Arbitration CAS 2007/A/1210 Ittihad Club v. Sergio Dario Herrera, award of 3 July 2007

Panel: Mr Miguel Ángel Fernández-Ballesteros (Spain), President; Mr Jean-Philippe Rochat (Switzerland); Mr Rui Botica Santos (Portugal)

Football
Termination of the employment contract with just cause
Just cause
Breaches of contract
Consequences of the termination of contract
Compensation in accordance with the principle of positive interest

1. **Under Swiss law, an employment agreement entered into for a fixed term can only be terminated prior to the expiry of the term if there are "valid reasons" or if the parties reach a mutual agreement as to the ending of the contract. According to Swiss case law, whether there is "good cause" for termination of an employment contract depends on the overall circumstances of the case. Particular importance is thereby attached to the nature of the breach of contract. The existence of a valid reason has to be admitted when the essential conditions, of an objective or a personal nature, under which the contract was entered into are no longer present. Only a breach which is of a certain severity justifies termination of a contract without prior warning. In principle, a breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit the continuation of the employment relationship between the parties such as a serious breach of confidence.**

2. **The fact that the player's salaries are not paid by the club for 3 months despite a written notice sent to the club by the player constitutes a breach of contract. Reasons provided by the club for the absence of payment, namely the fact that (a) the player did not collect cheques that were at his disposal at the club's offices and that (b) the player had closed his bank account, cannot justify the breach. In addition, the fact that the player was not allowed to play for the club's first team, in violation of what had been agreed in the employment contract, also constitutes a breach of the contract.**

3. **In bilateral contracts, when a party is in default and has not performed its contractual obligations within the deadline set by the other party in a notice of default, the claiming party can – amongst other possibilities – renounce the agreement and claim damages. Termination of the contract by one party does not relieve the other party from performing the obligations that had accrued before termination.**

4. **The claiming party has the right to claim "positive" damages, i.e. an amount that would place the claimant in the position it would be if the contract had been properly performed until its termination in accordance with its terms. As a rule, this includes**

amounts corresponding to the remaining value of the contract, less (1) any amounts that the claimant does not have to incur as a result of the early termination of the contract; and (2) any amounts that the claimant has earned (or will earn) and that it would not have earned had the contract not been terminated.

Ittihad Club (hereinafter "Ittihad") is a football club established under the laws of Saudi Arabia and having its registered office in Jeddah, Saudi Arabia. It is a member of the Saudi Arabian Football Federation, which is, in turn, a member of the Federation Internationale de Football Association (hereinafter FIFA). FIFA is an association established in accordance with Article 60 of the Swiss Civil Code and has its seat in Zurich (Switzerland).

Mr Sergio Dario Herrera (hereinafter "Mr. Herrera") is a professional football player from Colombia.

On 9 August 2004, Ittihad and Mr Herrera signed an agreement entitled *"3 years APPOINTMENT CONTRACT"* (hereinafter the "Contact"), effective as from 1 August 2004. According to Article 2 of the Contract, Ittihad *"has agreed to appoint [Mr Herrera] as a Professional Football player in The first Team of Ittihad Club"*.

Article 3 of the Contract provides as follows: *"[Ittihad] undertakes to remunerate [Mr Herrera] with a Total Amount of USD 680.000 DOLLAR for the fulfilment of the obligations stipulated in this contract during the first year the total remuneration for the second year total us$(400.000) and the remuneration for the third year will be discussed after the completion of the first year, as stated in appendix (A), or any addendum or appendix thereof. […]"*. Article 4, however, states that the remuneration of Mr Herrera for the third year of employment *"should not be less than $400.000"*.

Article 5 of the Contract further provides that Mr Herrera is entitled to a bonus of USD 15,000 in case of win of the local championship and of USD 20,000 in case of win of the Asian championship.

Appendix (A) of the Contract contains a schedule of payment, according to which Mr Herrera should receive an amount of USD 280,000 as advance payment, and 24 monthly instalments of USD 33,333 each between 1 September 2004 and 1 August 2006. The Appendix confirms that the monthly salaries for the third year will be discussed and agreed after the completion of the first year of the contract period.

On 3 December 2005, Mr Herrera wrote to Mr Al Balawi, President of Ittihad, to complain about the fact that he had not received the bonus for winning the Arab Championship, nor his salaries for the months of September, October and November 2005.

