Arbitration CAS 2009/A/1956 Club Tofta Itróttarfelag, B68 v. R., award of 16 February 2010

Panel: Mr Odd Seim-Haugen (Norway), President; Mr Lars Halgreen (Denmark); Mr Manfred Nan (the Netherlands)

Football
Unilateral termination of the employment contract without just cause
Request for the grounds of the FIFA decision
Application of a national law other than the national law applying complementarily
Principle of good faith
Just cause
Burden of proof
Compensation for the breach of contract

1. **There is no indication that a request for the grounds of a FIFA DRC decision shall be made in a formal way. It is thus sufficient that the party dissatisfied with the operative part of the decision expresses its intention, probably in writing and within ten days, to challenge the decision. It would be an excess of formalism to consider that a letter from the party informing that the decision issued by the FIFA DRC *"is hereby appealed"* and expressing the intention to supplement the appeal with other grounds has not validly triggered the proceedings leading to the notification of a full reasoned decision.**

2. **When the rules and regulations of FIFA are to be applied primarily and Swiss law complementarily, there is no place for the application of the rules of another national law, except in the case where these rules would have to be considered as mandatory according to the law of the seat of the arbitration, i.e. Swiss law in cases involving FIFA Regulations and submitted to the FIFA Statutes.**

3. **If a party has clearly shown that it was willing to rely upon a signed agreement by performing its contractual obligations, it may not submit that the agreement is to be considered as invalid and repudiate it. Such repudiation would clearly be contrary to the attitude adopted by the party before the termination, which is prohibited by the general principles of good faith (*venire contra factum proprium*).**

4. **The athlete is obliged to do whatever is necessary on his part to maintain his working capacity. If he breaches this, this can constitute a *"just cause"* for termination. If the player cannot provide the club with his working capacity due to illness or injury, this does not constitute a breach of duty and there is no *"just cause"* for unilateral termination of the contract. There is also no breach of the duty to work if the player does not play at the level wanted by the club.**

5. **A termination of contract with immediate effect, for just cause, is to be declared only in circumstances where the employee has committed a serious breach of the contract. According to Swiss law, the termination of the contract with immediate effect is to be applied as *ultima ratio*. When the breaches of the contract by a player are not serious, a termination with immediate effect shall only occur when the employee has been warned before hand and made aware that a repetition of the act for which warnings have been issued might lead to the termination of the contract.**

6. **In application of Art. 8 of the Swiss Civil Code concerning the burden of proof, it is up to the party invoking a *"just cause"* to establish the existence of the facts founding this *"just cause"*.**

7. **According to the CAS case law, if the employer dismisses an employee without notice and without just cause, the employee has a claim to compensation for the amount which he would have earned had the employment been terminated in compliance with the notice period or by expiry of the fixed term.**

The Appellant, Club Tofta Itróttarfelag, B68 ("the Appellant" or "the Club") is a football club in the city of Toftir, Faroe Islands, and a member of the Faroese Football Association, which in turn is a member of the Fédération Internationale de Football Association (FIFA). The latter is an association established in accordance with Art. 60 of the Swiss Civil Code and has its seat in Zurich, Switzerland.

R. ("the Respondent" or "the Player") is a Dutch citizen. He played as a professional football player with the Appellant from the beginning of the 2007 sporting season until April 2008.

The Respondent played for the Appellant during the 2007 Faroese football season, which ended in October 2007. On 26 January 2008, the Respondent signed a new employment contract with the Appellant, valid from 3 February 2008 until 31 October 2008.

This agreement, entitled *"Player Contract"*, reads, *inter alia*, as follows:

"1.-

[R.] commits himself to play football for B68 during the football-season 2008, and according to the FSF competition rules § 13 til § 15, commits himself not to change football club this season.

[R.] also commits himself to join the training practice in B68 and to play the matches that are set in the program for the Formula League and League Cup.

2.-

This agreement becomes effective on 1st February 2008 and is binding for both parts until the end of the Faroese football season 2008.

3.-

Wages

[R.] will be paid monthly following amount DKK 12.000,- in februar, mars, april and mai. DKK 14.000,- in juni, juli, august, september and oktober. The amount will be paid via the Faroese tax system. The amount will be transferred as monthly rates the first time 28.02.2008 og the last time 28.10.2008.

