Arbitration CAS 2007/A/1328 Sivasspor v. Raymond Kalla, award of 25 June 2008

Panel: Mr Hendrik Willem Kesler (The Netherlands), President; Prof. Massimo Coccia (Italy); Mr Bernardo Cremades (Spain)

Football
Validity and enforceability of an employment contract
Unilateral termination of the contract
Legal effect and enforceability of the termination of the contract without just cause
Calculation of the compensation and equality of the parties

1. **It is considered as a unilateral termination of the contract, if a player has fulfilled his obligations towards a club and that the termination of the contract is only due to the fact that the new trainer/coach of the club no longer appreciates his presence in the selection.**

2. **A statement signed by a player in the sense that he has received all due money for one season from the club does clearly not state or imply that the player explicitly waives his rights under the contract for the other season(s). The termination of the contract by the club may be legally valid in terms of its legal effect, namely termination, but cannot be enforced without also granting compensation to the player on the basis of article 17 para 1 of the FIFA Regulations, if it was without just cause.**

3. **The existing contract between the parties serves as a guide for the calculation of the compensation, and the amount has to be determined having regard to the equality of the parties.**

Sivasspor club ("the Appellant") is a football club from Turkey, existing under the laws of Turkey and has its headquarters in Sivas, Turkey. It is affiliated to the Turkish Football Association.

Raymond Kalla ("the Respondent"), born on 22 April 1975, is a professional football player from Cameroon.

Appellant and Respondent are subject to and bound by the applicable rules and regulations of the Fédération Internationale de Football Association (FIFA). The FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials, players and players' agents worldwide. The FIFA is an association under Swiss law and has its headquarters in Zürich (Switzerland).

On 10 August 2005 the Respondent signed an employment contract with the Appellant with a term from 1 August 2005 to 30 June 2007.

In clause 12 and clause 13 of this employment contract, the following was agreed upon:

> *"Clause 12*
>
> *Le Joueur a le droit d'annuler le contrat sans payer une compensation, en cas de retard de paiement pout une durée de 2 mois. En cas d'annulation pour cette raison, le joueur peut réclamer les montants précédents non-payés.*
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> In English:
>
> *If the club is late with its payments for two months, the player will have the right to terminate the contract without any penalty payments. In case of termination for this reason the player will have the right to request for the unpaid amounts.*
>
> *Clause 13*
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> *En cas d'accomplir des précédents responsabilités le club peut annuler le contrat du joueur en juin 2006.*
>
> In English:
>
> *If the previous obligations are fulfilled by the club, the club can terminate the contract with the player in June 2006".*

According to the financial provisions of the said employment contract, the Respondent was entitled to receive the following payments from the Appellant:

- signing-on bonus	USD 30,000 cash plus a cheque for USD 110,000 payable on 29 August 2005;
- monthly salary	USD 15,000 (payable on the tenth of the month for the months of September 2005 up to and including May 2006; in total USD 135,000);
- bonus for qualifying for the UEFA Cup	USD 50,000;
- bonus for winning the Turkish championship	USD 25,000;
- not specified	USD 160,000.00 in August 2006;
- monthly salary	USD 15,000 (payable on the tenth of the month for the months September 2006 up to and including May 2007; in total USD 135,000).

By letter, dated 12 June 2006, the Respondent sent the Appellant a reminder that he had to receive outstanding amounts up to USD 295,000.

On 22 June 2006, the Respondent filed a claim against the Appellant before the FIFA, claiming that the Appellant had unilaterally terminated the employment contract without just cause one year before its ordinary expiry date.

In this respect the Respondent submitted a letter of termination issued by the Appellant dated 8 June 2006.

In this letter the Appellant informed the Respondent that the contract had been terminated as the Appellant had appointed a new coach, who no longer required the services of the Respondent. In addition, the Appellant thanked the Respondent for his services and mentioned that the Respondent had been a good example for the Appellant's team.