On 17 January 2006, Mr Herrera's counsel wrote to Ittihad and repeated that neither Mr Herrera's salaries for the months of September, October and November 2005, nor the bonus for winning the championship had been paid. Mr Herrera's counsel further mentioned that the car that was left at Mr Herrera's disposal had been taken away without reason. Mr Herrera's counsel stated that the non payment of the player's salaries was a breach of Ittihad's contractual obligations and could be

sanctioned by the FIFA Dispute Resolution Chamber. He claimed payment of the amount of USD 100,000, plus the bonus, with interest, on or before 20 January 2006.

On 23 January 2006, Mr Herrera's counsel again wrote to Ittihad, mentioning that no answer had been received to his letter of 17 January 2006 and stating the following: *"Mr Herrera takes note that Al-Ittihad has unilaterally breached the employment contract entered into between the parties. As a result, Mr Herrera hereby informs you that he considers his employment contract as terminated by your own and sole fault and therefore he does not regard himself bound any longer to your club"*.

On 26 January 2006, Mr Herrera filed a complaint with FIFA, requesting *inter alia* payment of an amount of USD 153,332 corresponding to salaries for the months of October 2005 to January 2006 and a USD 20,000 bonus for winning the Arab Cup, plus interest. Mr Herrera also requested payment of an amount of USD 633,331 as compensation corresponding to the rest value of the Contract, reimbursement of air tickets, as well as payment of USD 199,998 as supplementary compensation, equal to six monthly salaries.

On 1 February 2006, Mr Herrera's counsel wrote to Mr Omar Ongaro, Head of the FIFA's Players' Status Committee, and complained about the fact that Ittihad was impeding the player to leave Saudi Arabia, by refusing to deliver the club's written departure authorisation form. Mr Herrera's counsel requested FIFA's intervention in this matter, and demanded that a disciplinary procedure be opened against Ittihad. These requests were reiterated by letter dated 9 February 2006.

On 10 February 2006, FIFA wrote to the Saudi Arabian Football Federation, urging Ittihad to ensure that Mr Herrera *"receives all the necessary assistance so as to enable him to leave the country"*. On 14 February 2006, FIFA wrote again to the Saudi Arabian Football Federation, insisting that the player be allowed to leave Saudi Arabia.

On 3 March 2006, Mr Herrera signed an employment contract with Clube Atlético Paranense for the period between 3 March and 5 December 2006. According to this agreement, Mr Herrera's salary was R$ 36,400.-.

On 19 April 2006, the Confederação Brasileira de Futebol wrote to FIFA to complain about the fact that the International Transfer Certificate that would allow Mr Herrera to play with Clube Atlético Paranense had not been issued, despite several requests.

On 17 August 2006, FIFA's Dispute Resolution Chamber issued a decision, which reads as follows:

> *"1. The claim of the Brazilian player Sergio Herrera Month is partially accepted.*
>
> *2. The respondent, Club Al-Ittihad, has to pay the total amount of USD 353,332 (USD 133,332 as outstanding salaries, USD 20,000 as outstanding bonus and USD 200,000 as compensation) to the player Sergio Herrera Month, within 30 days following the date of communication of the present decision.*
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> *3. In the event that the above-mentioned amount is not paid within the stated deadline, an interest rate of 5% per year will apply as of expiry of the relevant time-frame and the present matter shall be submitted to FIFA's Disciplinary Committee, so that the necessary disciplinary sanctions may be imposed.[…]".*

On 9 January 2007, Ittihad filed an appeal with CAS against the decision issued by the FIFA Dispute Resolution Chamber of 17 August 2006. The appeal was directed against Mr Herrera and FIFA.

Upon the CAS' request, FIFA produced a clean copy of the decision on 15 January 2007. In its cover letter, FIFA stated that it could not be considered as a Respondent in this matter, which relates to a contractual dispute between a player and his club, and requested to be *"excluded from the procedure at stake"*.

On 18 January 2007, Ittihad filed an appeal brief. On 16 February 2007, Mr Herrera filed his statement of defence.

LAW

CAS Jurisdiction

1. The Contract does not contain any jurisdiction clause.

2. Therefore, jurisdiction is based on Articles 60 ff. of the FIFA Statutes, in particular Article 61(1), which provides that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"*.

3. The parties confirmed the jurisdiction of CAS by signing the order of procedure of 23 April 2007.

4. It follows that CAS has jurisdiction to decide on the present dispute. The mission of the panel follows from Article R57 of the Code, according to which the panel has full power to review the facts and the law of the case. Furthermore, the same article provides that 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. According to Article R58 of the Code of Sports-related arbitration (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"*.