Also [R.] will be paid in cash monthly following amount DKK 2.000,- in februar, mars and april. DKK 3.000,- in mai, juni and juli. DKK 4.300,- in august, september and oktober. The amount will be paid as monthly rates the first time 28.02.2008 og the last time 28.10.2008.

4.-

If one of the parts fails to fulfil his obligations according to this contract, the violated part, in spite of § 3, can give a written notice to terminate the contract with a months notice. This contract in valid only if [R.] gets working permission in Faroe Islands".

The Appellant alleges that the Respondent did not appear at the training sessions as expected by the Club. The Appellant also alleges that it became clear that the Respondent was not ready to make the necessary efforts to get into the proper physical shape for playing at his best. The Respondent would have been seen very drunk on the night before a day on which an important derby match was scheduled. The coach and the captain of the Club would have had several conversations with the Respondent, in order to make him realize that a change in his lifestyle was needed. The Respondent would have explained that the reason for his lack of physical performance was an old injury. Therefore, the coach and the players of the team would have been very dissatisfied by the attitude of the Respondent.

According to a witness statement of the captain of the Club dated 20 September 2009, filed with the Appellant's Appeal Brief, the Player never reached the required physical form due to an old injury. Also according to this witness statement, the Player often did not turn up to the training sessions and showed a bad attitude when the coach tried to persuade him to be more serious with the training. The witness further declares that the Club decided to end the contract, *"after having had talks both with myself, as the team captain, and the coach, and in order to put an end to the disturbance and turmoil around [R.]".*

On 29 April 2008, the Appellant unilaterally terminated the employment contract of the Respondent with immediate effect. The reasons for this termination are explained in a letter to the Respondent dated 29 April 2008, signed by the chairman of the Club and which reads, in pertinent part, as follows:

"Termination of the contract

Referring to § 4 in the contract from January 26, 2008 we hereby inform you that Tofta Itróttarfelag has decided to make an end to the contract immediately. The reason for this is that you, in our opinion, have violated the contract in such a way, that further cooperation between you and Tofta Itróttarfelag is impossible.

(…)

Our decision is especially based upon written information from our head coach on certain circumstances. According to this information, you have not shown the will to make an effort to get the best results from the sport. Neither has it been possible to make you cooperate with the head coach who has decided, that he will not use you as Player in the Formula League this year because of disciplinary problems.

(…)".

The letter of the head coach of the Club on which is based the decision to dismiss the Respondent is dated 29 April 2008. Such letter reads, in pertinent parts, as follows:

*"I have after a couple of incidents, lost confidence in the Player [*R.*]. After a couple of conversations and several attempts at reaching an understanding with [*R.*] about his alcohol use and failed attempts to get fully fit.*

*I as his coach see no other way of solving this overwhelming problem than to let [*R.*] go as of Friday 25 of April, this to better the circumstances and moral for the rest of the team and maximize our chances to reach our main goal and stay in Formuladeildin 2008.*

*[*R.*] was aware that there would be no second chance this season; he knew very well that alcohol use (drunken states) was not permitted and absolutely not on the eve of the match against NSI, although the match was postponed [*R.*] could not have foreseen this.*

*[*R.*] was also aware, given his history in the club, that he would have to deliver top performance every time. It is inconvenient that he his injured at this time; the injury is the same injury that prohibited him from playing football for some time in the year 2007. His general lack of fitness is most likely due to the lack of training, injuries and his use of alcohol. This combined with his attitude towards the club's officials, etc. puts him in no position to be a profile Player.*

*With this in mind, the board of B68 Toftir should make an agreement with the Player and release [*R.*] from his contract.*

(…)".

It has not been alleged or evidenced that this letter has been presented to the Player before the termination of the contract or simultaneously with this termination.

On 6 May 2008, the agent of the Player wrote a letter to the Club submitting that the contract could not be terminated without a just cause. The agent therefore summoned the Club to confirm that the obligations towards the Player shall be fulfilled, amongst which the payment of the monthly salaries and the agreed cash amounts. On 9 May 2008, the chairman of the Club sent an e-mail to the agent of the Player, confirming the decision to terminate the contract of the Player with immediate effect and referring to § 4 of the employment contract and to the letter of the coach dated 29 April 2008, which was attached to the e-mail. By e-mail dated 9 May 2008, the agent of the Player informed the

Club that he shall apply to the Dispute Resolution Chamber of FIFA (the "FIFA DRC") and that the Player was at the disposal of the Club to fulfil his professional obligations.

