Arbitration CAS 2007/A/1258 Aris F.C. v. Sérgio Silva de Souza Júnior, award of 23 October 2007

Panel: Mr Quentin Byrne-Sutton (Switzerland), President; Mr Rui Botica-Santos (Portugal); Ms Margarita Echeverria Bermúdez (Costa Rica)

Football
Termination agreement to an employment contract
Validity of the termination agreement
Burden and standard of proof
Place and date of payment

1. **Under Swiss law and the FIFA Regulations there are no mandatory rules that, as a matter of principle, prevent parties to an employment contract agreeing on the termination of a fixed-time contract, even if the reasons for agreeing on termination are linked to the employee having been injured during his employment. However, Swiss law does contain rules that prevent an employment contract being terminated in an abusive manner as well as general rules protecting a party against obligations contracted under duress.**

2. **According to article 8 of the Swiss Civil Code, a party has the burden of proving the facts underlying its claim(s) and the standard of proof normally applied to a contractual claim is whether the relevant facts have been established beyond reasonable doubt.**

3. **According to article 74 of the Swiss Code of Obligations (CO), the creditor's place of domicile is where obligations to pay money must be performed if the parties have failed to agree on the place of payment. According to articles 75 and 102 para. 2 CO the payment of a sum of money becomes due immediately and automatically upon an agreed date, i.e. without any further notice by the creditor being necessary. In other words, the debtor is deemed in default upon the expiry of the agreed date.**

Aris F.C. (the Appellant, "Aris" or the "club") is a football club with its registered office in Greece. It is a member of the Hellenic Football Federation, which is affiliated to FIFA.

Mr Sérgio Silva de Souza Júnior is a Brazilian football player (the Respondent, "the player").

On 30 January 2004, the player and Aris signed an employment contract (the "employment contract") for a period running from 30 January to 31 December 2004, with an option to renew it for the year 2005.

On 21 December 2004, the employment contract was renewed for a period running from 1 January to 31 December 2005.

According to article 6 of the employment contract and the declaration of renewal, the player was entitled to a remuneration of EUR 103'362.94 for the year 2005, to be paid by means of eight instalments of EUR 12,920.37, the first instalment being due on 30 January 2005.

On 5 January 2005, the player got injured in a training session with Aris.

On 20 January 2005, the player and Aris signed a form of termination agreement (the "termination agreement"). The termination agreement was drafted in Portuguese but the following English translation submitted to FIFA has not been contested:

"(1) […] Both [parties] agree that the player shall accept the club's proposal to terminate his contract, which was signed on 1 January 2005 to be effective until 31 December 2005. He shall travel to Brazil to proceed with his treatment.

(2) The same contract, effective for one year, shall be valid as from 1 July 2005, with the same financial conditions, and shall be signed after the club has verified the player's physical integrity and his full recovery according to medical tests.

(3) The club accepts and undersigns that, if it is verified that the player is fully recovered, the club shall and must sign a new contract with the same length and the same amounts of the contract that is being terminated today.

(4) Today, the player shall receive an advance amount concerning late wages. In the next days, he shall receive the remaining amount that was agreed upon, until it reaches the full amount of EUR 30,000.

(5) If this remaining amount is not received, the player shall be entitled to require before FIFA that the full amount for his full contract be paid.

(6) The contract termination shall not be valid either if the player does not receive the abovementioned amount".

Very shortly after signing the foregoing agreement, the player departed to Brazil.

According to the player, out of the EUR 30'000 that Aris undertook to pay him under the termination agreement, he only received an amount of EUR 16'000, which was paid to him upon signing the agreement, i.e. before his departure.

For the EUR 16'000, the player signed a receipt dated 20 January 2005. It contained the following statements:

"For full and complete payment due to mutually dismantling of my contract"

and

"… I have no other financial claim against F.C. Aris".

Aris affirms that in addition to the amount of EUR 16'000 covered by the receipt, it paid the player a further EUR 4'000 the next day before his departure to Brazil and *"… agreed to pay him in a few days another eight thousand Euros"* (submission of 25 November 2005 by Aris to FIFA).

In other words, notwithstanding the wording of the receipt, Aris recognized that it owed the player a balance under the termination agreement.

In this proceeding, the Aris' representative took the position that out of the EUR 30'000 stipulated in the termination agreement, EUR 16'000 related to unpaid salaries for the year 2004, thus the formulation of the receipt, whereas the balance of EUR 14'000 was a lump-sum which Aris had agreed to pay as a participation towards costs the player might incur for treatment in Brazil.

In its appeal brief, Aris stated as follows that it was unable to pay the balance to the player after his departure to Brazil because he failed to communicate with the club: *"The appellant paid to the respondent twenty thousand Euros (20'000) and agreed with him to pay in the next months, another eight thousand in an account that the respondent would indicate to the appellant. That never happened because the respondent never communicated with the appellant and not by denial of the appellant"*.

