Arbitration CAS 2005/A/931 Györi ETO FC Kft v. Sasa Malaimovic, award of 30 October 2006

Panel: Mr Chris Georghiades (Cyprus), Sole Arbitrator

Football
Termination of a contract of employment between a club and a player
Conditions for a club's failure to fulfil its financial obligations to constitute a breach of contract
Obligations of the parties related to a player's residence and work permit

1. **A club has an obligation to pay to a player the "additional payments" provided for in a contract of employment if the additional payments are part of the player's remuneration and are not related to the player's successful performance nor otherwise constitute an incentive payment. The failure to pay the additional payments only once does not constitute a breach of the contract without just cause by the club since it is not a "persistent failure".**

2. **Employment matters and particularly residence and work permits are regulated in a particular manner in each national jurisdiction. Where residence and work permits are required for a player to play in a country, even if it is the obligation of the club to secure the same it is equally the obligation of the player to do all what is necessary to secure the same according to the applicable regulations. Where it appears that the player did not comply with his obligation in this respect, one cannot consider that the club's failure to secure the requisite residence permit constitute a breach of the contract without just cause.**

Györi ETO FC Kft of Hungary ("the Club" or "the Appellant") is a Hungarian football club.

Mr Sasa Milaimovic ("the Player" or "the Respondent") is a Serbian football player.

On 28 August 2002 the Player and the Club signed an employment contract (hereinafter "the Contract") valid from 1 June 2002 until 30 July 2007. The Contract provided for remuneration in the form of a monthly salary of EUR 3,000 and bonus payments as per Article V(1) of the Contract and remuneration *"as a stimulation for achievement of results"* totalling EUR 100,000 payable by way of five instalments as follows:

- 24/07/2002 EUR 30,000
- 01/07/2003 EUR 10,000
- 01/07/2004 EUR 15,000

- 01/07/2005 EUR 20,000
- 01/07/2006 EUR 25,000

The Player complained to the FIFA Dispute Resolution Chamber (DRC) that the payment by the Respondent of his salaries for April, May and June 2003 and the bonus payable on 1 July 2003 were not paid as a result of which the Respondent unilaterally terminated the Contract.

As a result the Player claimed the payment of all salaries from April 2003 until June 2007 amounting to EUR 153,000 plus the amounts payable totaling EUR 70,000 making a grand total of EUR 223,000.

On 1 June 2005 the DRC passed its decision ("the Decision") according to which the claim of the Player was partially accepted. The Club was ordered to pay the amount of EUR 70,000 to the Player i.e. EUR 9,000 corresponding to the salaries for April, May and June 2003, EUR 10,000 corresponding to the bonus payable on 1 July 2003, plus EUR 36,000 corresponding to one year salaries and EUR 15,000 corresponding to the bonus payable on 1 July 2004.

On 15 July 2005 the Appellant filed its statement of appeal with the CAS, appealing against the Decision.

The Sole Arbitrator decided to render its decision on the basis of the written submissions.

The Appellant's arguments can be summarized as follows:

- The term of the employment contract was mistakenly noted by the DRC which stated this as 30 July 2007 instead of 30 June 2005.
- except for the monthly salary of EUR 3,000 the other amounts stated in the Contract do not qualify as bonus but as "incentive of success" payable in case of the Player's performance and/or achievements which the Player failed to perform since he did not play any league matches during the season in question i.e. 2003.
- Pursuant to the provision of the Contract with respect the "incentive of success" where the Contract is terminated for any reason before its completion, namely 30 June 2005, only a pro rata part of the incentive of success is due and in case the employer, i.e. the Appellant, paid more than the pro rata amount, it is entitled to claim back the payment in excess.
- The Player ceased providing his services on 30 June 2003 disappearing and failing to procure an extension of his residency permit a matter requiring his initiative and personal attendance. In support of this argument, the Appellant quotes and submits the provisions of the Hungarian law and Regulations and refers to the decision of the Transfer Committee of the Hungarian F.A. on a similar matter, i.e. the Karabatic case.
- The Appellant carried out payments to the Player in 2003 producing as evidence a voucher dated 24 April 2003 where the words "advance payment" are stipulated. These payments allegedly are in excess of the Club's obligations and hence the Club claims the amount overpaid i.e. HUF 1,186,207.

- The DRC has misunderstood the facts upon which the Appellant based its counterclaim. In effect the Club claims for the payment of the Player's taxes amounting to HUF 1,186,207 and further claims EUR 400,000 as compensation as per the provisions of clause XI of the Contract, relating to the fee in case of transfer of the Player.
- The Player's failure to acquire the requisite residency permit, despite being warned verbally by the Managing Director of the Appellant and in writing on 8 July 2003 has caused the termination of the Contract.
- The Club did not fail to pay the Player's salaries and the DRC finding that there was a persistent failure by the Club to pay salaries which amounted to a breach of the Contract is wrong.
- The Club did produce evidence of the payments made and the DRC was wrong in its finding that the Club did not present any considerable written evidence proving that salaries and bonus claimed by the Player were paid. The non-signature of the receipt by the Player does not avail the DRC the right to conclude that the documentation presented is not reliable. The presumption of non-payment is wrong.
- The Player by not playing for the Club in 2003 was not entitled to a bonus or an incentive payment.

