



Arbitration CAS 2008/A/1674 Al-Hilal Al-Saudi Club v. Fédération Internationale de Football Association (FIFA), award of 20 March 2009

Panel: Mr Chris Georghiades (Cyprus), President; Mr Jirayr Habibian (Lebanon); Mr Hendrik Willem Kesler (the Netherlands)

Football

Interpretation of a provision

Commencement of a sanction period

The literal interpretation of the words *“following season”* of Art. 17 (3) of the FIFA Regulations on the Status and the Transfer of Players (RSTP 2005) is the season after the event that gave rise to the termination, i.e. the transfer of the Player to the Appellant. Nevertheless, in case of a delayed communication of the DRC decision, the sanction takes effect *“as of communication of the present decision”*. According to a clear, unambiguous and literal interpretation of Article 17(3) the sanction commences from the commencement of the next season wherever the Player may find himself.

Al-Hilal Al-Saudi Club (the “Appellant” or the “New Club”) is a football club, based in Riyadh, Saudi Arabia, playing in the Saudi League Tournament for Premier Level Teams. It is affiliated to the Saudi Arabian Football Association.

The Fédération Internationale de Football Association (the “Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

Pursuant to the above, the Appellant is subject to and bound by the applicable rules and regulations of FIFA.

On 15 June 2004, a football player E. (the “Player”) entered into an employment contract (the “First Contract”) with a Turkish football club Gaziantepspor (the “Former Club”) valid from 1 July 2004 to 30 June 2007.

On 14 March 2006, the Player filed a claim with FIFA to release him from the First Contract for alleged non-payment of his salary.

On 17 March 2006, the Former Club filed a complaint with FIFA for an unexcused absence of the Player from 15 March 2006 and requested that he be ordered to return immediately to the Former Club. The Former Club claimed that the Player had been paid all monies due to him, a fact disputed by the Player who alleged that receipts for payments had been forged.

On 27 April 2006, FIFA's Dispute Resolution Chamber (the "DRC") ruled that the Former Club has respected its financial obligations towards the Player, that the Player had no just cause to terminate the First Contract and ordered the Player to return immediately to the Former Club (the "First Decision").

By letter dated 6 June 2006, the Player appealed the First Decision to the Court of Arbitration for Sport (CAS), with the reference *CAS 2006/A/1100* (the "First Arbitration").

On 6 July 2006, the Panel in the First Arbitration granted the Player's request for provisional measures and stayed the execution of the First Decision pending the final award.

On 27 July 2006, the Player entered into an employment contract with the New Club (the Player remains in the employment of the New Club and his current employment contract is valid from 1 July 2008 to 1 July 2009).

On 15 November 2006, the Panel in the First Arbitration rendered its final award in which it concluded that the Player had breached the First Contract without just cause but that "*a player cannot be compelled to remain in the employment of a particular employer*". The Panel referred the matter back to the DRC to calculate the compensation due to the Former Club and to determine any sporting sanctions against the Player and/or the New Club under Article 17 of the FIFA Regulations for the Status and Transfer of Players (the "Regulations").

On 30 November 2007, the DRC held the Player and the New Club jointly and severally liable to pay the Former Club US\$ 600,000 compensation "*within 30 days of notification of the present decision*" and that "*A restriction of four months on his eligibility to play in official matches is imposed on the player E. This sanction shall take effect as of notification of the present decision*" (the "Second Decision"). The parties before the DRC with respect to the Second Decision were the Former Club as the claimant party and the Player and the New Club as the respondent parties.

The DRC stated at paragraph 28 of its Second Decision that:

"In continuation, the DRC focused on the further consequences of the breach of contract in question, and in this respect, first of all decided that, in accordance with art. 17 par. 2 of the Regulations, the new club of the player, i.e. Al-Hilal, must be jointly and severally responsible for the payment of the above-mentioned amount of compensation. In this respect, the DRC was eager to point out that the joint liability of the player's new club is independent from the question as to whether the new club has committed an inducement to contractual breach. This conclusion is in line with the well-established jurisprudence of the DRC that was repeatedly confirmed by the CAS. Notwithstanding the aforementioned, the DRC recalled that according to art. 17 par. 4 of the Regulations, it shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach".

Furthermore, the DRC stated at paragraph 33 of its Second Decision that:

“Finally, the DRC had to analyse whether, in view of art. 17 par. 4 of the Regulations, the player’s new club Al-Hilal is to be found responsible for having induced the player to terminate his contract with Gaziantepspor without just cause during the protected period, and therefore shall be banned from registering any new players, either nationally or internationally, for two registration periods. In this respect, taking into consideration the particular circumstances of the case at stake as well as the explanations of Al-Hilal, the DRC decided that the presumption contained in the Regulations cannot be upheld, and that therefore, no sporting sanctions shall be imposed on Al-Hilal for inducement to breach of contract in accordance with art. 17 par. 4 of the Regulations. In particular, the DC pointed out that Al-Hilal had decided to acquire the player’s services only after the first decision of the DRC and, most importantly, only following the decision of the CAS accepting the player’s request for the stay of the execution of the said DRC decision”.

