-law, Istanbul, Turkey.

31. On 11 January 2012, the CAS Court Office informed the Appellant that Dr Thomas Bach was not a CAS arbitrator but a member of the ICAS. The Appellant was hence given 3 days to complete its Statement of Appeal by nominating an arbitrator from the CAS list.

32. On 13 January 2012, the Appellant nominated Mr Efraim Barak as its arbitrator.

33. On 14 January 2012, the Appellant requested the CAS Court Office to grant its new lawyer 10 days to study the case and file its Appeal Brief

34. On 16 January 2012, the CAS Court Office informed the Appellant that its deadline for filing its Appeal Brief was suspended pending the receipt of the Respondent's position on its request. The Appellant was also informed that pursuant to CAS jurisprudence, an appeal against a decision of a financial nature issued by a Swiss private association automatically meant that the execution of that decision was stayed. The Appellant was requested to state its position in relation to this within 3 days.

35. On 17 January 2012, the Respondent objected French as the language of arbitration. He stated that pursuant to Article R29 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code"), the fact that the DRC proceedings were held in English and the fact that neither party was a native English speaker, the Parties ought to be treated equally, meaning that the language for the arbitration ought to be English. He also objected to the Appellant´s request for a 10 day extension to file its Appeal Brief.

36. On 17 January 2012, the CAS Court Office granted the Appellant one day to state whether he consented to the arbitration being conducted in English, failure to which an Order would be

rendered by the President of the CAS Appeals Arbitration Division. In the meantime, the Appellant´s deadline for filing its Appeal Brief remained suspended.

37. On 18 January 2012, the Appellant informed the CAS Court Office that it withdrew its request for a stay. It also requested the extension of its 10 days request to file an Appeal Brief, while maintaining its position to have the proceedings conducted in French.

38. On 19 January 2012, the Parties were informed that the Deputy President of the CAS Appeals Arbitration Division would issue an Order in relation to the language of the arbitration.

39. On 20 January 2012, the Deputy President of the CAS Appeals Arbitration Division issued his Order pursuant to Article R29 of the CAS Code, ruling that the proceedings would be conducted in English. The CAS Court Office granted the Appellant until 26 January 2012 to file its Appeal Brief.

40. On 26 January 2012, the Appellant filed its Appeal Brief. The CAS Court Office granted the Respondent 20 days to file his Answer.

41. On 31 January 2012, the CAS Court office referred the Parties to its letter dated 16 January 2012, and informed the Respondent that since it had failed to nominate its arbitrator, the President or Deputy of the CAS Appeals Arbitration Division would appoint one in his place.

42. On 31 January 2012, the Respondent informed the CAS Court Office that he was unable to nominate his arbitrator because the letter dated 16 January 2012 was in French, which was not the language of the proceedings. He consequently nominated Mr Francisco Müssnich as his arbitrator.

43. On 31 January 2012, the CAS Court Office informed the Parties that in view of the consensual nature of arbitration, the nomination of Mr Francisco Müssnich as the Respondent's arbitrator had been accepted.

44. On 17 February 2012, the Respondent filed his Answer together with documents and evidence in support of his defence. The CAS Court Office granted the Parties until 27 February 2012 to state whether they wanted a hearing to be held or to have the matter decided on the basis of the written submissions only.

45. On 27 February 2012, the Respondent indicated his wish to have the matter decided on the basis of written submissions only, saying he did not have the financial means to bear the legal costs and expenses. On the same date, the Appellant indicated its wish for a hearing to be held.

46. On 30 April 2012, the Parties were informed that the Panel appointed to decide the above-referenced case was constituted as follows:

- Mr Rui Botica-Santos, Attorney-at-law in Lisbon, Portugal as President.
- Mr Efraim Barak, Attorney-at-law, Tel Aviv, Israel, appointed by the Appellant.
- Mr Francisco Müssnich, Attorney-at-law, Rio de Janeiro, Brazil, appointed by the Respondent.

The Panel aslo appointed Mr Felix Majani, Attorney-at-law, Nairobi, Kenya to act as the *ad hoc* clerk.

