



Arbitration CAS 2006/A/1126 Sasa Gajser v. Olimpiakos Nikosia FC, award of 11 January 2007

Sole Arbitrator: Prof. Luigi Fumagalli (Italy)

Football

Breach of a contract of employment

Choice of the resolution system for employment related disputes between club and players

Exclusive competence of FIFA to impose sports sanctions or disciplinary measures

1. **The FIFA Regulation for the Status and Transfer of Players (RSTP) 2001 established a system for the resolution of the employment related disputes between clubs and players, but acknowledged said system to be “without prejudice to the right of any player or club to seek redress before a civil court” (Article 42 para. 1, introductory period): on one hand, the RSTP 2001 defined a “sporting system” for the settlement of disputes; on the other hand, it conceded that State adjudication in employment related disputes could not be entirely excluded.**
2. **Under Article 42 para. 1 RSTP 2001, while a further alternative for the adjudication on the existence of a breach is given, so that the dispute is heard either by the Dispute Resolution Chamber (DRC) or by a national sports arbitration tribunal, no choice is left for the determination of the consequences of the breach, that have to be considered only at FIFA level. In other words, the DRC has an exclusive competence to impose sports sanctions or disciplinary measures, in the event a breach without just cause or sporting just cause is found, or to award financial compensation and/or impose disciplinary measures on the club concerned, in the event it is established that the player terminated a contract with just cause or sporting just cause.**

Mr Sasa Gajser (hereinafter referred to as the “Player” or “Mr Gajser”) is a Slovenian professional football player.

Olimpiakos Nikosia FC (hereinafter referred to as the “Club” or “Olimpiakos”) is a Cypriot football club existing under the laws of Cyprus and has its headquarters in Nicosia, Cyprus. It is affiliated to the Cyprus Football Association (hereinafter referred to as “CFA”), which in turn is a member of the Fédération Internationale de Football Association.

The Club and the Player are subject to and bound by the rules of the Fédération Internationale de Football Association (hereinafter referred to as “FIFA”), which is the governing body of international football. FIFA is an association under Swiss law, with headquarters in Zurich, Switzerland, and exercises regulatory, supervisory and disciplinary functions over continental confederations, national

associations, clubs, officials and players, worldwide.

On 19 June 2002 the Player signed an employment contract (hereinafter referred as the “Contract”) with the Club for a period starting on the date of the signature and ending on 30 May 2004.

According to the Contract, the Player was entitled to receive the following remuneration:

- i. EUR 170,000 for the period starting on 19 June 2002 and ending on 30 May 2003, to be paid as follows:
 - EUR 40,000 on 23 June 2002;
 - and EUR 130,000 in ten instalments of EUR 13,000 per month from 30 July 2002 to 30 April 2003;
- ii. EUR 180,000 for the period starting on 31 May 2003 and ending on 30 May 2004, to be paid as follows:
 - EUR 40,000 on 30 August 2003; and
 - EUR 140,000 in ten instalments of EUR 14,000 per month from 30 July 2003 to 30 April 2004;

Under the Contract, in addition, the Player was entitled to receive *“the fixed premium and/or benefit that the employer provides for all the players as described in the Internal Regulations of the Club and to provide to the employee 2 return air tickets Larnaca/ Slovenia per year, flat and a car”*.

On 7 March 2005 the Player contacted FIFA submitting a complaint against the Club, and asking that the Club be ordered to pay

- A. *EURO 180,000.- which represents his outstanding salaries for the period 2003-2004 of the contract of employment.*
- B. *An amount that is considered reasonable to cover his legal fees and other related expenses”.*

In support of his claim the Player stated before FIFA that the Contract had been terminated in May 2003, due to the fact that he had not been paid the salaries for the season 2002/2003, and that he had not been summoned to take part in the training sessions of the Club for the season 2003/2004. More specifically, the Player submitted:

- that the Disciplinary Committee of the Cyprus Football Association (hereinafter referred as the “CFA Committee”) by a decision passed on 13 October 2003 (hereinafter referred as the “CFA Decision”) had ordered the Club to pay to the Player the salaries due for the season 2002/2003, but that the issue relating to the salaries for the season 2003/2004 remained outstanding;
- that he *“did not succeed to find any employment with another club during the football season 2003-2004 (despite his efforts to this effect)”*;
- that the amount claimed *“represents the damage and loss he suffered as a result of the unlawful behavior and action of the football Club not to honor the Contract of employment until its termination i.e. until the end of football season 2003-2004”*.