6. In addition, Article 60(2) of the FIFA Statutes provide that CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

7. The Contract does not contain any choice-of-law clause and the parties have not otherwise specifically agreed on the applicable law.

8. As the seat of CAS is in Switzerland, this arbitration is subject to the rules of Swiss private international law ("LDIP"). According to Article 187(1) LDIP, the arbitral tribunal decides in accordance with the law chosen by the parties or, in the absence of any such choice, in accordance with the rules with which the case has the closest connection. Although the parties have not expressly chosen any specific law, there is, in cases of appeals against decisions issued by FIFA, an indirect choice of law, in accordance with Article R58 of the Code and Article 60(2) of the FIFA Statutes. Such indirect choice of law is valid under Swiss private international law rules.

9. Therefore, the Panel shall apply the applicable FIFA regulations and, additionally, Swiss law.

Merits

10. Two issues are at the center of the present proceedings: first, did the Appellant and/or the Respondent commit a breach of the Contract (see below, section A.); and second, what are the consequences thereof (see below, section B.).

A. Breach of contract

11. By letter of his counsel dated 23 January 2006, Mr Herrera notified Ittihad that he held the Appellant to be in breach of contract and, as a result, considered that the Contract had been terminated by Ittihad's fault and did not bind him anymore. On 26 January 2006, Mr Herrera then filed a request with FIFA claiming payment of certain sums of money, notably as outstanding salary and compensation for breach.

12. The Panel considers that the Respondent's letter of 23 January 2006 must be considered to be a notice of termination of the Contract by Mr Herrera. The question therefore arises whether this termination was justified.

13. According to Article 13 of the Regulations of the Status and Transfer of Players (the "Regulations"), *"[a] contract between a Professional and a club may only be terminated on expiry of the term of the contract or by mutual agreement"*. Article 14 of the Regulations further provides that *"[a] 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"*. However, the Regulations do not define the notion of "just cause" (they only define "sporting just cause", which is governed separately by Article 15 of the Regulations). It is therefore necessary to rely on Swiss law to determine in which circumstances a contract can be terminated based on just cause.

14. Under Swiss law, an employment agreement entered into for a fixed term can only be terminated prior to the expiry of the term if there are "valid reasons" or if the parties reach a mutual agreement as to the ending of the contract (see ATF 110 I 167; WYLER R., Droit du travail, Berne 2002, p. 323; STAEHELIN/VISCHER, Kommentar zum Schweizerishen Zivilgesetzbuch, Obligationenrecht, Teilband V 2c, Der Arbeitsvertrag, Art. 319-362 OR, Zurich 1996, n. 17 ad Art. 334, p. 479).

15. In this respect, Article 337(2) of the Swiss Code of Obligations provides that *"[a] valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship"*. According to Swiss case law, whether there is "good cause" for termination of an employment contract depends on the overall circumstances of the case (ATF 108 II 444). Particular importance is thereby attached to the nature of the breach of contract. The Swiss Federal Tribunal has ruled that the existence of a valid reason has to be admitted when the essential conditions, of an objective or a personal nature, under which the contract was entered into are no longer present (ATF 101 Ia 545).

16. Only a breach which is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145; ATF 108 II 444). In principle, a breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit the continuation of the employment relationship between the parties such as a serious breach of confidence (WYLER R., *op. cit.*, p. 364; TERCIER P., Les contrats spéciaux, Zurich, Basle, Geneva 2003, n. 3394, p. 495).

17. In the present case, Mr Herrera based the termination of the Contract, on 23 January 2005, on the fact that his salaries for the months of October, November and December 2005 were not paid, despite a formal notice of default and request to pay having been sent to the Appellant on 17 January 2005. In the course of the proceedings, the Respondent later mentioned additional breaches committed by the Appellant, in particular the fact that the latter did not allow the player to play with Ittihad's First Team.

18. In the Panel's opinion, and pursuant to the above mentioned case law, the termination of the Contract by Mr Herrera was made for just cause, for the following reasons:

- It is not disputed that the Respondent's salaries for the months of October, November and December 2005 were not paid by the Appellant. This is a breach of Article 3 of the Contract.

- These salaries were not paid despite a written notice sent to the Appellant by the Respondent on 17 January 2006.