47. On 9 May 2012, the CAS Court Office requested FIFA to send a copy of the file related to the DRC proceedings.

48. On 23 May 2012, the CAS Court Office received a copy of the FIFA file.

49. On 31 May 2012, the CAS Court Office informed the Parties that the matter would be heard on 5 September 2012 at the CAS headquarters. They were invited to state whether they intended to call any witnesses or had any witness statements to adduce.

50. On 5 June 2012 the Order of Procedure was sent to the Parties, who both signed the same. In signing its Order of Procedure, the Appellant indicated that it would be represented by Mr Seyh Samil Çaglar, attorney-at-law, Istanbul, Turkey during the hearing.

51. On 27 August 2012, Mr Seyh Samil Çaglar, informed the CAS Court Office that he had ceased acting for the Appellant. He indicated that he would not attend the hearing on the Appellant´s behalf.

52. On 28 August 2012, the CAS Court Office granted the Appellant until 31 August 2012 to state the person or people who would represent it during the hearing scheduled for 5 September 2012.

53. By 31 August 2012, the CAS Court Office was yet to hear from the Appellant in relation to its new lawyer, and on 3 September 2012, the Appellant informed the CAS Court Office that it would name its new representative for the hearing scheduled on 5 September 2012 on or before 9.00 am on 4 September 2012.

54. On 4 September 2012, the Panel arrived in Lausanne, ready and duly prepared for the hearing which was set to take place on 5 September 2012. The Respondent´s counsel had also arrived in Lausanne and was waiting for the next day to attend the hearing.

55. On 4 September 2012, while the Panel was already in Lausanne, the Appellant informed the CAS Court Office that it was unable to find a new representative in time for the hearing. The Appellant requested the CAS Court Office to grant it more time to find a new representative and consequently asked that the hearing, which had been fixed for 5 September 2012, be cancelled and that no decision should be issued on 5 September 2012. Upon receiving this

notice from the Appellant, the Panel inquired and was informed that the Respondent's counsel, who was supposed to attend the hearing, had already arrived in Lausanne.

56. On 4 September 2012, the CAS Court Office informed the Parties that the Panel had cancelled the hearing scheduled for 5 September 2012. The Parties were also informed that the Appellant would *"(…) bear all the costs related to the cancelled hearing (CAS and Respondent´s), notwithstanding the outcome of the procedure"* because the flights and other costs of the Panel members as well as the flights costs for counsel of the Respondent were actually a *fait accompli* at the late stage of the notification made by the Appellant. The CAS Court Office consequently informed the Parties as follows:

a) The Parties were granted until 5 September 2012 to state whether they wanted a new hearing to be scheduled, and in case of the affirmative, the CAS would request the Appellant to pay additional advance of costs or to state whether they wanted the matter decided on the basis of written submissions.

b) The Respondent was invited to submit the costs it had incurred in relation to the cancelled hearing.

57. On 5 September 2012, the Respondent informed the CAS Court Office that it did not want a hearing and preferred the matter to be decided on the basis of the written submissions. The Respondent further informed the CAS Court Office that:

a) It lacked financial means to travel to Lausanne for another hearing; and

b) Should the Panel therefore decide to hold a hearing, the Appellant must first be ordered to:

i. Reimburse all the costs incurred by the Appellant in relation to the cancelled hearing; the video conference and travel arrangements all totalling to EUR 10,000 and

ii. Make a further advance payment of EUR 10,000 to cover additional expenses in the event of a new hearing.

58. On 6 September 2012, the Appellant informed the CAS Court Office that it insisted on a hearing.

59. On 11 September 2012, the CAS Court Office informed the Parties that following the Appellant´s request for a new hearing, the matter would be heard in Rio de Janeiro, Brazil, to save the Respondent further costs. Pursuant to Article R64 of the CAS Code, the Appellant was requested to pay the CAS Court Office CHF 15,000 to cover for the Panel´s travel to Rio de Janeiro. The Parties were informed that failure by the Appellant to pay this additional advance of costs would lead the Panel to render the award on the basis of written submissions only and no further hearing would be held.