On 10 June 2008, the Player filed a request before the FIFA DRC, claiming for the payment, by the Club, of a total amount of 103.900,- Danish Krones (*"DKK"*), as compensation for the unpaid wages during the period between May 2008 and October 2008.

On 16 April 2009, the FIFA DRC issued the following decision on the claim presented by the Player:

> *"1. The claim of the Claimant, [R.], is accepted.*
>
> *2. The Respondent, Club Tofta Itróttarfelag B68, has to pay to the claimant, [R.], the amount of DKK 103.900,- within thirty days as from the date of the notification of this decision.*
>
> *3. If the aforementioned sum is not paid within the aforementioned deadline, an interest rate of 5 % per year will apply as of expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee so that the necessary disciplinary sanctions may be imposed.*
>
> *4. The claimant, [R.], is directed to inform the Respondent, Club Tofta Itróttarfelag B68, immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".*

This decision was followed by a *"note relating to the findings of the decisions"*, informing the parties that, according to Art. 15 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, a request for the grounds of the decision must be sent, in writing, to the FIFA General Secretariat within ten days of receipt of notification of the findings of the decision and that failure to do so within the stated deadline will result in the decision coming into force.

By fax dated 30 April 2009, the FIFA DRC served the decision to the parties and to the Faroe Islands Football Association.

On 5 May 2009, the attorney-at-law representing the Club wrote a letter addressed to FIFA informing the latter, *inter alia*, that *"the decision from the Dispute Resolution Chamber is hereby appealed as it is my opinion that the decision does not have legal basis in the Rules (…)"*. Considering that the deadline for appealing the matter is only ten days, the representative of the Club asked *"for a new deadline for a final written protest within a deadline laid down by FIFA"*. Furthermore, the representative of the Club submitted several grounds to challenge the decision made by the FIFA DRC. This letter was sent by the Faroe Islands Football Association to FIFA, by fax, on 6 May 2009.

On 8 May 2009, the FIFA DRC acknowledged receipt of the above-mentioned letter and requested the production of a relevant power of attorney. The FIFA DRC furthermore referred the Club to the *"note relating to the motivated decision"* following the findings of the decision in question. A proper power of attorney was sent to FIFA on 12 May 2009.

On 25 June 2009, the FIFA Players Status Committee informed the parties that it seemed like the Club had still not fulfilled its obligations as established in point 2 of the findings of the decision of the FIFA DRC dated 16 April 2009.

The events following this letter dated 25 June 2009 from the FIFA Players Status Committee do not clearly appear from the FIFA file. It results from documents produced by the Appellant that several letters were exchanged between the Appellant and FIFA.

On 1 September 2009, the FIFA DRC served the grounds of the decision passed on 16 April 2009 to the parties. The FIFA DRC decision states as follows, in relevant parts:

"(…)

3. Furthermore, the Chamber analyzed which edition of the Regulation on the Status and Transfer of Players should be applicable as to the substance of the matter. In this respect, the Chamber referred, on the one hand, to Article 26 par 1 and 2 of the Regulations on the Status and Transfer of Players (edition 2008) and, on the other hand, to the fact that the present claim was lodged on 10 June 2008 and that the relevant employment contract was signed on 26 January 2008. In view of the aforementioned, the Dispute Resolution Chamber concluded that the current version of the Regulations (edition 2008) is applicable to the matter at hand as to the substance.

(…)

8. In this regard, first of all, the Chamber acknowledged that the contractual clause invoked by the Respondent for the unilateral termination of the contract, lacked objective criteria. Furthermore, the Chamber stated that the termination of the contract for non objective criteria would also put the claimant at an unjustified disadvantage, in relation to his financial rights.

9. Therefore, the Chamber pointed out that if such a clause would be accepted, this would create a disproportionate allocation of the rights of the parties to the employment contract, to the strong detriment of the claimant.