The Club, in its answer before FIFA, submitted that the Player could not lodge a new claim because:

- the matter had already been settled by the CFA Decision;
- the Player had “resigned” from the Contract, by filing a claim against the Club at a time the Contract was still in force and by ceasing his activities with the Club;
- he had failed to prove “that he put himself in the market so as to mitigate his loss”, but “merely waited the end of his contract in order to file a claim against the club for damages of the remaining of his contract”;
- FIFA had no jurisdiction, because the Player had decided to lodge his claim before the CFA Commissions under the CFA rules and obtaining the CFA Decision.

In light of the foregoing, the Club requested FIFA to dismiss the Player’s claim.

On 21 February 2006 the Dispute Resolution Chamber of the FIFA Players’ Status Committee (hereinafter referred to as the “DRC”) issued the following decision (hereinafter referred to as the “Decision”):

“... The Dispute Resolution Chamber cannot consider the claim lodged by the Claimant, Mr Sasa Gajser”.

In support of the Decision, the DRC remarked that the Player had lodged his claim before FIFA after having obtained the CFA Decision, rendered with respect to the Player’s petition to be awarded the “outstanding salaries and bonuses” pertaining to the season 2002/2003 and “damages”.

The DRC then considered the CFA Decision and noted that “it stipulates that ‘... the football player reserves his right to continue the civil action and to pursue damages for illegal termination of his employment contract with the football club Olympiakos’”, and that it had been executed by the Club.

In this connection, the DRC, rejecting the Player’s submission, stated that the claim filed with FIFA “must be regarded as the logical continuation of the procedure that Mr Gajser initiated in front of the deciding body in Cyprus”. As a result, “having opted for proceedings in front of a national deciding body, the Player has excluded recourse to FIFA’s Dispute Resolution Chamber”. The DRC was therefore “not competent to deal with the substance of the claim lodged by the Player”.

The Decision was notified to the Player, to the Club and to the CFA on 13 June 2006.

On 3 July 2006, the Player filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”), pursuant to the Code of Sports-related Arbitration (hereinafter referred to as the “Code”), to challenge the Decision. The statement of appeal contained the request:

- *That the CAS states that the FIFA DRC should have considered the claim of the Appellant.*
- *That the CAS then decides the merits of such claim as defined in the FIFA DRC decision.*
- *That the CAS grants the Appellant late interests and, ex aequo et bono, an amount in order to contribute to his legal costs and defence”.*

In support of its request for relief the Appellant submits that the Decision rendered by the DRC “amounts to a denial of justice”, because the Player, who had reserved his right to continue the civil action

against the Club and to seek damages for the illegal termination of the Contract, “*was perfectly legitimate to seek redress in the FIFA DRC*”. In the merits, the Player submits to be entitled to the remedy sought before the DRC, for the reasons explained in the FIFA proceedings.

The Respondent, did not file any answer within the deadline indicated in Article R55 of the Code.

LAW

Jurisdiction

1. CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of CAS, which is not disputed by either party, is based *in casu* on Article R47 of the Code and on Articles 59 ff. of the FIFA Statutes.

Appeal proceedings

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 and for the purposes of the Code.

Admissibility

3. The statement of appeal was filed by the Player within the deadline set down in the FIFA Statutes and the Decision. No further recourse against the Decision is available within the structure of FIFA. Accordingly, the appeal is admissible.