60. On 19 September 2012, the Appellant informed the CAS Court Office of its inability to pay the requested additional advance of costs fee of CHF 15,000 by 19 September 2012 due to financial difficulties.

61. On 20 September 2012, the CAS Court Office granted the Appellant a new deadline until 1 October 2012 to pay the requested additional advance of costs. The Appellant was reminded that failure to pay the said costs would lead to an award issued on the basis of the Parties´ written submissions without a hearing.

62. On 1 October 2012, the Appellant stated its inability to pay the additional advance of costs. Given its financial difficultly, it requested that the matter be decided on the basis of the Parties´ written submissions only.

63. On 3 October 2012, a new Order of Procedure was sent to the Parties, who both signed the same. The Parties confirmed that the Panel would be entitled to decide the matter based on the Parties' written submissions only and that their right to be heard had been respected.

V. THE PARTIES´ POSITIONS

V.1. THE APPELLANT'S POSITION

a. The issue for determination

64. The Club maintains that the issue for determination is who between the Player and the Club had just cause to terminate the Contract. The Club´s termination was just because the Player had breached his contractual obligations.

b. The Termination

65. The Club reiterates that its termination of the Contract on 7 August 2009 was justified because the Player was not fulfilling his contractual obligations. The Player missed the training sessions in Austria between 14 and 27 July 2009 without any permission, and also absented himself from the ensuing training sessions from 27 July 2009.

66. The Club acknowledges having not paid the Player´s April and May 2009 salaries of USD 32,000, but denies the USD 50,000 claimed by the Player and also the amounts remaining, because the Contract had already been terminated.

67. The evidence adduced by the Player during the DRC proceedings was insufficient to prove the Player´s case. According to the Club, the DRC established that the *"(…) club is not able to prove that the player was absent at the camp in Austria. This is against the nature of life, why and how the club has to prove this"*.

68. The DRC failed to consider the Club´s termination fax dated 6 August 2009, but on the other hand considered all the letters sent by the Player. This contravened the principles of equity.

69. The Appeal Decision must hence be set aside because it erred in its findings in relation to the termination.

c. Compensation

70. The Player was able to get new employment contracts with other clubs after the termination. Although his remuneration under the said new contracts was below his remuneration with the Club, the Player has only himself to blame, because he consented to the remuneration under his new contracts.

71. Even if the Club is to be found to have unjustifiably terminated the Contract, compensation should only be calculated for the period 30 November 2010 to 31 May 2011 because the Player´s rights as an employee of the Club were only protected during this period. According to the Club, the amount due to the Player over this period is USD 82,000, i.e 6 months x USD 16,000[1].

72. The DRC's calculation of the compensation in the Appeal Decision is unfair and illegal because it awarded an amount which turned out to be a full payment of contract instead of compensation. Compensation must not allow a party benefit without the said party doing any contractual obligation.

d. Requests

73. The Appellant requests the CAS to issue the following relief:

"i) to cancel the decision of FIFA Dispute Resolution Chamber (…) and decide the decision as the Club has to pay 32.000,00 USD with interest %5 [sic] to the Football player,

ii) if our above demand is not accepted and agreed that the contract is terminated by the fault of client club, than fix the calculation of compensation and decide it at the amount of 82.000,00USD according to our explanations;

iii) also kindly request to award an injunction decision before the judgment of the arbitrators started, as not to execute the decision of FIFA Dispute Resolution Chamber until the date of CAS a decision".

V.2. THE RESPONDENT'S POSITION

a. The Club had no just cause to terminate the Contract and to withhold the Players' outstanding salary

74. The DRC fully analysed the Club´s termination letter dated 6 August 2009 and found that there existed no just cause for the Club to terminate the Contract.

[1] The Panel took note of the fact that this calculation is wrong; 6 months x USD 16,000 corresponds to an amount of USD 96,000.

75. The Player duly fulfilled his contractual obligations and went on holiday with the Club´s authorisation. When the Club returned from its training camp in Austria, it informed the Player that he would no longer take part in any of the Club's training or physical activities.