10. In light of the foregoing, the Chamber concluded that such a clause could not be taken into consideration.

(…)

12. In this regard, the Chamber was eager to point out that, in accordance with Article 12 § 3 of the Procedural Rules, any party claiming a right on the basis of an alleged fact shall carry the burden of proof. In this context, the Chamber acknowledged that, in accordance with the documentation on file, the Respondent did not provide any documentary evidence in support of its above-stated allegations, other than a letter from its own employee (the team coach), i.e. evidence that the claimant's attendance at training was below the expected standards as a result of his attitude, and that the claimant consumed alcohol to such an extent that he violated his contractual obligations. In consequence, the Chamber decided that the allegations of the Respondent regarding the claimant's behaviour, in particular his failure to fulfil his contractual obligation, had to be rejected, since there was not sufficient evidence provided by the Respondent in order to prove the allegations.

13. Likewise, the Chamber deemed it also appropriate to point out that the alleged disciplinary infringements committed by the claimant could in no case constitute, per se, a valid reason for the

termination of the contract. In particular, the Chamber emphasized that, in connection with infringements of disciplinary standards, such as those alleged in the matter at hand, the party concerned should only have the right to terminate the contract as ultima ratio, i.e. a case of repeated and grave incidents, which, under the circumstances, would still require that the claimant be warned before end, of the eventual consequences of the actions, if they were to be repeated.

(…).

16. In calculating the amount of compensation due to the claimant, the Chamber considered the rest value of the relevant employment contract, as well as the fact that the claimant concluded no employment agreement with a new club in the period between the termination of the contract by the Respondent (29 April 2009 (recte 2008)) and the date on which that contract was due to end (31st October 2008).

(…)

18. In conclusion, the Chamber decided that the Respondent was liable to pay to the claimant the amount of DKK 103.900,- and, therefore, the claimant's claim is accepted".

At the end of the fully reasoned decision was mentioned a note relating to the motivated decision, as follows:

"According to Article 63 par 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within twenty-one days of receipt of notification of this decision and shall contain the elements in accordance with point 2 of the Directives issued by CAS, a copy of which we enclose hereto. Within another ten days following the expiry of the time-limit for filling the statement of appeal, the Appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS (cf. point 4 of the Directives)".

In its fax dated 1 September 2009, the FIFA DRC mentioned that the grounds of the decision passed were attached, *"as requested by the legal representative of the club Tofta Itróttarfelag B68"*.

By letter dated 21 September 2009, the Appellant filed its Statement of Appeal concerning the decision rendered by the FIFA DRC. The Appellant requested the following: *"that the Appellant is acquitted for the claim from the Respondent, or that the Appellant shall be judged to pay a lesser amount than the one, which the Respondent has claimed, such lower amount to be decided by the Court"* and that *"a delaying defect (sic) is attributed to the complaint so that the claim is not executed until a final decision has been rendered"*.

By letter dated 28 September 2009, the Appellant filed its Appeal Brief, together with eight exhibits.

In support of its claim, the Appellant contends, *inter alia,* that:

a) The Respondent would not have appeared for training on a regular basis, would have misused alcohol and would have had a bad conduct towards the coach and the other players of the Club.

b) Prior to the termination of the contract on 29 April 2008, the Respondent would have received several warnings and several attempts would have been made to obtain a change in his behaviour and attitude.

c) The statements from the Club, from the head coach of the Club and from the captain of the Club, would have to be considered as sufficient evidence that the Player did not perform his obligations, so that the Club would have had the right to terminate the contract with immediate effect.

d) The contract would have to be considered as not valid. According to the Faroese rules, the Faroese Football Association should have accepted and recognized the contract, which was not the case. Therefore, the Respondent should be viewed as an amateur Player.

e) The Respondent would be under a general obligation to mitigate the losses of the Appellant. This obligation would have been breached because the Player did not enter into a contract with another club before the expiry of his fixed term contract with the Appellant.

On 19 October 2009, the Respondent filed its Answer, together with two exhibits. The Respondent requests the CAS *"to declare the request of Club Tofta Itróttarfelag B68 inadmissible"* and, as a subsidiary, *"to conform (sic) the decision of the FIFA DRC of 16 April 2009 to dismiss all claims from the Club"*. The Respondent also requests from CAS *"to condemn the Club to pay all the costs involved in this procedure including compensation for the costs of legal assistance for the Respondent at this moment amounting EUR 1.200,- "*.