- The reason that was provided by the Appellant for the absence of payment, namely the fact that (1) Mr Herrera did not collect cheques that were at his disposal at the club's offices and (2) Mr Herrera had closed his bank account, do not justify the breach. Concerning the first point, the Panel notes that the cheques produced by the Appellant are in the Arabic language, which is not the language of the proceedings and which the members of the Panel do not understand. In the absence of an English translation, which

was required under applicable procedural rules (Art. R29 of the Code), it is not possible to determine whether such cheques correspond to the amounts claimed. Nevertheless, the Panel notes that, from the cheques produced, that these documents are related to February 2005 and not to the salaries claimed. In addition, there is no evidence establishing that these cheques were offered to the Respondent, which is disputed by the latter, and refused by him. Concerning the second point, the Appellant has produced no evidence supporting its allegation that Mr Herrera had closed his bank account before the termination of the Contract. Mr Herrera admitted having closed the account, but only after such termination. In any event, the Appellant has not either produced any evidence showing that it tried to pay the salaries to the Respondent, but was prevented to do so because the bank account had been closed.

- The fact, undisputed, that Mr Herrera was not allowed to play for Ittihad's first team also constitutes a breach of the Contract. Indeed, Article 2 of the Contract expressly states that *"[Ittihad] has agreed to appoint [Mr Herrera] as a professional Football player in The first team of Ittihad Club"*. The reasons that have been presented by the Appellant to justify the decision to have Mr Herrera play with the Under 23 team, essentially that the player's fitness was insufficient, are unconvincing. First, the Panel notes that the Respondent disputed the allegation that his physical condition did not allow him to play with the first team. In this respect, the Appellant has not produced any evidence supporting such allegation. On the contrary, it is undisputed that Mr Herrera was called by the Colombian federation to play for the Colombian national team in an international friendly match against Spain in December 2005. Second, the Panel considers, in any event. that by expressly mentioning in the Contract that the player would play for the first team, Ittihad undertook a clear contractual obligation and assumed the risks related to the player's fitness. The Panel acknowledges that such assumption of risk may not extend to exceptional or unforeseen circumstances; however, there is no evidence on record that there existed such exceptional and/or unforeseen circumstances related to Mr Herrera's fitness.

19. Therefore, the Panel finds that the Appellant has breached Mr Herrera's employment contract and that, therefore, the player had the right to terminate it on 23 January 2005.

B. Consequences of the termination

20. Under Swiss law a party can claim performance of the other party's contractual obligations, based on the agreement, if the latter is still in force and binding on the parties. However, in cases where the agreement has been terminated, the parties' right to claim performance and/or damages will depend on the basis for termination.

21. In the present case, the contract was terminated following a breach by Itthiad, essentially based on the fact that the Appellant had failed to pay the player's salaries.

22. It is undisputed that the salaries due to Mr Herrera were not paid by Ittihad, even though these salaries should have been paid at specific dates, which were set out in Appendix A of the

Contract. The Appellant has not demonstrated that it had any legally valid reason for refraining from paying the amounts due to Mr Herrera. As a consequence, in accordance with Article 108 CO, the Appellant was in default as from the dates when these payments were due, i.e., at least as from 1 October 2005.

23. By letter dated 17 January 2006, Mr Herrera wrote to Ittihad complaining about the Appellant's default and claiming payment of the outstanding amounts. The player set an additional time-limit to Ittihad to pay the amounts due. It is undisputed that the amounts due were not paid by Itihad within this time limit.

24. On 23 January 2006, Mr Herrera sent a letter containing the following statement: *"Mr Herrera takes note that Al-Ittihad has unilaterally breached the employment contract entered into between the parties. As a result, Mr Herrera hereby informs you that he considers his employment contract as terminated by your own and sole fault and therefore he does not regard himself bound any longer to your club"*.

25. The Panel considers that this statement complies with Article 107(2) CO, according to which, in bilateral contracts, when a party is in default and has not performed its contractual obligations within the deadline set by the other party in a notice of default, the claiming party can – amongst other possibilities – renounce the agreement and claim damages. In the Panel's opinion, it is clear from the Respondent's correspondence, that it intended to renounce performance of the agreement by the parties and claim damages for the residual financial value of the contract (so-called "positive" damages, i.e., damages that would place the claimant in the position it would be in had the contract been properly performed until its termination in accordance with its terms).