At the hearing, Aris' representative added that he had personally attempted to locate the player upon a number of occasions without success during the period between the latter's departure and July 2005.

According to the player, he only received an amount of EUR 16'000 before his departure and was never paid the balance of 14'000 owed to him under the termination agreement. He contends that Aris knew where he could be located but never attempted to communicate with him.

It is undisputed that during the first fortnight in July 2005 the player (whose nickname was "Marica") called Aris several times, since in its submission of 25 November 2005 to FIFA the club notably states: *"… we were awaiting to know regarding Marica until the end of July 2005, and he called us some times saying that in a few days he would be ready to come to Greece … After some days in the middle of July we lost contact of Marica and the person that brought him to Greece, Mr. Ioannis Kontis, FIFA agent, could not reach him in his house as nobody was replying the phone"*.

The player affirms he was fully recovered and ready to return but was not willing to do so before being paid what he was owed.

On 25 July 2005, the player's lawyer wrote to Aris stating that the latter had breached its duties under the termination agreement by not paying the agreed amount of compensation, and that therefore the whole amount of the employment contract for 2005 was due. He also affirmed that the termination agreement was invalid in any event due to having been signed in violation of FIFA rules protecting injured players.

Aris did not respond to the foregoing letter.

As a result, in November 2005, the player submitted a claim to FIFA against Aris, notably claiming an amount of EUR 124'362. 96, representing the compensation he considered due to him under the employment contract for 2005.

In response, Aris argued it owned no monies to the player because his lack of communication with the club after his departure to Brazil had prevented it from paying the balance due and that in addition the player had taken no steps to return to Greece within the agreed timeframe, thereby preventing the labour relationship from reviving.

Aris also made a counterclaim for the repayment of the amount of EUR 20,000 it affirmed to have paid the player following the signature of the termination agreement.

On 25 August 2006, the Dispute Resolution Chamber of FIFA rendered the following decision (the "DRC decision"):

"1. The claim of the Brazilian player Sergio Silva de Souza Junior is partially accepted.

2. The counterclaim of the Greek club Aris Thessaloniki FC PAE is rejected.

3. The club Aris Thessaloniki FC PAE has to pay the amount of EUR 103,362.96 to the player Sergio Silva de Souza Junior.

4. The amount due to the player Sergio Silva de Souza Junior has to be paid by the club Aris Thessaloniki FC PAE within the next 30 days as from the date of notification of this decision.

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. If the aforementioned sum is not paid within the aforementioned deadline, an interest rate of 5% per year will apply as from the first day of expiry of the aforementioned deadline.

7. The player Sergio Silva de Souza Junior is directed to inform the club Aris Thessaloniki FC PAE immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.

8. Any further request of the player Sergio Silva de Souza Junior is rejected".

On 16 March 2007, the DRC decision was notified to the parties and on 4 April 2007 Aris filed an appeal against it with the Court of Arbitration for Sport ("CAS").

On 11 April 2007, Aris filed its Appeal Brief, containing the following prayer for relief: *"The appellant's request is to be accepted the claim against the respondent and the decision of FIFA DRC of August 25 2006, to be cancelled".*

On 9 May 2007, the Respondent filed its Answer, which contained the following prayers for relief:

"… it is requested that

a) be denied the Appellant request, and consequently sustained the conviction;

b) be accepted the requests from the counter-claim; i.e.

b.1) indemnification to be arbitrated by this Panel;

b.2) yearly interests of 5% on top of the amount of salaries from the 2005 contract since it was unfulfilled

b.3) yearly interests of 5% on top of the amount that would be added by this Panel's conviction, starting in 30 days of the publication of the this decision;

b.4) attorney's honoraries established in 20% of the total amount of conviction;

b.5) reimbursement of the travel expenses, hotels and meals to be calculated and presented to the date of the hearing, because only then they would be known".

On 1 June 2007, the player indicated to CAS he was withdrawing his counterclaim because financial difficulties were preventing him from paying the required advance on arbitration costs.

On 25 September 2007, a hearing took place in Lausanne.

At the outset of the hearing both parties' representatives agreed that Swiss law be applied by the panel to resolve the matters in dispute.

With the Respondent's permission, the Appellant filed an additional payment sheet taken from the club's accounting of the player's salary in 2005. The Respondent also accepted that the Executive manager of Aris, Mr Ioannis Kontis, call the President of the club, Mr. Skordas Haralambos, in order to seek clarifications by telephone regarding the accounting, notably with regard to the question of whether the compensation stipulated in the employment contract constituted net amounts or gross amounts. Mr Haralambos and the club's accountant affirmed that all the payments stipulated in the employment contract were gross amounts, from which at-source tax and social-security costs had to be deducted in accordance with Greek law. He affirmed that the required legal deductions were apparent on the payment sheets.