In support of its request, the Respondent contends, *inter alia*, that:

a) There has been no due request by the Club to get the motivated decision from the FIFA DRC within the ten days time frame from the notification of the operative part of the decision of the FIFA DRC on 30 April 2009, so that the said decision would have come into force and the Appeal would not be admissible.

b) On the merits, the Respondent alleges that the real reason to dismiss him was the fact that he got injured while playing for the Club, which does not constitute a just cause for a termination of this immediate effect.

c) The Respondent denies the allegations of the Club regarding his behaviour.

d) The Respondent points out that there is no evidence that he had been warned prior to the termination of the contract.

e) The obligation to register a contract is an obligation for the Club and not for the Player. The Player would have to be considered as a professional Player according to Art. 2 of the FIFA Regulations for the Status and Transfer of Players, and not as an amateur.

On 5 January 2010, the Appellant sent to the CAS copies of letters exchanged between FIFA, the Faroese Football Association and the Appellant in July 2009. These letters were not in the file produced by FIFA.

On 7 January 2010, the Respondent sent a letter to the CAS Court Office, with comments on the FIFA file and on the supplementary exhibits produced by the Appellant on 5 January 2010. By letter dated 11 January 2010, the Appellant sent a letter to the CAS Court Office, with further comments and exhibits regarding the proceedings before FIFA, between the notification of the findings of the

decision and the notification of the fully reasoned decision. On 27 January 2010, the Respondent sent final comments in this respect. By letter of 28 January 2010, the CAS Court Office reminded the parties that, pursuant to Art. R56 of the Code of Sports-related Arbitration (the "Code"), no further submission is allowed.

With the consent of the parties, the Panel has decided, pursuant to Art. R57 of the Code, that it was not deemed necessary to hold a hearing and that it was sufficiently well informed to issue a decision on the basis of the parties' written submissions.

LAW

The Jurisdiction of the CAS

1. Art. R47 of the Code provides that it applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such a dispute may arise out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement. *In casu*, the jurisdiction of the CAS is based on Art. 62 and 63 of the Statutes of FIFA and is confirmed by the signature of the Order of Procedure dated 14 January 2009 whereby the parties have expressly declared the CAS to be competent to resolve the dispute. Moreover, in their correspondence with the CAS, the parties have at no time challenged the CAS' general jurisdiction.

2. The mission of the Panel derives from Art. R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Art. R57 of the Code provides that the Panel may issue a new decision which shall replace the decision appealed against or may annul the decision and refer the case back to the previous instance.

The Admissibility of the Appeal

3. The Respondent challenges the admissibility of the appeal and alleges that no request for the motivation of the FIFA DRC decision was made within the ten days deadline set at Art. 15 of the FIFA Rules Governing the Procedure of the Players' Status Committee and the Dispute Resolution Chamber, therefore considering the FIFA DRC decision of 16 April 2009 as final and binding upon the parties.

4. It results from the FIFA file that FIFA received on 6 May 2009, that is to say within the ten days deadline set by the relevant Rules, a letter from the Club informing that the decision issued by the FIFA DRC *"is hereby appealed"*.

5. The question to be addressed is whether this letter is to be considered as a request for the grounds of the decision according to Art. 15 of the Rules Governing the Procedure of the Players' Status Committee and the Dispute Resolution Chamber.

6. The Panel is clearly of the opinion that the letter received on 6 May 2009 by FIFA is a sufficient step to be considered that a request for the grounds of the decision has been made, upon receipt of the findings of the decision. There is no indication that a request for the grounds of the decision shall be made in a formal way. It is thus sufficient that the party dissatisfied with the operative part of the decision expresses its intention, probably in writing and within ten days, to challenge the decision. In the present case, the Club expressed the will to appeal the decision. The Club also expressed the intention to supplement its appeal, with other grounds. The Panel considers than such intent from the Respondent corresponds to his will to be able to file an appeal based on a fully grounded decision. Moreover, such a procedural step goes further than a plain request for the grounds of the decision and clearly shows the intention of the appealing party to challenge the decision received.