The Respondent's reply as set out in a letter addressed to the CAS, dated 8 June 2005, can be summarized as follows:

- The Respondent agrees with the decision of the DRC dated 1 June 2005.
- The Respondent is patiently waiting for the progress of the case as the amount adjudicated in his favour will relieve the difficult situation he has found himself.
- The CAS is urged to conclude the matter.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from Art. 59ff of the FIFA Statutes and Art. R47 of the Code of Sports-related Arbitration ("the Code"). It is further confirmed by the Order of Procedure duly signed by the parties.

2. It follows that the CAS has jurisdiction to decide the present dispute.

3. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law.

Applicable law

4. Art. R58 of the Code specifies 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"*.

5. In the present case, there was no agreement among the parties regarding the application of any particular law.

6. It follows that the FIFA rules and regulations shall apply primarily and that Swiss law is applicable subsidiarily.

Admissibility

7. The appeal was filed within the applicable deadline provided by Art. 60 of the FIFA Statutes. It further complied with all other requirements of Art. R48 of the Code.

8. It follows that the appeal is admissible.

Merits

9. The issues to be resolved by the Sole Arbitrator are briefly the following:
   - Whether the Club breached its obligation to pay the Player the amounts due to him under the Contract as a result of which the Club can be held to have breached the Contract without just cause.
   - Whether the Club was obliged to secure the renewal of the Player's residence permit the failure of which caused the termination of the relationship and consequently of the Contract.
   - Whether the Club is entitled to the amounts as per its counterclaim.
   - Whether the Club, if found to have breached the Contract, is obliged to pay the amounts adjudicated by the DRC.

10. With respect the first issue, from the documentation filed with the DRC and the CAS, it is evident that the Contract provided for the payment of a monthly salary of EUR 3,000, bonuses as these would be calculated in accordance to Article V(1) of the Contract and additional payments totalling EUR 100,000. The additional payments were to be made as follows:
    - 24 July 2002 EUR 30,000
    - 1 July 2003 EUR 10,000

- 1 July 2004 EUR 15,000
- 1 July 2005 EUR 20,000
- 1 July 2006 EUR 25,000

11. The Appellant argues that the additional payments were payable by way of an "incentive of success" and since the Player did not play for the Club in 2003 he was not entitled to the same.

12. The facts of the case do not support the Club's argument. Notwithstanding whether or not the Player was included in the team and whether or not his performance was successful it is evident from the Contract that in each year starting from 24 July 2002 and thereafter on the first day of July in every subsequent year up to 1 July 2006 the aforementioned additional payments were to be made. There is no reference in the Contract that the additional payments were related to the Player's successful performance and/or otherwise constituted an incentive payment and therefore should be considered as constituting part of the Player's total annual remuneration.

13. The Player maintains that the club failed to pay salaries for the months of April, May and June 2003 for an amount of EUR 9,000 and the bonus payable on 1 July 2003 amounting to EUR 10,000 as a result of which the Club unilaterally breached the Contract.

14. The Club has submitted evidence compiled by its financial department showing that the salaries from April to June 2003 had been paid. The evidence submitted in the form a document entitled "Disbursement Voucher" purportedly signed by the Player marked "Advance payment" relates to an amount of HUF 3,618,000.

15. The Appellant has further produced a statement prepared by the financial manager of the Club, which details the monthly salaries the Player was entitled to receive during 2003. The statement contains only the monthly salaries not the additional payments.

16. As per the said statement the gross amount for February to July 2003 amounts to EUR 18,000, corresponding to HUF 4,499,040, of which HUF 3,618,000 have arguably been paid leaving a balance of HUF 83,104, plus the additional payment of EUR 10,000.

17. The amount of HUF 3,618,000 paid is in excess of the amount to be paid in respect of the months of April, May and June 2003, i.e. HUF 2,247,570. Hence one can say that the salaries of April, May and June 2003 were paid but not the additional payment of EUR 10,000 payable on 1 July 2003.

18. On the basis of the standpoint taken above i.e. that the additional payments constitute part of the Player's remuneration, the failure to pay the same on 1 July 2003 constitutes a breach of the Club's obligations which if a "persistent failure" may constitute a breach of the Contract by the Club.

19. From the facts before the Sole Arbitrator there is no evidence of a persistent failure. The failure of the Club relates to the non-payment of the additional amount payable as per the Contract on

1 July 2003. As a result the Sole Arbitrator cannot agree with the DRC that the Club's persistent failure to meet its monetary obligations caused the breach of the Contract.