On 23 February 2007 the FIFA Dispute Resolution Chamber (the DRC) issued a decision ("the DRC Decision") holding that:

> *"1. The claim of the Claimant, player Raymond Kalla, is partially accepted.*
>
> *2. The Respondent, Club Sivasspor, has to pay the amount of USD 175,000 to the Claimant, player Raymond Kalla,* ***within 30 days*** *as from the date of notification of this decision.*
>
> *3. Any further claims lodged by the Claimant, player Raymond Kalla, are rejected.*
>
> *4. In the event that the due amount is not paid within the stated deadline, an interest rate of 5% p.a. will apply as of expiry of the fixed time limit.*
>
> *5. If the aforementioned sum is not paid within the aforementioned deadline, the present matter shall be submitted to FIFA's Disciplinary Committee, so that the necessary disciplinary sanctions may be imposed.*
>
> *6. The Claimant, player Raymond Kalla, is directed to inform the Respondent, Club Sivasspor, immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*
>
> *7. According to Article 61 para. 1 of the FIFA Statutes this decision may be appealed before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receiving notification of this decision and has to contain all elements in accordance with point 2 of the directives issued by the CAS, copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for the filing the statement of appeal, the appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal (cf. point 4 of the directives)".*

First of all the DRC analysed whether it was competent to deal with the matter at stake. In this respect the DRC referred to Article 18 para. 2 and 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

The present matter was submitted to the FIFA on 22 June 2006, as a consequence the DRC concluded that the revised Rules Governing Procedures (edition 2005) on matters pending before the decision making bodies of the FIFA are applicable on the matter at hand.

With regard to the competence of the Chamber, Article 3 para. 1 of the abovementioned Rules states that the Dispute Resolution Chamber shall examine its jurisdiction in the light of articles 22 to 24 of the current version of the Regulations for the Status and Transfer of Players (edition 2005). In accordance with Article 24 para. 1 in connection with Article 22 (b) of the aforementioned Regulations, the Dispute Resolution Chamber shall adjudicate on employment related disputes between a club and a player that have an international dimension.

As a consequence, the DRC decided to be the competent body to decide on the present litigation involving a Cameroonian player and a Turkish club regarding the alleged breach of contract and outstanding compensation in connection with an employment contract.

Furthermore the DRC conclude that the current FIFA Regulations for the Status and Transfer of Players (edition 2005) are applicable to the case at hand as to the legal substance of the matter. The DRC started their considerations with the fact that it was not disputed by the parties that the Appellant and the Respondent signed an employment contract on 10 August 2005, which was to be valid until 30 June 2007.

The DRC considered furthermore that the unilateral termination of the employment contract by the Appellant by means of its written notice dated 8 June 2006 was not contested by the Appellant. The DRC then continued to examine the documents produced by the Appellant dated 7 June 2006, where the Respondent confirmed, on the one hand, that he had received from the Appellant a cash payment amounting to USD 16,745 and, on the other hand, that the Appellant had fulfilled all its contractual obligations towards the Respondent for the football season 2005/'06.

With regard to the objection raised by the Respondent that he had been forced to sign the relevant documents, the DRC, at first, pointed out that the DRC is not competent to decide on matters of criminal law, such as the alleged threat to sign documents, but that such affairs fall into the jurisdiction of the competent national criminal authority.

Therefore the DRC stated that the Respondent, by signing the documents dated 7 June 2006, waived all rights he may have had towards the Appellant on the basis of the relevant employment contract for the season 2005/06.

Then the DRC analysed the content of the clauses 12 and 13 of the employment contract.

Referring thereto the DRC underlined that the clause which gives one party the right to unilaterally terminate an employment contract without providing the other party to the contract with similar rights, is -as general rule- a clause with disputable validity. The DRC concluded that the clause contained in the relevant employment contract is unilateral to the benefit of the Appellant only, i.e., the stronger party in the employment relationship.

Taking some other aspects into account, the DRC concluded that clause 13 of the employment contract, providing for a unilateral option in favour of the Appellant to terminate the contract with the Respondent, cannot be accepted.

Therefore the DRC decided that the Appellant had terminated the contract without just cause thereby breaching the contract with the Respondent on 8 June 2006.

Finally, taking into account Article 17 para. 1 of the Regulations, in particular the non-exhaustive enumeration of objective criteria, the DRC fixed the compensation to be paid by the Appellant to the Respondent in the amount of USD 175,000.

On 9 July 2007 the Appellant filed an (incomplete) statement of appeal with the CAS, pursuant to the Code of Sports Related Arbitration ("the Code") to challenge the DRC Decision of 23 February 2007.

On 13 July 2007 the Appellant completed his statement, confirming his request for relief, specified in the following terms:

> *"Conclusion and request: with respect to the foregoing reasons;*
>
> *We herewith kindly request to stay the execution of the decision of the Dispute Resolution Chamber, and with the arbitration, abolish the decision of Dispute Resolution Chamber dated 23.02.2007, with the acceptation of our appeals, to reject the claims of the Claimant if not to make a reduction in the amount of the claim".*

Furthermore the Appellant wants the CAS tribunal to deliberate on the following issues, which it considers to be the *"most important subjects"*:

> *"1- Is the employment contract between the parties valid?*
>
> *2- Is the employment contract applicable?*
>
> *3- Is the employment contract acceptable?*
>
> *4- Should the clause 12 and the clause 13 of the employment contract be discussed together or separately?*
>
> *These questions have to be answered and the decision must be given according to the conclusion".*

On 23 July 2007 the Appellant sent his appeal brief with 5 exhibits and withdrew his application for a stay of the execution of the decision of the DRC.