7. Therefore, the Panel considers that the Club has validly requested the grounds of the FIFA DRC decision, within the ten days deadline. Even if it can be underlined that the steps taken by the Club were not totally clear and that it appears that the legal representative of the Club has been misled about the remedies available at the stage of the notification of the findings of the decision, it would be an excess of formalism to consider that the letter appealing the decision received by FIFA on 6 May 2009 has not validly triggered the proceedings leading to the notification of a full reasoned decision. In that respect, the Panel underlines that FIFA has finally considered the letter received from the Club on 6 May 2009 as a request for the grounds and that the grounds have been drafted and notified to the parties on 1 September 2009.

8. Furthermore, the Statement of Appeal filed by the Appellant was lodged within the deadline provided by Art. 63 of the FIFA Statutes, namely twenty-one days from the notification of the fully reasoned decision. It further complies with the requirements of Art. R58 of the Code.

9. It results from the above mentioned that the Appeal is admissible.

The Applicable Law

10. Art. R58 of the Code provides that 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.

11. Art. 62 par. 2 of the FIFA Statutes, 2008 edition, in force as from 1 August 2008, provides for the application of the various regulations of FIFA and, additionally, Swiss law. The previous FIFA Statutes contained a similar provision. In the present matter, the parties have not

chosen the application of any particular law. Therefore, the Rules and Regulations of FIFA apply primarily and Swiss law applies complementarily.

The Merits

12. The main issues to be resolved by the Panel are the following:

    a) Is there any ground to declare the employment contract between the Appellant and the Respondent not valid?

    b) Has the Appellant established the existence of a just cause to terminate the contract with immediate effect?

    c) If any, what is the amount to be paid to the Respondent as compensation for the breach of the employment contract?

A. Is there any ground to declare the employment contract between the Appellant and the Respondent not valid?

13. The Appellant submits that a contract with a professional Player shall be approved by the Faroese Football Association, according to the rules in force in the Faroe Islands. In the absence of such an approval, the Player would be regarded as an amateur player and none of the parties may rely on the contract.

14. It is to be noted that the Appellant has not evidenced that the rules in force in the Faroe Islands impose an obligation that a contract between a club and a player be approved. There is no reference in the Appellant's submissions to any provision of any regulations or statutes providing for such obligation. Neither is there any copy of such regulations annexed to the Appellant's submissions. It is thus clear that the Panel cannot accept the submissions of the Appellant on the basis of non evidenced allegations.

15. Moreover, the rules and regulations of FIFA are to be applied primarily in the present proceedings, and Swiss law complementarily. Therefore, there is no place for the application of the rules of the Faroe Islands, except in the case where these rules would have to be considered as mandatory according to the law of the seat of the arbitration, which is in the present case Swiss law (see POUDRET/BESSON, *Comparative Law of International Arbitration*, 2nd edition, London 2007, No. 705 and following, p. 607). In order to claim that a specific provision of a foreign law is to be applied in cases involving FIFA Regulations and submitted to the FIFA Statutes, one has to establish that the relevant provisions are of a mandatory nature according to Swiss law, which is the law of the seat of the arbitration (see CAS 2008/A/1485, especially § 7.4.3). In the present case, it has not been submitted that the rules allegedly in force in the Faroe Islands are of a mandatory nature according to Swiss law and the Panel has no reason to deem that it is the case. In that respect, it has to be underlined that the conditions set by Swiss law are very restrictive and that it is only in exceptional circumstances that a provision of law which is not applicable as *lex causae* would have to be considered as mandatory and applied directly.

16. Finally, the Panel is of the opinion that it is totally against the good faith principle to submit that the contract is to be considered as invalid. It does not result from the text of the contract that the agreement would be conditional upon approval by the Faroese Football Association. Furthermore, the Appellant has clearly performed its contractual obligations between January and April 2008. In that respect, the Appellant has clearly shown that it was willing to rely upon the signed agreement, so that it may not repudiate it. Such repudiation would clearly be contrary to the attitude adopted by the Appellant before the termination, which is prohibited by the general principles of good faith (*venire contra factum proprium*).