Applicable law

4. According to Article R57 of the Code, the Arbitrator has full power to review the facts and the law of the case. Furthermore, the Arbitrator may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.
5. According to Article R58 of the Code, the Arbitrator is required to 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, pursuant to Article 59.2 of the FIFA Statutes:
"...CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss Law".
7. In this case, therefore, the FIFA rules and regulations fall to be applied primarily. Swiss law, then, applies subsidiarily.
8. More precisely, the Sole Arbitrator finds that the Contract, executed on 19 June 2002, is governed, as to its substance, by the September 2001 edition of the FIFA Regulations for the Status and Transfer of Players (hereinafter referred to as the "RSTP 2001"), which, pursuant to its Article 46, entered into force on 1 September 2001. In any case, RSTP 2001 are applicable, also for the determination of the competence of the DRC to hear a dispute concerning the Contract, because the Player submitted his claim to FIFA on 7 March 2005, before the entry into force of the 2005 edition of the FIFA Regulations for the Status and Transfer of Players. As the DRC correctly remarked, therefore, the RSTP 2001 applied to the claim submitted to FIFA by the Player, and are applicable before this Sole Arbitrator.

The merits of the dispute

9. The Appellant is challenging the Decision to the extent the DRC held that it was not competent to deal with the claims lodged by the Player against the Club. The Appellant submits, in fact, that the competence of FIFA was not precluded by the requests he had filed before the CFA Commission and by the CFA Decision. The Appellant, in this respect, alleges that before the CFA Commission only the issue relating to the payment of the outstanding salaries for the season 2002/2003 was discussed, and that he had reserved the right to further seek compensation for the damages sustained as a result of the breach of the Contract by the Club.
10. The Sole Arbitrator notes that the Article 42 para. 1 of the RSTP 2001 provides, in the pertinent portions, the following:
"Without prejudice to the right of any player or club to seek redress before a civil court in disputes between clubs and players, a dispute resolution and arbitration system shall be established, which shall consist of the following elements:
(a) [...]
(b) (i) The triggering elements of the dispute (i.e. whether a contract was breached, with or without just cause, or sporting just cause), will be decided by the Dispute Resolution Chamber of the FIFA Players' Status Committee or, if the parties have expressed a preference in written agreement, or it is provided for by collective bargain agreement, by a national sports arbitration tribunal composed of members chosen in equal numbers by players and clubs, as well as an independent chairman. This part of the dispute must be decided within 30 days after the date on which the dispute has been submitted to the parties' tribunal of choice.
(ii) If the decision reached pursuant to (i) is that a contract has been breached without just cause or sporting just cause, the Dispute Resolution Chamber shall decide within 30 days whether the sports sanctions or disciplinary measures which it may impose pursuant to Art. 23 shall be imposed. This decision shall be reasoned, also in respect of the findings made pursuant to (b)(i), and can be appealed against pursuant (c).

- (iii) *Within the period specified in (ii), or in complex cases within 60 days, the Dispute Resolution Chamber shall decide any other issues related to a contractual breach (in particular, financial compensation). This decision shall be reasoned, and can be appealed against pursuant to (c).*
- (iv) *In addition, the Dispute Resolution Chamber may review disputes concerning training compensation fees and shall have discretion to adjust the training fee if it is clearly disproportionate to the case under review. Furthermore, the Dispute Resolution Chamber can impose disciplinary measures on the basis of Art. 34, par. 4 of the FIFA Statutes where these regulations or the Application Regulations so provide, or pursuant to a specific written mandate by the FIFA Player's Status Committee. The Dispute Resolution Chamber shall rule within 60 days after the date on which a case has been submitted to it by one of the parties to the dispute (with the exception of those disciplinary measures referred to in Art. 23, which are covered by (ii)). These decisions shall be reasoned, and can be appealed against pursuant to (c).*
- (v) *The Dispute Resolution Chamber may award financial compensation and/or impose disciplinary measures on the club concerned, if it is established pursuant to (b)(i) that a player terminated his contract with this club with just cause and the player, as a result of the procedural provisions in these regulations, has been suspended from playing in the national championship of his new club. The Dispute Resolution Chamber shall rule within 60 days after the date on which a case has been submitted to it the player concerned. This decision shall be reasoned, and can be appealed against pursuant to (c). [...]*