On 13 August 2007 the Respondent filed his answer requesting the Panel to reject the claims of Sivasspor and to confirm the decision of the Dispute Resolution Chamber dated 23 February 2007.

The hearing was held in Lausanne on 21 February 2008.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from Art. 60 ff of the FIFA Statutes and Art. R47 of the Code. It is further confirmed by the Order of Procedure, duly signed by the Parties.

Admissibility of the Appeal

2. As these proceedings involve an appeal against a decision in a dispute relating to a contract, issued by a federation (FIFA), whose statutes provide for an appeal to the CAS, they are considered and treated as Appeal Arbitration Proceedings in a non-Disciplinary Case in the meaning of and for the purpose of the Code.

3. The Respondent's statement of Appeal was filed within the deadline set down in the FIFA Statutes and the DRC Decision. No further recourse against the DRC Decision is available within the structure of FIFA. Accordingly the Appeal is admissible.

Scope of the Panel's review

4. According to art. R37 of the 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.

Applicable law

5. Pursuant to art. R58 of the Code, the Panel is required to decide the dispute:

"According to the applicable regulations and rules of law chosen by the parties or, in the absence of the such a choice, according to the law of the country in which the federation / association of 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".

6. Pursuant to art. 59, para. 2 of the FIFA Statutes in force of the time of the Appeal to the CAS:

"CAS shall apply the various Regulations of FIFA and additionally Swiss law".

7. In addition, the Panel has noted that the contract at issue does not provide for an express choice of law to govern it.

8. In this case, therefore, the FIFA Rules and Regulations are to be applied primarily with the subsidiary application of Swiss law. As the contract relating to the dispute was signed on 10 August 2005, the 2005 edition of the Regulations for the Status and Transfer of Players shall be applicable.

The legal merits of the dispute

9. The dispute between the Parties concerns, in its substance, the validity and enforceability of an employment contract executed by the Appellant and the Respondent on 10 August 2005.

10. The Parties are not divided on the issue of whether the contract between the parties was concluded in a legal way, but only on the issue whether clause 13 is legally valid and can be enforced accordingly and if not, whether the contract is *per se* legally valid or null and void.

11. The Panel will therefore now answer the following questions:

    A. Is the contract concluded between the Parties legally valid, even if clause 13 is not valid?

    B. Is clause 13 valid and, if not, what consequences does that have? The Panel notes in this regard that the discussion of this issue also covers the question asked by the Appellant, namely whether clauses 12 and 13 of the contract should be interpreted together or whether they apply independently of each other.

A. *Is the contract legally valid?*

12. It is undisputed between the parties that the contract *per se* is legally valid. The Respondent only contests the validity of Clause 13. The Panel can therefore answer the first question with a straightforward "yes". The employment contract concluded between the parties on 10 August 2005 is valid. Is the contract still valid if clause 13 was not valid and should therefore be declared ineffective? The Panel answers that question *a priori* with a "yes". The Panel fails to see why, if clause 13 was ineffective, the other clauses of the contract should also become ineffective.

B. Is clause 13 legally valid and enforceable?

13. Therefore, the crucial question before the Panel is whether clause 13, in the manner in which it is included in the contract, is legally valid and enforceable.

14. The Panel concludes that clause 13, in itself, does have legal effect. After all, it gives one of the parties the possibility to terminate the contract, a possibility that the contract also stipulates for the other party (clause 1 and clause 12 of the contract).

15. Primarily the panel must question to what extent such a contract provision is permissible under the FIFA Regulations (Regulations for the Status and Transfer of Players). Article 14 provides:

    "The contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) in the case of just cause".

    The crucial question of course is to what degree the unilateral termination of the Appellant on the basis of clause 13 constitutes just cause. In the comment on article 14 of the definition of the concerned regulation of FIFA it states that:

    "The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has such a level that the party suffering the breach is entitled to terminate the contract unilaterally".

Article 17 para. 1 of the same FIFA Regulations determines that the Contracting Party who wishes to terminate a contract without just cause must pay compensation. The Panel is of the opinion that Articles 14 and 17 para. 1 of the FIFA Regulations are both applicable in the present case. In this respect, the Panel can also be lead by the provisions of clause 1 of the contract, which states that if the Respondent wishes to terminate the contract at the end of the 2005/2006 season, he must pay a sum of USD 150,000.