26. Termination of the contract by one party does not relieve the other party from performing the obligations that had accrued before termination. Ittihad therefore has the obligation to pay to Mr Herrera the amounts that were due when the agreement was terminated, on 23 January 2006. This includes the following amounts, which are not disputed:

- Salaries for the months of October 2005, November 2005, December 2005 and January 2006, i.e., USD 133,332 (4 x USD 33,333);

- Bonus for winning the Arab Cup, i.e., USD 20,000.

27. In addition, the Panel finds that Mr Herrera has the right to claim positive damages, in accordance with Article 107(2) CO. He may then claim an amount that would place him in the position he would be in had the contract been properly performed until its termination in accordance with its terms. As a rule, this includes amounts corresponding to the remaining value of the contract, less (1) any amounts that the player does not have to incur as a result of the early termination of the contract; and (2) any amounts that the player has earned (or will earn) and that he would not have earned had the contract not been terminated.

28. According to the Respondent, the remaining value of the contract was USD 633,331, which corresponds to the amount claimed in Mr Herrera's request to FIFA. However, since the

Respondent did not appeal the DRC decision of 17 August 2006, the relevant question is whether the amount granted by the DRC, i.e., USD 200,000, is appropriate.

29. According to Article 3 of the Contract, Ittihad had the obligation to pay the player USD 33,333 per month until 30 August 2006, plus a minimum amount of USD 400,000 for the third year of employment. Therefore, on 23 January 2006, the remaining value of the Contract was at least USD 633,331, which is well in excess of USD 200,000.

30. Following termination of the agreement, in January 2006, Mr Herrera did not have to perform contractual obligations any further. In addition, he had the possibility to mitigate any damages suffered, through professional activities that he could not have engaged in while the contract was still in existence.

31. In the present case, Mr Herrera explained that he entered into a contract with another football club, Club Atlético Paranense for the period between 3 March and 5 December 2006. According to this agreement, Mr Herrera's salary was R$ 36,400.-, i.e., less than USD 20,000. This amount, which the player would not have earned if the Contract had not been terminated, must be deducted from any damages that could be claimed by the Respondent.

32. There is no evidence on record, nor specific allegations of fact by the Appellant, that the player earned other monies during the period between termination of the Contract and 1 August 2007.

33. The Appellant has, however, claimed that the player also committed breaches of the Contract, in particular by (1) not remaining sufficiently fit for playing; (2) not collecting his paychecks and by closing his bank account; and (3) by not returning promptly to Saudi Arabia after a friendly match in Europe.

34. Concerning the first two points, the Panel already stated above (see paragraph 18 above) that there was no breach on the player's part.

35. Concerning the third point, the Panel is of the opinion that if the Appellant considered that the player had committed a breach of contract by not returning to Saudi Arabia promptly after the friendly match in Europe was over, it should have raised objections and complained to the player immediately, which it did not do based on the evidence on record.

36. Therefore, based on the elements on record, the Panel considers that the amount granted as compensation by the DRC, USD 200,000, is appropriate, in particular in the light of the remaining value of the contract at the time of termination.

37. In accordance with Article 104 CO, interest at the rate of 5% may be due on outstanding payments, as from the date the corresponding obligation accrued. In the present case, the disputed decision ordered the Appellant to pay interest at the rate of 5% as from the expiration of a 30-day time limit following the date of communication of the decision. Therefore, the amounts due in accordance with the decision were due, at the latest, as from such date. Since the Respondent did not appeal the decision, it is not necessary to examine whether interest for late payment should have commenced to run at an earlier date.

38. Finally, the Panel notes that the general claim of the Appellant that the Respondent should be *"under the obligation to reimburse the appellant all the costs and investments incurred in relation with his transfer, as assessed by the Panel pursuant to the relevant CAS case law"*, has not been substantiated and is not supported by any evidence. The appeal contains no specific allegations of fact nor legal argumentation explaining on which basis such a reimbursement should be ordered. In any event, the Panel has found that the Contract was terminated by the Respondent in accordance with applicable law, as a result of a breach of contract by the Appellant. In addition, the Panel has found that the Respondent did not breach the Contract. The Panel therefore finds no basis to order the Respondent to pay any reimbursement to the Appellant. The Appellant's claims must thus be dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed on 9 January 2007 by Ittihad against the decision issued on 17 August 2006 by the FIFA Dispute Resolution Chamber is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 17 August 2006 is confirmed.

(…)