In his closing statement, Mr Kontis requested that if for any reason the appeal was dismissed the Panel should specify that the amount awarded to Aris in the DRC decision related to gross compensation.

In his closing arguments, the representative of the player, Mr Amoretty Souza, maintained that the amounts stipulated in the employment contract were net amounts. He also confirmed the player had withdrawn his counterclaim.

LAW

Jurisdiction

1. In this case the jurisdiction of CAS is not contested and is based on article 61 para. 1 of the FIFA Statutes and art. R47 of the Code of Sports-Related Arbitration ("the Code").

2. Since the player withdrew his counterclaim, the panel shall only adjudicate the claims linked to the appeal.

Applicable Law

3. 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. In the latter case, the Panel shall give reasons for its decision".

4. At the hearing the parties agreed that Swiss law would apply to the dispute. Consequently, the panel shall adjudicate the dispute on the basis of Swiss law while applying any relevant provisions in the FIFA Regulations.

Merits of the Appeal

5. At the heart of the dispute is the question of whether the termination agreement is valid and, if so, whether one or the other party failed to fulfil it duties under the agreement and with what consequences.

6. Accordingly, the Panel shall first examine the validity of the termination agreement and, if it is deemed valid, then turn to the question of its performance and resulting consequences.

i) Validity of the Termination Agreement

7. Under Swiss law and the FIFA Regulations there are no mandatory rules that, as a matter of principle, prevent parties to an employment contract agreeing on the termination of a fixed-time contract, even if the reasons for agreeing on termination are linked to the employee having been injured during his employment.

8. However, Swiss law does contain rules that prevent an employment contract being terminated in an abusive manner as well as general rules protecting a party against obligations contracted under duress.

9. According to article 8 of the Swiss civil code, a party has the burden of proving the facts underlying its claim(s) and the standard of proof normally applied to a contractual claim is whether the relevant facts have been established beyond reasonable doubt.

10. Consequently, in the present case it is for the player to establish beyond reasonable doubt that he signed the termination agreement under duress.

11. The panel considers that although the player is alleging the termination of his employment contract occurred in unfair circumstances, he has offered no evidence that the negotiation and signature of the termination agreement took place under duress. For example, no testimony or any form of written evidence was offered in that respect.

12. Furthermore, there is circumstantial evidence to the contrary, i.e. which tends to indicate that the termination agreement was negotiated fairly.

13. One circumstance is that the original termination agreement was drafted in the player's mother tongue (Portuguese) rather than in Greek, despite Greek being the language of the employment contract. This tends to indicate there was a desire to enable the player to properly understand the terms being discussed, which would not be the typical behaviour of an employer intending to take advantage of the situation.

14. In addition, the termination agreement is quite balanced in overall terms, since it contains several clauses which protect the player's interests, notably the clause specifying that in case of non-payment of the CHF 30'000 he can file a claim with FIFA and the clause providing that in case of non-payment of the foregoing amount the full compensation owed under the employment contract for 2005 would automatically become due. In addition, the termination agreement was formulated in a manner that made it clear that no barriers prevented the player from returning to Greece to resume his position as a player providing he was medically fit to do so.

15. For the above reasons, the panel finds there is no reason to consider the termination agreement is invalid.

ii) Breach of the Termination Agreement and Consequences Thereof

16. In order to determine whether any obligations under the termination were breached and with what consequences, it is necessary to first clarify the scope of the parties' relevant obligations.

17. Since both parties are contending that the other did not fulfil its contractual duties relating to the stipulated payment of CHF 30'000, the Panel shall begin by examining their respective obligations deriving from the following clause: *"Today, the player shall receive an advance amount concerning late wages. In the next days, he shall receive the remaining amount that was agreed upon, until it reaches the full amount of EUR 30,000"*.

18. It is uncontested that a total payment of EUR 30'000 was due by Aris to the player under that clause and that at least part of that payment remained outstanding when the player departed to Brazil.

19. It is also uncontested that part of the amount of EUR 30'000 was ultimately never paid by Aris to the player.

20. Aris contents that the balance owed was only EUR 8'000, whereas the player alleges that EUR 14'000 remained unpaid. Thus, there is no doubt that at least EUR 8'000 remained unpaid.

21. The parties disagree as to the reasons for the non-payment. Aris is contending in essence that it could not pay the balance because the player did not respect an oral undertaking to provide his bank-account number to the club and that it was unable to reach the player. The player is alleging in essence that Aris knew perfectly well where and how to reach him but simply did not want to spontaneously pay the outstanding amount.

22. In determining the parties' respective duties, it is relevant to ascertain whether the parties had agreed on a date of payment and where the payment had to be made.