76. When notified to pay the Player´s April and May 2009 salaries plus USD 50,000, the Club reacted on 29 July 2009 by informing the Player that it would no longer provide his accommodation and car, despite these benefits being part of the Contract.

77. On 30 July 2009, the Player tried to attend the Club´s morning training session but was prohibited from doing so. He tried to attend the afternoon session, only to be told by the Club´s director, Mr Ozhan, that he was no longer allowed to train with the Club, and that his access to the Club´s facilities had forthwith been denied.

78. It supports the Appeal Decision's findings that the Club had received several notices from the Player to stop breaching the Contract, and only responded for the first time on 31 July 2009.

b. Absence of evidence proving that the Player missed training

79. The Club has not adduced evidence proving that the Player was absent from the Austria training camp, and subsequently from the Club´s activities as from 27 July 2009 without its approval.

80. The Club erroneously states in its letter dated 6 August 2009 that the Player missed training sessions.

81. In any case, the Club´s termination letter dated 6 August 2009 was received by the Player after the Contract had already been terminated, meaning that this letter would not have any legal effect.

82. The Club´s arguments in relation to compensation should be dismissed. Compensation for breach of contract must be assessed in accordance with Article 17 of the RSTP, and must take into account the time remaining under the contract and the new employment contracts entered into by the Player.

c. Requests

83. The Player concludes by requesting the CAS to find as follows:

"(…) the present appeal shall be reject in totum and the decision rendered by FIFA DRC on 15 June 2011 shall be totally upheld.

For the sake of completeness, Respondent hereby attaches the initial claim presented by before FIFA proceedings, reverting in totum to its terms.

Claimant shall bear all the costs of the arbitration proceeding.

(…)".

VI. LEGAL ANALYSIS

VI.1 JURISDICTION OF THE CAS

84. The jurisdiction of the CAS, which is not disputed, derives from Articles 62 and 63 of the FIFA Statutes edition 2011 and Article R47 of the CAS Code.

85. Moreover, the Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure.

86. It follows that the CAS has jurisdiction to decide this dispute.

VI.2 ADMISSIBILITY

87. In accordance with Article 63.1 of the FIFA Statutes 2011, *"[a]ppeals against final decisions passed by FIFA´s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".*

88. The grounds of the Appeal Decision were notified on 15 December 2011 and the Statement of Appeal filed on 4 January 2012. This was within the required 21 days.

89. It follows that the appeal is admissible. Furthermore, no objection in this respect has been raised by the Respondent.

VI.3 SCOPE OF THE PANEL´S REVIEW

90. According to Article R57 of the CAS Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance.

91. The Panel notes that the Respondent annexed *"(…) the initial claim presented before FIFA proceedings, reverting in totum to its terms".* Among the prayers and requests made by the Respondent in the FIFA proceedings included a request that sporting sanctions be imposed on the Appellant. He also requested an amount of USD 366.267,00 as compensation.

92. However, the Respondent has not appealed against the Appeal Decision. He only requests that the CAS dismiss the Appellant´s appeal and confirm the Appeal Decision. In view of this,

the Panel´s scope of review is limited and cannot go beyond by reviewing aspects which the Appellant has not appealed against. The request for sporting sanctions and the request for the award of USD 366.267,00 as compensation shall therefore not be assessed.

VI.4 LAW APPLICABLE TO THE MERITS

93. Article R58 of the CAS Code provides the following:

"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".

94. Pursuant to clause 7 of the Contract, the Player accepted *"(…) all the terms and conditions of Turkish Football Federation, UEFA, FIFA and Denizlispor Club".*

95. In addition to this, the matter at stake relates to an appeal against a FIFA decision, and reference must hence be made to Article 62.2 of the FIFA Statutes edition 2011 which states that:

"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

96. The Parties have not invoked any provisions of the TFF, UEFA and/or Club regulations.

97. In light of the above, the Panel is of the view that the law applicable to the present appeal shall be the FIFA regulations and Swiss law in subsidiary.