17. It results from the above-mentioned considerations that the employment contract is to be considered valid.

B. Has the Appellant established the existence of a just cause to terminate the contract with immediate effect?

18. The Appellant submits that it had the right to terminate the employment contract with the Respondent. Before the FIFA DRC, the Appellant has relied on Art. 4 of the employment contract, which provides that this contract can be terminated within a month's notice, *"if one of the parts fails to fulfil his obligations according to this contract"*. In its Appeal Brief, the Appellant emphasized that it has to be possible for a coach to terminate the employment contract of a player, when such player does not perform his duties.

19. As pointed out by the FIFA DRC, the present case is to be assessed according to the FIFA Regulations for the Status and Transfer of Players which came into force on 1 January 2008. In that respect, one has first to refer to Art. 26 of the FIFA Regulations for the Status and Transfer of Players which are actually in force, that is to say the Regulations which came into force on 1 October 2009. Art. 26 § 1 of these Regulations provides that *"Any case that has been brought to FIFA before these regulations came into force shall be assessed according to the previous regulations"*. The present matter has been brought to FIFA in June 2008. At that time, the FIFA Regulations on the Status and Transfer of Players which were in force were the version adopted in October 2007, in force as from 1 January 2008 (the "2008 FIFA Regulations"). The 2008 FIFA Regulations shall in consequence be applied to the present case.

20. Under the chapter *"Maintenance of contractual stability between professionals and clubs"*, Art. 16 of the 2008 FIFA Regulations provides that *"A contract cannot be unilaterally terminated during the course of a season"*. This provision expresses the principle of maintenance of contractual stability and prohibits the unilateral termination of a contract during the course of a season. The 2008 FIFA Regulations contain one exception to this principle, in Art. 14, which provides that *"A contract may be terminated unilaterally by either party without consequences, where there is just cause"*. The system set up by the 2008 FIFA Regulations is clear and there is no room for conflicting or diverging provision agreed directly between the parties. Consequently, Art. 4 of the contract has to be construed according to the relevant provisions of the 2008 FIFA Regulations and the Panel has to consider whether or not, in the present case, there is a just cause to terminate the contract with immediate effect, according to Art. 14 of the 2008 FIFA Regulations.

21. The 2008 FIFA Regulations, as well as the 2009 FIFA Regulations, do not provide for a definition of a *"just cause"*. Case law has been developed by the CAS on this question (see HAAS U., *Football Disputes between Players and Clubs before the CAS*, in RIGOZZI/BERNASCONI (eds.), Sports Governance, Football Disputes, Doping and CAS Arbitration, Berne 2009, p. 232). It has for instance been considered that if the player does not provide the club with his working capacity, this constitutes a serious breach of duty which can justify unilateral termination of the contract, for example if the player does not even report for work (see CAS 2006/A/1082 & 1104, § 69 and following). The athlete is obliged to do whatever is necessary on his part to maintain his working capacity. If he breaches this, this can constitute a *"just cause"* for termination, as accepted by a CAS Panel in a case in which the player had consumed cocaine (CAS 2005/A/876, p. 13). If the player cannot provide the club with his working capacity due to illness or injury, this does not constitute a breach of duty and there is no *"just cause"* for unilateral termination of the contract (see HAAS, *op cit.*, p. 232 and authorities cited in footnote 93). There is also no breach of the duty to work if the player does not play at the level wanted by the club (see CAS 2003/O/535, where the Panel has denied that the decrease of the sporting performances of the player is not a *"just cause"*, except in the case where it is established that the player deliberately decided to play below his potential). Furthermore, in application of Art. 8 of the Swiss Civil Code, concerning the burden of proof, it has been considered that it is up to the party invoking a *"just cause"* to establish the existence of the facts founding this *"just cause"* (see IBARROLA J., *La jurisprudence du TAS en matière de football – Questions de procédure et de droit de fond*, in BERNASCONI/RIGOZZI (eds.), The Proceedings before the Court of Arbitration for Sports, Berne 2007, p. 252).