23. With respect to the place of payment, the panel finds that upon the player's departure the parties had agreed, at least implicitly, that such place would be Brazil, which would also be the solution under article 74 of the Swiss code of obligations ("CO"), since according to such provision the creditor's place of domicile is where obligations to pay money must be performed if the parties have failed to agree on the place of payment.

24. According to articles 75 and 102 para. 2 CO the payment of a sum of money becomes due immediately and automatically upon an agreed date, i.e. without any further notice by the creditor being necessary. In other words, the debtor is deemed in default upon the expiry of the agreed date.

25. The panel finds that the language of the termination agreement and Aris' initial submissions to FIFA after the dispute arose constitute good evidence that the parties had agreed on the fact that the outstanding amount was owed to the player. Indeed, the agreement itself states that the total amount would be paid *"In the next days"* (translation of *"… e nos proximos dias"*), and in its submission to FIFA of 25 November 2005 Aris contends with regard to the outstanding payment that *"… we agreed to pay him in a few days another eight thousand Euros"*.

26. In its appeal brief filed in this proceeding, Aris contradicts its earlier submission by stating that it promised payment of the balance *"… in the next months"*. The Panel finds this later submission less credible since the termination agreement itself speaks of the "next days" and there is no reason to believe that upon departing from Greece the player would, in the circumstances, have accepted to be paid the outstanding amount with several months of delay.

27. Because the wording "in the next days" logically means within a week – since beyond a week the right expression to use would have been "within x weeks" or "within x months" – the panel considers that the parties had agreed upon a payment date which would expire at the latest within a week from the date of signature of the contract and the payment of the initial amount of EUR 16'000.

28. Consequently, in application of article 102 para. 2 CO, the panel finds that the balance of at least EUR 8'000 owed by Aris became due automatically without the player having to put Aris on notice.

29. It follows that Aris has the burden of proving it attempted to make the payment in question but was unable to do so because it was impossible to reach the player.

30. Aris has offered no evidence to support its allegations that it did not have the player's bank-account number and that it attempted to contact the player but was unable to communicate with him after his departure to Brazil. It filed no documents, such as copies of letters or e-mails or records of phone calls, even indicating that attempts were made to reach him in Brazil, and it called no witnesses to testify to the same.

31. At the hearing, Mr Ioannis Kontis did state that he had unsuccessfully attempted to reach the player on numerous occasions upon the latter's return to Brazil and that it was difficult to find the player as the latter tended to move around and even the Brazilian federation did not know of his whereabouts.

32. However, Mr Kontis' declarations, unsupported by other elements of proof, cannot carry particular weight because he was representing Aris at the hearing, in his current capacity as Executive manager of the club, and because Mr Kontis himself admitted to being in a conflict-of-interest situation as a result of having been the players' agent. It also seems curious that a club and an agent having dealt with a player on a daily basis for over a year would not have sufficient information at hand, especially with today's means of communication, to enter into contact with the player in Brazil.

33. Furthermore, at the time of the facts Aris had a duty of its own (independently from Mr Kontis) to try and reach the player and to pay the player, and did not necessarily have the same interests as Mr Kontis, given his position as the player's agent.

34. For the above reasons, the panel finds that Aris has not met its burden of proof that it attempted to make the outstanding payment of at least EUR 8'000 which it admits remained due under the termination agreement.

35. As a result, the panel considers that when the player filed his claim with FIFA, Aris was bound by the clause in the termination agreement stating that: *"If this remaining amount is not received, the player shall be entitled to require before FIFA that the full amount for his full contract be paid".*

36. Concerning the full amount of the employment contract for 2005 which was thus due to the player, the DRC did not specify in its decision whether the amount of EUR 103'362.96 it awarded represented a net or a gross amount.

37. In that relation the panel considers that although the player is alleging the instalments stipulated in the employment contract for 2005 were net amounts, he has offered no evidence that such was the parties' agreement.

38. Moreover, there is circumstantial evidence that tends to indicate that the parties agreed on gross amounts, i.e. on amounts subject to the mandatory deductions of at-source tax and social security provided under Greek law.

39. One circumstance is that the instalments stipulated for 2005 in the employment contract do not constitute round figures. Another circumstance is that the payment sheets for the year 2004 filed by the Appellant confirm that under Greek law, in relation to contracts of this type, at-source tax and social-security costs must be deducted by the employer.

40. For the above reasons, the panel finds that the player has not established that the amount he is claiming under the employment contract for 2005 was stipulated in the contract as a net amount.

41. Consequently, the panel considers that in application of the DRC decision Aris owes the player a gross amount of EUR 103'362.96, which is payable within the deadlines and with the interest specified in therein.

The Court of Arbitration for Sport rules:

1. The appealed decision of 25 August 2006 of the FIFA Dispute Resolution Chamber is upheld.

2. (…).

3. (…).

4. Any and all other claims are dismissed.