On 12 October 2008, the New Club filed an appeal with the CAS partially challenging the Second Decision of the DRC and named FIFA as the Respondent.

By its appeal the Appellant disputed when the suspension imposed upon the Player by the DRC should take effect or otherwise commence submitting its own arguments and/or interpretation of the relevant provisions of the FIFA Regulations.

Based on its arguments and/or submissions the Appellant requested the CAS *“To withhold and freeze the execution of article (6) of the DCR decision which stated that «A restriction of four months on his eligibility to play in official matches is imposed on the player E. This sanction shall take effect as of the notification of the present decision» till final award on the present appeal is issued”*. In effect the Appellant requested provisional and conservatory measures from the CAS.

The CAS granted time for the parties to put forth their standpoint in relation to the provisional and conservatory measures and by its Order dated 14 November 2008 granted the application for provisional and conservatory measures requested by the Appellant. The operative part of the Order was communicated to the parties on 14 November 2008.

On 12 December 2008, the President of the Panel issued the reasoned Order regarding the Appellant’s request for provisional and conservatory measures.

Following the issue of the reasoned Order, the Panel considered the case with reference to the documents contained in the file of the matter and the written and verbal deliberations of the Panel members.

In its combined statement of appeal and appeal brief, the New Club/Appellant partially challenges the Second Decision of the DRC. The Appellant states that the compensation to the Former Club has been paid – the statement of appeal contains a copy of the bank transfer evidencing that payment was made on 10 October 2008 – and submits that it is not disputing the length of the suspension. However, the Appellant is disputing when the suspension shall take effect.

The Appellant submits that although the Second Decision is dated 30 November 2007, it was only notified to them on 29 September 2008. The Appellant further submits that the season in Saudi

Arabia commenced on 13 September 2008 and accordingly, any sporting sanction should take effect from the beginning of the 2009 season.

The Appellant requests the CAS *“To withhold and freeze the execution of article (6) of the DCR decision which stated that «A restriction of four months on his eligibility to play in official matches is imposed on the player E. This sanction shall take effect as of the notification of the present decision» till final award on the present appeal is issued”*.

By letter dated 24 October 2008 and within the time limit granted, the Respondent filed its ‘Answer to the request for stay of execution’.

On 6 November 2008 the Respondent filed its ‘Answer to the Appeal’. Its submissions as expressed in its written Answer are headed as follows:

- to reject the appeal concerning the DRC decision for formal reasons;
- to reject the appeal concerning the DRC decision for reasons of substance;
- to order the Appellant to bear all the costs incurred;
- to order the Appellant to cover all legal expenses of the Respondent.

With respect to the formal reasons the Respondent notes in its Answer that the Appellant does not challenge the compensation part of the DRC decision but only that part relating to the sporting sanctions highlighting that *“the player directly concerned by the mentioned sporting sanction has not lodged an appeal”* and *“The CAS shall therefore not enter into considerations about the substance of the current appeal, since the player has not made an appeal against the decision regarding the said sporting sanction, despite that the present appeal concerns a sporting sanction against him”*.

The Respondent submits that the lack of an appeal by the player against the challenged decision is to be interpreted as the player’s tacit acceptance of the decision in question. Consequently, the respective sanction imposed on the player and all questions related thereto, such as the starting point of such sanction, shall not be reviewable by the CAS.

The Respondent further submits that the Appellant *“is the wrong plaintiff and has no active legal standing to appeal the sporting sanction in question and to submit any question related thereto to the CAS”*. The Player is the only person directly affected by the sanction, the Appellant is affected indirectly only and therefore *“has no active legal standing to appeal the sanction in question”* as a result of which the appeal must be rejected.

The formal reasons constitute the Respondent’s primary request, in the alternative the Respondent submits that the appeal should be rejected for reasons as to substance.

The reasons as to substance are based on the fact that *“that the DRC had no other possibility than to impose a sanction on the player for breach of contract he had committed”*. The Respondent stressed that Article 17(3) of the Regulations do not allow otherwise than to impose a sporting sanction.

As regards the starting point of the sanction in question, the Respondent relied on the DRC jurisprudence pertaining to the beginning of the suspension imposed on a player, which is based on the approach to consider the wording of Article 17(3) of the Regulations.

The Respondent submitted that *“the DRC is particularly concerned that the sanction is enforced as quickly as possible”* and *“only the immediate application of the sanction at stake causes a desirable effect and constitutes a strong signal to the public with regard to the determination of the competent authorities to safeguard and protect the enforcement of the principle of the maintenance of contractual stability”* where a decision is taken during the course of an ongoing season. *“The sanction has its best punitive effect if it starts immediately after the notification of the relevant decision”*.

The Respondent submits that the jurisprudence of the DRC has been confirmed by the CAS in its awards as a result of which the DRC decision concerning the particular player *“shall take effect as of notification of the respective decision”* in line with the DRC jurisprudence regarding Article 17(3).

The Panel, following the agreement of the Parties for the Panel to issue an award based on the written submissions and pursuant to Article R57 of the Code of Sports-related Arbitration (the “Code”), decided to adjudicate on the basis of documents only.