98. In relation to which FIFA regulations should be applicable to the matter, the Panel, as the DRC found in its decision, confirms that in accordance with Article 26.1 and 26.2 of the RSTP (editions 2009 and 2010), and considering that the matter before the DRC was filed on 8 September 2009, the RSTP 2008 edition is applicable to the matter at hand as to the substance.

VI.5 THE MERITS OF THE APPEAL

99. Based on the Parties´ submissions, the issues for determination are the following:

a) The alleged irregularities at the DRC level.

b) Which party had just cause to terminate the Contract and what are the consequences of this termination?

c) Was the decision made by the DRC regarding the compensation fair and just?

a) The alleged irregularities at the DRC level

100. It is the Appellant´s assertion that the DRC failed to consider the Club´s termination fax dated 6 August 2009, but on the other hand considered all the letters sent by the Player. According to the Club, this contravened the principles of equity.

101. The Player claims that the DRC fully analysed the Club´s termination letter dated 6 August 2009 and found that there existed no just cause for the Club to terminate the Contract. He adds that in any case, he received the letter dated 6 August 2009 after the Contract had already been terminated, meaning that this letter would not have any legal effect.

102. Looking at the Appeal Decision, it appears that the DRC considered the letter dated 6 August 2006, and did not find it relevant in arriving at its final conclusion, because in the DRC´s opinion, the said letter was sent after the Club had already breached the Contract. This is evident in paragraph 15 of the Appeal Decision, which states that *"(…) the Chamber concluded that the Respondent was actually already in breach of contract, when it alleges having terminated the employment contract by means of its correspondence dated 6 August 2009"*.

103. Notwithstanding the above, the Panel notes that through these proceedings, the Appellant has adduced new evidence and fresh arguments together with the letter dated 6 August 2009.

104. Reference must hence be made to Article R57 of the CAS Code under which the Panel has full power to review the facts and the law. Therefore, any prejudice suffered by the Appellant before the DRC has been cured by virtue of this appeal in which the Appellant had the right to present its arguments and evidence (CAS 2008/A/1574; CAS 2009/A/1840 & CAS 2009/A/1851; CAS 2008/A/1545).

b) Which party had just cause to terminate the Contract?

105. The Club justifies its termination of the Contract by claiming that the Player was not fulfilling his contractual obligations, as he missed the training sessions in Austria between 14 and 27 July 2009 without any permission, and also absented himself from the ensuing training sessions from 27 July 2009.

106. The Player denies this, by claiming to have fulfilled his contractual obligations and gone on holiday with the Club´s authorisation.

107. The Player states that the Club breached the Contract by not paying his April and May 2009 salaries plus USD 50,000, and declining to provide him with accommodation and a car. The Player also maintains that he tried to attend the Club´s training sessions, only to be told by Club´s director, Mr Ozhan that he may no longer train with the team or make use of the Club´s facilities. Despite these and several notices of default, the Club continued breaching the Contract, prompting him to terminate it on 7 August 2009.

(i) The legal basis

108. Pursuant to the well-established CAS jurisprudence, only material breaches of an employment contract are just cause for termination. The breach must be material in the sense that in the circumstances of the breach at stake the other party cannot be expected to continue the contract while the first party is in breach (CAS 2004/A/587; CAS 2006/A/1180; CAS 2006/A/1100; and CAS 2011/A/2567).

109. Article 14.4 of the FIFA Commentary lays out a number of grounds which justify a club to terminate a player´s contract. These grounds include:

a) A player going on an unauthorised leave, or staying longer than the period granted;

b) A player´s unjustified absence from training for two or more weeks;

c) A player displaying an uncooperative attitude or constantly arguing and/or fighting with teammates or officials; and

d) A player disobeying the coach's instructions.

110. On the other hand, pursuant to Article 14.3 of the FIFA Commentary, a player has just cause for terminating his contract if the club defaults in paying his salary for over 3 months and despite having informed the club of its default, the club does not settle the amount due. Article 14.3 of the FIFA Commentary indeed sets this clear by stating as follows:

"A player has not been paid his salary for over 3 months. Despite having informed the club of its default, the club does not settle the amount due. The player notifies the club that he will terminate the employment relationship with immediate effect. The fact that the player has not received his salary for such a long period of time entitles him to terminate the contract, particularly because persistent noncompliance with the financial terms of the contract could severely endanger the position and existence of the player concerned".