20. With respect the second issue, as to whether the Club was obliged to secure the renewal of the Player's residence permit the following is to be noted:

- The Club did secure a work permit for the Player, such work permit was issued by the Hungarian Authorities on the 13 June 2003 and related to the period 1 July 2003 to 30 June 2004.
- The Club by virtue of its communication of 8 July 2003 inquired whether the Player had taken steps as regards his residency in Hungary. The Player apparently did not reply to the said query.
- On 22 July 2003, the Club terminated the employment of the Player with effect as of 30 June 2003 on the ground that the Player failed to secure the requisite residence permit.
- The Appellant advised the DRC that according to the Hungarian law and regulations the issue of a residency permit requires the personal presence and/or involvement of the Player.
- . Upon request from the CAS Court Office, the Club produced from the competent Hungarian Authorities, namely the Ministry of Justice and Security Affairs, the Immigration and Citizenship Office, a written statement concerning the law and practice applicable in matters of residency permits whereby it confirmed that the *"issue or extension of validity of the residence permit should be presented personally at the competent regional immigration and security office"*.

21. The DRC, before which the above were presented, chose to disregard them on the ground that he Club did not provide any written evidence to prove that the extension of the requisite permits could only be arranged by the Player.

22. The DRC in its decision stated that it is a basic principle of labour law *"that an employer has to provide his employees with a residence and work permit, and if this compels the player to leave the country where he is employed, and therefore quit his work, this is basically to be considered as an unjustified breach of the employment contract by the employer"*.

23. On the basis of the evidence produced by the Appellant the Sole Arbitrator is of the view that the DRC was wrong in its finding *"that the Club did not provide any written evidence proving that the extension of the mentioned permits indeed can only be arranged by the player"*. The DRC did not request the Club to produce any further evidence as regards the law and/or regulations and/or the practice applicable in Hungary with regard the said matter nor did it request the Player to confirm what efforts, if any, were made by him and therefore could not dismiss in the manner it did the evidence provided by the Club. The DRC could have requested the Club to produce further evidence on the matter and verify whether or not the issue of the requisite permit required the personal involvement of the Player.

24. As regards the reference made by the DRC to a basic principle of labour law that establishes a duty upon the employer to secure the employees residence and work permits the Sole Arbitrator doubts there is such a basic principle. Employment matters and particularly residence and work permits are regulated in a particular manner in each jurisdiction an issue which was not investigated or clarified by the DRC.

25. Where residence and work permits are required (as in the particular case) even if one was to agree that it is the obligation of the Club to secure the same it is equally the obligation of the Player to do all what is necessary to secure the same something the Player apparently failed to do or disregarded.

26. On the basis of the above the Sole Arbitrator cannot agree with the findings of the DRC as regards the Club's failure to secure the requisite residence permit, which was held to constitute a breach of the Contract without just cause.

27. Concerning the Club's counterclaim it is evident from the judgment rendered by the DRC that it did not pay any real attention to the issue save for referring to the matter in the clause detailing the facts.

28. The Appellant's counter claim relates to two amounts:

- HUF 1,186,207 being an amount paid in respect of the Player's taxes resulting from the Player's failure to acquire the requisite residence permit which otherwise would allow for a more favourable tax treatment, and
- the amount of EUR 400,000 being the agreed fee for the Player's transfer, as per Clause XI of the Contract.

29. Concerning the amount of HUF 1,186,207 the Sole Arbitrator finds that this cannot be claimed as the Club was obliged to make all the payments until June 2003 and the failure to secure the residency permit should not operate as detrimental to the Player vis-à-vis any tax obligation.

30. Concerning the amount of EUR 400,000 relating to the transfer fee for the Player, as the latter did not secure any employment and as no evidence has been produced in this respect the Sole Arbitrator finds that the Club cannot claim the same.

31. As regards the fourth issue the Sole Arbitrator finds as follows:

- The Club has failed to pay all the remuneration due to the Player under the Contract in respect of 2003 i.e. EUR 10,000.
- The failure to pay the said remuneration cannot be considered as a "persistent failure" as no evidence of a course of such conduct has been produced. The failure to pay occurred once. Hence the Club cannot be held to have developed such a conduct which could be held to have breached the Contract without just cause and accordingly the DRC decision concerning the remuneration to be paid and the compensation for breach of Contract of the DRC decision are amended accordingly.

- Consequently the amount to be paid by the Club in respect of the Contract is EUR 10,000 whilst no compensation for breach of Contract is payable.

The Court of Arbitration for Sport rules:

1. The appeal filed by Györi ETO FC Kft against the decision issued on 1 June 2005 by the FIFA Dispute Resolution Chamber is partially admitted.

2. The decision of the FIFA Dispute Resolution Chamber is amended as follows:

   Györi ETO FC Kft is ordered to pay to Sasa Milaimovic the amount of EUR 10,000 (ten thousand Euro).

3. All other claims are dismissed.

(…).