22. In the present case, the Panel is clearly of the opinion that the Appellant did not establish the existence of a just cause. The Panel does not consider that the Appellant has produced convincing evidence on this point. The letter from the head coach of the Club, written on the day when the Player was dismissed, cannot be taken for an objective description of the situation. Even if the coach alleges that the Player is guilty of *"alcohol use"*, this does not show that the Player deliberately had the intention to play below his potential. To the contrary, the coach mentions the existence of an injury, which is described as *"the same injury that prohibited him (the Player) from playing football for some time in the year 2007"*. Considering the letter of the coach dated 29 April 2008, the Panel is of the opinion that the alleged bad sporting performances from the Player were caused by an old injury rather than by the deliberate intention of the Player to play below his potential. As this injury already affected the Respondent in 2007, the Appellant was aware of this problem. It cannot therefore rely on this circumstance to claim for the existence of a just cause justifying the termination of the contract.

23. The witness statement of the captain of the Club dated 20 September 2008 does not lead the Panel to reach a different conclusion. In his witness statement, the captain of the Club also mentions the existence of an old injury, which would be the reason why the Player never reached the required physical fitness.

24. In the view of the above-mentioned considerations, the Panel does very much doubt of the existence of the grounds alleged by the Appellant to justify the termination of the contract. On the one side, the declarations of the coach and of the captain of the Club have to be taken with caution. On the other side, these declarations do not exclude that the cause of the bad performances of the Player is the existence of an old injury, which cannot be considered as a just cause, according to the case law mentioned here-above. Consequently, the Panel is of the opinion that the Appellant failed to evidence the existence of a just cause. The Panel considers this to be sufficient ground to reject the appeal.

25. Moreover, it has to be emphasized that a termination of contract with immediate effect, for just cause, is to be declared only in circumstances where the employee has committed a serious breach of the contract. According to Swiss law, which applies additionally, and as emphasized by the FIFA Dispute DRC in the appealed decision, the termination of the contract with immediate effect is to be applied as *ultima ratio*. When the breaches of the contract by a player are not serious, for instance in case of disciplinary problems resulting from the behaviour of such player, a termination with immediate effect shall only occur when the employee has been warned before hand and made aware that a repetition of the act for which warnings have been issued might lead to the termination of the contract (on this point, see for instance the decision of the Swiss Supreme Court published in DTF 121 III 467). In the present case, there is no evidence that the Player has been warned of a possible termination of the contract because of his alleged incorrect behaviour.

C. If any, what is the amount to be paid to the Respondent as compensation for the breach of the employment contract?

26. The Appellant submits that it is not reasonable to compensate the Player with the entire remaining contractual period, as the Player is under an obligation to mitigate his losses.

27. The Panel has no hesitation to confirm the decision of the FIFA DRC on this point. According to Art. 17 of the 2008 FIFA Regulations, the Player has to be compensated for the damages caused by the unlawful termination of the employment contract. According to the CAS case law, if the employer dismisses an employee without notice and without just cause, the employee has a claim to compensation for the amount which he would have earned had the employment been terminated in compliance with the notice period or by expiry of the fixed term (see HAAS, *op cit.*, p. 242, especially the authorities cited in footnote 139).

28. According to this principle, it is fully justified to award the Respondent the wages to be paid until the end of the contract. No deduction is to be operated, as the Respondent did not play for another club until the end of his fixed term contract with the Appellant, that is to say 31 October 2008. Furthermore, there is no evidence that the Player was in a position to play for another club and refused to do so, thereby breaching his duty to mitigate the damage suffered. This is especially the case considering that the Player has been dismissed in the course of a season and was apparently suffering from an old injury.

29. Based on the above-mentioned considerations, the Panel is of the opinion that there is no ground to reduce the amount awarded by the FIFA DRC to the Player.

Conclusion

30. Based on the foregoing and after taking into due consideration all evidence produced and all arguments submitted the Panel finds that the Appellant could not terminate the employment contract of the Respondent with immediate effect. Therefore, the Respondent is entitled to receive the entire remaining value of the employment contract, as compensation for the unlawful early termination of this contract.

31. The club's appeal is therefore dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed on 21 September 2009 by Club Tofta Itróttarfelag, B68 against the decision issued on 16 April 2009 by the FIFA Dispute Resolution Chamber is dismissed.

2. The decision of 16 April 2009 from the FIFA Dispute Resolution Chamber is confirmed.

(…)

5. Any further claims lodged by the parties are denied.