111. The situations contained in the FIFA Commentary, as well established by CAS jurisprudence, are of course just examples since the FIFA commentary *per se* is not considered to be a binding legal source. However CAS panels do refer to such circumstances and refer to the FIFA Commentary as a guiding source when determining whether a given situation was indeed a breach which meets the level of being a just cause and by this entitling the affected party to terminate the agreement due to the breach.

112. In all the aforementioned situations, a party will only be able to establish a just cause to terminate the employment contract if it had previously warned the other party of its unacceptable conduct or attitude (CAS 2007/A/1233 & 1234; CAS 2004/A/587 and CAS 2011/A/2567).

113. The seriousness and frequency of the breach, the circumstances under which it occurred and the club or player´s attitude must also be considered in determining whether a party has just cause to terminate a contract (CAS 2011/A/2567). As specified in Article 14.2 of the FIFA

Commentary, the breach ought to have persisted for a long time, and/or the violations ought to have accumulated over a certain period of time and not remedied in spite of the warning or warnings.

114. Pursuant to Article 337.3 of the Swiss Code of Obligations (hereinafter referred to as "CO") referred also in Article 14.2 of the FIFA Commentary, the deciding authority has the discretion to assess the facts and determine whether there was just cause for terminating the contract, on the merits of each particular case.

(ii) The evidence adduced and the burden of proof

115. In accordance with the principle of the burden of proof, which is a basic principle in every legal system, each party to a legal procedure bears the burden of corroborating its allegations. In other words, any party deriving a right from an alleged fact shall carry the burden of proof (cf. Article 12.3 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber and, for example, CAS 2009/A/1810 & 1811).

116. Based on the facts and evidence adduced, it appears that:

a) On 31 May 2009, the Player, together with the rest of the team, left for vacation which was authorised by the Club;

b) On 25 June 2009, the Player returned to Turkey to attend the Club´s pre-season training;

c) On 30 June 2009, the Player travelled with the rest of the Club´s players to Sparta, where the Club held pre-season training until 11 July 2009;

d) On 13 July 2009, the Club left for Austria for further pre-season training. However, the Player was not part of the squad which travelled to Austria. He was left behind and took part in the training activities organised by the Club´s youth squad in Denizli;

e) On 27 July 2009, the Club returned to Denizli and continued its pre-season training. The Player did not attend any of the sessions on the justification that he was prohibited from doing so by the Club. The Club says that the Player failed to participate in training from 27 July 2009 without its authorisation; and

f) On 30 July 2009, the Player reported to the Club´s morning training. The Player alleges that the Club´s director, Mr Ohan, restrained him from taking part in any of the Club´s training sessions and facilities. The Club states that on 31 July 2009, it informed the Player that he had not participated in training in Austria between 14 and 27 July 2009 without its authorisation and that the Player had not participated in the Club´s training since 27 July 2009.

117. It is hence manifest that according to the Club's instructions the Player attended the Club's youth squad training sessions from 14 July to 27 July 2009.

118. According to the Player, from 27 July 2009 onwards, he tried to avail his services to the Club, only to be prohibited from doing so. He sent the Club a notice on 30 July 2009 asking them to allow him to train. The Club however ignored this notice, and the Player´s absence from the training sessions was therefore involuntary.

119. From the facts established by the Panel and presented by the Parties, the Club has not adduced evidence proving or even supporting the allegation that the Player missed the training sessions in Austria between 14 and 27 July 2009 on his own initiative without any permission. It has also not been proven that the Player freely absented himself from the ensuing training sessions from 27 July 2009. In addition to this, the Club has not adduced evidence rebutting the DRC´s findings, and the Player´s allegations, that the club prevented him from attending the training sessions.