LAW

CAS Jurisdiction

1. Article R47 of the Code provides that:
“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.
2. The jurisdiction of the CAS, which is not disputed by either party, derives from Article R47 of the Code and from the FIFA Statutes, as referred to at paragraph III.8 of the Second Decision of the DRC which specifies that *“According to art. 61 par. 1 of the FIFA Statutes this decision may be appealed before the Court of Arbitration for Sport (CAS)”*.
3. It follows that the CAS has jurisdiction to decide the present dispute.

Applicable Law

4. According to Article R58 of the Code, 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”.

5. Article 62 paragraph 2 of the FIFA Statutes (May 2008 edition) reads as follows:
“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”.
6. In the present matter, the parties submit that the rules and regulations of FIFA apply. Accordingly, the Panel shall apply primarily the various regulations of FIFA and, additionally, Swiss law.

Admissibility

7. Paragraph III.8 of the Second Decision provides that *“The statement of appeal must be sent to the CAS within 21 days of receiving notification of this decision...”*.
8. Although the Second Decision is dated 30 November 2007, the Appellant states that it was only received by them on 29 September 2008. The Respondent neither disputes this fact nor offers any explanation for the delay in notification. The appeal was filed on 13 October 2008 and therefore within 21 days of the Appellant receiving notification of the Second Decision.
9. Accordingly, the Appellant’s appeal was filed in due time and is admissible.

Legal Discussion

The Appellant’s ability to Appeal the Second Decision of the DRC

10. This issue was dealt with in detail in the reasoned Order in respect of the Request for Provisional and Conservatory Measures issued on 12 December 2008 which is consequently adopted for the purpose of this award.
11. Consequently the Respondent’s arguments as to form are hereby dismissed.

Merits

12. The principle issue to be resolved relates to the commencement of the sanction in view of the circumstances of the particular case.
13. Whether or not the DRC was obliged to impose a sanction on the Player for breach of contract, as suggested by the Respondent, it is the Panel’s view that once the breach was

confirmed by the DRC the only remedy available was the imposition of a sanction. The Appellant in this particular case has not contested the imposition of the sanction rather it acknowledges same arguing only as to the commencement date of the sanction. The Panel therefore finds that there is no reason to deal further with the issue of the sanction itself and turns to the disputed issue as to its commencement date.

14. In the particular case it is the Panel's task to interpret the provisions of Article 17(3). Books and books have been written on the techniques of interpretation of written provisions. Beyond doubt the Panel's task is to find out the intention of those who created the provisions of Article 17(3). In doing this, it must, of course, start with the words used in the Article but not end with them.
15. The Panel should ask itself the question: If the makers of the specific Article had themselves come across the particular matter how would they have interpreted it in view of the particular circumstances. The Panel detects a crease in the material (the Regulations) and needs to iron it out. The crease seems to have been created by the undisputed delay of FIFA in communicating the DRC decision.
16. Article 17(3) reads "*...in all cases, these sporting sanctions shall take effect from the start of the following season at the new club*".
17. The "*new club*" is undoubtedly the Appellant as a result of which it is necessary to consider the words "*following season*". The literal interpretation of the words "*following season*" is the season after the event that gave rise to the termination i.e., the transfer of the Player to the Appellant.
18. As stated above, in the present case the application of Article 17(3) needs to be considered in view of the delayed communication of the DRC decision. In the DRC decision the sanction takes effect "*as of communication of the present decision*" accordingly the provisions of Article 17(3) can only be applied as from the date of receipt of the communication. According to a clear, unambiguous and literal interpretation of Article 17(3) the sanction in the words of Article 17(3) will commence from the commencement of the next season wherever the Player may find himself.
19. Having said the above the Panel acknowledges the problems created which otherwise would not be present if the DRC decision had been promptly notified and FIFA should be aware of the problems caused in the particular case.
20. On the basis of the above the Panel finds that in the particular case the DRC decision with respect to the Player's four-month ban shall commence from the season occurring immediately after the completion of the current season in Saudi Arabia or any season where the Player may join a new club whichever occurs first less the period that has lapsed as between the notification of the DRC decision on 29 September 2008 to the stay of execution on 14 November 2008.

21. The Player by virtue of the Panel's decision in the particular case shall retain and carry the sanction which will have to be satisfied at the first opportunity *i.e.* at the commencement of the new season in Saudi Arabia or elsewhere.

The Court of Arbitration for Sport rules:

1. The appeal filed by Al-Hilal Al-Saudi Club against the Decision issued by the FIFA DRC in respect of the commencement of the four-month ban imposed upon the Player E. is successful in that the ban shall apply immediately upon the commencement of the new season of the Saudi Arabian championships or the commencement of any new season in whatever jurisdiction the Player may be registered, whichever shall occur first.
2. The period as between the notification of the DRC decision on 29 September 2008 until the grant of the stay of execution on 14 November 2008 shall be taken into account and deducted from the four-month ban.
3. The Decision issued by the FIFA DRC on 30 November 2007 is upheld however suspended as to its commencement date in the fashion mentioned hereinabove.
4. (...)
5. (...)
6. Any further or other prayers for relief are dismissed.