16. The Panel finds however - with the DRC - that there is a serious imbalance in the manner in which the Parties can make use of the possibility to terminate the contract.

The mere fact that the Appellant can only make use of the possibility of terminating the contract if it has fulfilled all its financial obligations towards the Respondent for the season 2005/2006 does not alter that; *pacta sunt servanda*: agreements must be complied with and it is therefore only obvious that the Appellant has an obligation towards the Respondent to pay what it has contractually undertaken to pay to the Respondent.

17. The Panel also finds that the Respondent has fulfilled his obligations towards the Appellant and that the termination of the contract is only due to the fact that the new trainer/coach of the Appellant no longer appreciated his presence in the selection. It is therefore a unilateral termination, with which the Respondent does not agree, as is evidenced by his claim for payment of his full salary over the season 2006/2007, i.e. USD 295,000, as submitted to FIFA.

18. The Panel wishes to discuss in more detail the imbalance in the manner in which the Parties can terminate the contract. Clause 1 of the contract provides that the Respondent may terminate the contract at the end of the season 2005/2006 subject to payment to the Appellant of USD 150,000. The rationale behind this provision seems clear: the Respondent will only leave if another club is interested in him. The Respondent can only make use of that possibility if he is able to create substantially better financial conditions, in which case he will also be able to make the buy out payment of USD 150,000 to the Appellant. Not only the Respondent's (financial) situation will improve substantially, the Appellant will also receive a substantial amount.

19. The Panel furthermore finds that the statement signed by the Respondent on 7 June 2006 in the sense that he has received all due money for the season 2005/2006 from the Appellant does clearly not state or imply that the Respondent explicitly waives his rights under the contract for the season 2006/2007. Now that the Appellant has subsequently informed the Respondent by letter of 8 June 2006 that his services are no longer required, due to the new trainer, the termination of the agreement by the Appellant may be legally valid in terms of its legal effect, namely termination, but cannot be enforced without also granting compensation to the Respondent on the basis of article 17 para 1 of the FIFA Regulations, as it was without just cause.

20. The Panel still wishes to further discuss the solution provided by Swiss law. Article 337 Swiss Code of Obligations (Swiss CO) reads as follows:

Para 1:

"For valid reasons, the employer, as well as the employee, may at any time terminate the employment relationship without notice. He shall justify the termination of the contract in writing if so requested by the other party".

Para 2:

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

Para 3:

"The judge shall decide in his own discretion on the existence of such circumstances. In no event shall he consider the fact that the employee is prevented from performing work without its own fault to be a valid reason".

Article 337c of the Swiss Code of Obligation determines that:

"If the employer dismisses the employee without notice in the absence of a valid reason, the latter shall have a claim for compensation on what he would have earned if the employment relationship had been terminated by observing the notice period or until the expiration of the fixed agreement period".

21. The Panel considers that the concerned provisions of the Swiss CO are in line with those provided by the FIFA in articles 14 and 17 para. 1 of the Regulations (Regulations for the Status and Transfer of Players).

22. The Panel considers that also under Swiss law compensation should be awarded to the Respondent.

23. The question of the amount of the compensation due to the Respondent finally arises. The Panel holds there that the existing contract between the parties serves as a guide. The compensation amount will be determined having regard to the equality of the parties, as was also considered in the DRC decision.

24. Clause 1 of the contract provides that the Respondent can unilaterally terminate the contract by paying of a sum of USD 150,000 to the Appellant. The Panel is of the opinion that it is fair and reasonable that the Appellant may also terminate the contract without just cause reasons by paying a compensation to the Respondent in the amount of USD 150,000.

25. Therefore the appeal lodged by the Appellant is partially upheld in that the amount of compensation as awarded by the DRC decision is reduced from USD 175,000 to USD 150,000, to be paid by the Appellant to the Respondent.

The Court of Arbitration for Sport rules:

1. The appeal filed by Sivasspor club against the player Raymond Kalla at the Court of Arbitration for Sport is partially upheld.

2. The Decision of the FIFA Dispute Resolution Chamber of 23 February 2007 is partially upheld.

3. Sivasspor club has to pay to the player Raymond Kalla the amount of USD 150,000.00 (one hundred and fifty thousand US dollars) together with interest of 5% as from 21 July 2007.

4. (…).

5. (…).

6. All other prayers for relief are dismissed.