120. Furthermore, there exists no notice from the Club to the Player asking him to stop "breaching" the Contract on the alleged grounds of absence from training. Even if the Player would have missed the training sessions from 27 July onwards, the Club would only have had just cause to terminate the Contract if the Player´s absence exceeded an unreasonable period of time, and in the circumstances of this case the period referred to as an example in the FIFA Commentary of 2 weeks can be deemed as reasonable. However, in this case, the Club´s termination notice was sent on 6 August 2009, even before 2 weeks had elapsed.

121. In view of the foregoing, the Panel finds that the Club had no just cause to terminate the Contract.

122. Looking at the Player´s allegations, it is not in dispute that the Club has expressly acknowledged having not paid the Player´s April and May 2009 salaries. It however denies the USD 50,000 claimed by the Player, in addition to the amounts remaining, claiming the Contract had already been terminated.

123. The Panel notes that the amount of USD 50,000 was due to be paid between 1 June 2009 and 31 May 2010. It is hence clear, contrary to the Club´s assertions, that the Player could claim it with effect from 1 June 2009, before the Contract was terminated on 6 August 2009.

124. As highlighted earlier, under Article 14.3 of the FIFA Commentary, a Player who has gone for over 3 months without being paid may in general terms and in the absence of any proven facts that legally justify such delay, be entitled to terminate his contract on condition that he has served his club with a notice of default.

125. Despite having not paid the Player´s April, May and June 2009 salaries and receiving several notices from the Player dated 28, 29, 30 and 31 July 2009, and on 5 August 2009, the Club defaulted in settling these sums. This entitled the Player to terminate the Contract because persistent breach of the financial terms of a contract could severely endanger the position and existence of a player.

126. The Club had also undertaken to provide the Player with accommodation and a car pursuant to clauses 4 and 5 of the Contract. The Club however breached these terms on 29 July 2009 by informing the Player that he would no longer be provided with housing and a car, and failed to rectify this situation despite receiving several notices from the Player on 28, 29, 30 and 31 July 2009, and on 5 August 2009.

127. As already explained, based on the evidences that were brought in front of this Panel, the Panel is satisfied that the Club prevented the Player from attending its training sessions and also officially prohibited him from accessing its facilities from 30 July 2009. This was in breach of its contractual obligations. The Club did not remedy this situation, despite receiving notices from the Player dated 28, 29, 30 and 31 July 2009, and 5 August 2009.

128. Therefore, and in addition to the unpaid salaries, the Panel also considers the Club´s attitude of taking away the Player´s accommodation, car insurance and preventing him from training and/or accessing the Club´s facilities as additional factors which further justified the termination of the Contract by the Player (CAS 2011/A/2567).

129. In view of the above, the Panel finds that unlike the Club, the Player had just cause to terminate the Contract.

130. Article 17.1 of the RSTP edition states that *"[i]n all cases, the party in breach shall pay compensation"*.

131. Having found the Club unilaterally terminated the Contract without just cause, it follows that it must compensate the Player.

c) *Was the decision made by the DRC regarding the compensation fair and just?*

132. The Club argues that the Player was able to sign new employment contracts with other clubs after the termination of the Contract with the Appellant. Although his remuneration under the said new contracts was below his remuneration with the Club, the Club argues that the Player can blame only himself, because he consented to the said remunerations under his new contracts.

133. The Appellant also asserts that even if the Club is to be found to have unjustifiably terminated the Contract, compensation must be calculated for the period 30 November 2010 to 31 May 2011. According to the Club, this totals to USD 82,000 (6 months x USD 16,000). However, the Panel notes that even this calculation by the Club is wrong and should have amounted to USD 96,000.

134. It is the Club´s submission that the Appeal Decision's calculation of the compensation is unfair and illegal because it awarded an amount which turned out to be a full payment of contract instead of compensation. Compensation must not let a party to thrive without the said party doing any contractual obligation.

135. Pursuant to Article 17.1 of the RSTP edition, *"[i]n all cases, the party in breach shall pay compensation. (…) unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".*

136. It is evident from the above provision that the criteria are wide and the deciding body has discretion in assessing and determining the amount of compensation based on the specified criteria as well as on *any other objective criteria*.