11. By such provisions, the RSTP 2001 established a system for the resolution of the employment related disputes between clubs and players, but acknowledged said system to be *"without prejudice to the right of any player or club to seek redress before a civil court"* (Article 42 para. 1, introductory period): on one hand, the RSTP 2001 defined a "sporting system" for the settlement of disputes; on the other hand, it conceded that State adjudication in employment related disputes could not be entirely excluded. At the same time, while defining the "sporting system", the RSTP 2001 allowed for a further alternative with respect to the determination of whether a contract was breached, with or without just cause or sporting just cause: in principle, the issue is heard by the DRC, but the parties can agree in writing that the existence of the breach be heard by *"a national sports arbitration tribunal composed of members chosen in equal numbers by players and clubs, as well as an independent chairman"* (Article 42 para. 1 (b)(i)). *"In any case, the RSTP provides for the exclusive competence of the DRC to impose sports sanctions or disciplinary measures, in the event a breach without just cause or sporting just cause is found"* (Article 42 para. 1 (b)(ii)), *"or to award financial compensation and/or impose disciplinary measures on the club concerned, in the event it is established that the player terminated a contract with just cause or sporting just cause"* (Article 42 para. 1 (b)(v)). In other words, while a possible option for the adjudication on the existence of a breach is given, so that the dispute is heard either by the DRC or by a national sports arbitration tribunal, no choice is left for the determination of the consequences of the breach, that have to be considered only at FIFA level.
12. In light of the foregoing, the Sole Arbitrator notes that the DRC failed to apply such rules in the Decision. First, with respect to the determination of a breach of the Contract, the DRC failed to examine whether the CFA Committee could be considered as a sports arbitration tribunal for the purposes of Article 42 para. 1 (b)(i) of the RSTP 2001, after an investigation on its composition. Then, even assuming that the DRC competence to determine the existence of a breach had been effectively pre-empted by the submission of the dispute to the CFA Committee, the DRC failed to consider that in any case its competence to rule on the financial

consequences of the breach could not be excluded.

13. The Decision was therefore not correct in holding that the DRC had no competence to resolve on the claim filed by the Player: the DRC should have heard the claim of the Player to be awarded a financial compensation for the breach of the Contract. The competence of the DRC could be denied only if the DRC would have come to the conclusion, omitted by the DRC, that the issue of the breach of the Contract remained somehow outstanding and therefore had to be evaluated by the CFA Committee. Such conclusion, however, had to be subject to the further finding, which the DRC omitted to make, that the parties had agreed in writing for the competence of the CFA Committee and the CFA Committee could be considered as a sports arbitration tribunal for the purposes of Article 42 para. 1 (b)(i) of the RSTP 2001.
14. The Decision, therefore, has, in the Sole Arbitrator's view, to be vacated, and the case, pursuant to Article R57 of the Code, referred back to FIFA, whose intervention could be requested for a second time by the party interested in obtaining a decision on the merits of the outstanding dispute, which remains without prejudice.
15. This conclusion, finally, makes it not necessary for the Panel to consider the other requests submitted by the Appellant to the Panel.

Conclusion

16. In light of the foregoing, the Sole Arbitrator holds that the appeal brought by the Player is to be upheld. The Decision is set aside and the case referred back to FIFA, which shall be called to resolve another time on the dispute upon application of the interested party.

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Sasa Gajser against the decision issued on 21 February 2006 by the Dispute Resolution Chamber of the FIFA Players' Status Committee is upheld.
2. The decision adopted by the Dispute Resolution Chamber of the FIFA Players' Status Committee on 21 February 2006 is set aside and the case is referred back to FIFA, that shall hear it upon the application of the interested party.
3. All other prayers for relief are dismissed.

(...).