137. The Club states that compensation ought to be assessed with effect from 30 November 2010 to 31 May 2011. It has however not substantiated why compensation should cover these dates, and it has not adduced particulars proving the accuracy of the compensation claimed. It has hence failed to discharge its burden of proof (Article 12.3 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber).

138. Based on the principle of restitution, compensation for unilateral termination of contact must be aimed at reinstating the injured party to the position it would have been had the contract been fulfilled to its end and based on the principle of the positive interest as established in CAS 2008/A/1519 & 1520 and CAS 2010/A/2145, 2146 & 2147.

139. From the facts and evidence adduced, it is clear that the Contract was terminated on 7 August 2009. The value remaining thereunder must therefore be calculated with effect from 8 August 2009 until 31 May 2011 and not from 30 November 2010 to 31 May 2011. The remuneration and other benefits due to the Player under his new contracts must also be considered together with the unpaid salaries. The Club´s arguments in relation to compensation are thus rejected.

140. In relation to the unpaid salaries, the Club does not deny owing the Player USD 32,000 for April and May 2009. Since the Contract terminated on 7 August 2009, the Player was owed a further USD 3,733 for 7 days in August 2009 (i.e 7/30 x 16,000). In addition, the Player was to be paid USD 50,000. The Panel considers this amount to have been payable by the Club between 1 June and 31 July 2009 because it was part of the Player´s remuneration for the 2009-2010 season, and the first out of the ten monthly salary payments of USD 16,000 only fell due as from 31 August 2009. In total, the Player´s unpaid salary at the time the Contract was terminated is USD 85,733.

141. Looking at the value remaining under the Contract from 8 August 2009 until 31 May 2011 (19 months and 23 days), the Panel notes that it totals to USD 366,267, i.e (USD 16,000 x 19) = USD 304,000 + USD 12,267 + USD 50,000 as cash payment.

142. The Player received the following remuneration under his new contracts:

    a) Approximately USD 1,052 per month (2,000 Brazilian Reals) from Ceará Sporting Clube, where he had a valid contract from 31 August 2009 until 10 December 2010;

b) Approximately USD 1,578 per month (3,000 Brazilian Reals) from Club Atletico Clube Goianiense, where he had a valid contract from 13 January 2010 until 30 May 2010 on a monthly salary of 3,000 Brazilian Reals; and

c) Approximately USD 2,630 per month (5,000 Brazilian Reals) from Club Clube Nautico Capibaribe, where he had a valid contract from 26 May 2010 until 30 November 2010.

143. The total remuneration received by the Player under the new contracts from September 2009 to 30 November 2010 was USD 27,878. These amounts must be deducted from the total amount remaining under the Contract, USD 366,267.

144. As established in the Appeal Decision, there is no information in relation to the Player´s employment for the period December 2010 to May 2011, even though there was at least one registration period open during which the Player would have mitigated his damages by joining another club.

145. Despite considering the Player´s failure to find a new club for the period December 2010 and May 2011, the Appeal Decision does not give particulars on how it arrived at a final compensation of USD 300,000 given the fact that the Player received a total income of USD 27,878 from his new contracts, and the fact that the amount remaining under the Contract was USD 366,267.

146. Nevertheless, the Player has not challenged the Appeal Decision and the Panel finds no grounds for reviewing the amount of compensation granted in the Appeal Decision. The Panel also underlines that the amount of money the Player received under his new contracts plus the amount of USD 300,000 awarded by the DRC is less than the remaining value of the Contract with effect from the date of termination until 31 May 2011. It is therefore not excessive and is justified in terms of Article 17.1 of the RSTP edition.

Conclusion

147. In view of the foregoing, the appeal is fully dismissed. The contents of the Appeal Decision condemning the Club to pay the Player´s outstanding remuneration of USD 85,733 plus an additional compensation of USD 300,000 for breach of contract are fully upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by AS Denizlispor Kulübü Dernegi against the FIFA Dispute Resolution Chamber decision passed on 15 June 2011 is dismissed.

2. The FIFA Dispute Resolution Chamber decision passed on 15 June 2011 is confirmed.

(…)

5. All other and further claims or prayers for relief are dismissed.