Arbitration CAS 2017/A/5121 Vladimir Gadzhev v. FC Kuban, award of 19 December 2017

Panel: Prof. Jack Anderson (Ireland), Sole Arbitrator

Football
Termination of the employment contract
Existence of a contract based on the presence of the essentialia negotii in a document
Objective assessment of the totality of the factual circumstances surrounding a termination of contract
Termination of contract without just cause

1. **A correspondence that contains the *essentialia negotii* of a contractual relationship represents a contract between the relevant parties. The fact that surrounding or concluding formalities have yet to be agreed by the parties does not take away from the existing substantive nature of the contractual agreement.**

2. **The question whether an employment contract was terminated with or without just cause needs to be addressed objectively and taking into account the totality of the factual circumstances of the case.**

3. **A party's termination of contract appears premature and peremptory and hence deprived of any just cause where a better and even a definitive assessment of its counterparty's intention with regard to their contractual relationship could have been made in just over a week time and the opening of the players' registration period.**

I. PARTIES

1. Mr Vladimir Gadzhev (the "Appellant") is a Bulgarian professional football player.

2. FC Kuban (the "Respondent") is a football club based in Krasnodar, Russia, affiliated to the Football Union of Russia ("FUR"), the governing body for the sport in Russia and affiliated to UEFA and FIFA.

II. FACTUAL BACKGROUND

A. Background facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions. Additional facts and allegations found in the parties' written submissions, may be set out, where relevant, in connection with the legal discussion that follows. While the Sole

Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 31 August 2015, the Appellant signed a document labelled *"Labor Agreement"* and two addendums – additional agreement No1 and additional agreement No2. According to clause 2.2 of the Labor Agreement, the effective duration of the Agreement was until 31 May 2017. This effective duration was subject to a condition precedent contained in clause 2.1 of the Agreement and namely that the Respondent had to register the Appellant with the Russian Football Premier League by 23h00 CET on 31 August 2015. In the event that this was not done, the Agreement was, per clause 2.1, null and void and none of the parties to it should owe compensation to one another.

5. According to clause 5.1 of the Labor Agreement, the Appellant's monthly salary would amount to 3,200,000 RUB. This was amended under clause 1.1 of additional agreement No1 settling the Appellant's monthly salary at EUR 40,230 Euro.

6. According to clause 8.1 of the Labor Agreement, the Appellant was to be paid a *"lump sum bonus"* or signing-on fee of EUR 344,828, payable in 3 equal instalments on 1 October 2015, 31 December 2015 and 1 March 2015.

7. On 1 September 2015, the Respondent's Sports Director, Mr M. R. Gomleshko, wrote to the Appellant apologising for the Respondent's inability to register the Respondent (as required per clause 2.1 of the Labor Agreement) *"in view of the complicated internal political relations in the summer registration period* [an oblique reference to a FUR ban on the Respondents in registering new players]*"*. This letter of 1 September 2015 then offered to Appellant *"an employment contract with improved conditions, as of 1 January 2016"*. The letter went on as follows: *"In the first six months of the employment contract salary shall amount to EUR 40,000, in the next two years – EUR 45,000. The other conditions stipulated in the contract, including the signing-on fee, remain unchanged"*.

8. On 18 September 2015, the Appellant replied to the offer letter of 1 September 2015, in the following (handwritten) terms: *"I accept the above offer for the variation of the contract dated 31 August 2015 and consider myself contractually bound to FC Kuban from 1 January 2016 until 30 June 2018 as stipulated in the said contract in conjunction with this offer for its variation"*.

9. On 27 November 2015, the Appellant's representative wrote to the Respondent reminding the Respondent that, as the offer letter dated 1 September 2015 in conjunction with its acceptance dated 18 September 2015 contained *"all the basic essentialia negotii of an employment contract"*, it followed that the Respondent and Appellant were contractually bound for the period commencing on 1 January 2016 until 30 June 2018. In this light, the Appellant offered his services to the Respondent and asked for the following: written directions where and when to report for duty; that the Respondent facilitate the signing of a new FUR standard form employment contract prior to 1 January 2016; that the Respondent arrange a work permit for the Appellant; that the Appellant be provided with a return air ticket Sofia-Krasnodar as per clause 6.3 of the Labor Agreement; and that the first instalment of the signing-on fee due on 1

October be paid pursuant to the Respondent's obligation under clause 8.1 of the Labor Agreement.

10. On 10 December 2015, the Respondent (by way of its General Manager, Mr V. N. Statsenko) replied by writing that it was *"quite happy that* [the Appellant] *expressed his consent to become the part of our club's squad on conditions offered to him in the draft copy of the employment contract dated to 31 August 2015 as well as in the letter d/d 01 September 2015 (…) and that* [the Respondent] *confirms its readiness to enter into the labor relationships with the* [Appellant] *player starting from 1 January (…) upon completion of the standard procedures (entrance visa processing, receiving of work permit, carrying out of the medial examination (…)) a part of which is currently being completed by the authorised employees of our club"*.

11. In this letter of 10 December 2015, the Respondent then went on to ask for a copy of the Appellant's passport and asking him to present himself in Krasnodar on 28 December 2015 for a *"preliminary medical examination and further signing of the standard employment contact with FC Kuban"*.

12. In the 10 December 2015 letter, the Respondent wrote that the instalments of the signing-on fee should be postponed to the followings dates: 2 February 2016, 1 May 2016 and 2 July 2016. Their contention was that since the offer letter of 1 September 2015 had given an amended effective duration term for the contract, it followed that the signing-on fee instalments should be postponed *"proportionally"* given that both parties had *"agreed upon fixing a different date for contract entering into power"*. In a similar vein, the Respondent informed the Appellant that it could not purchase the air ticket before the employment contract had entered into force.

13. Finally, in this 10 December 2015 letter, the Respondent highlighted to the Appellant that *"the FUR has still not released our club from the ban for registration of the new players. Aside from that there exists a quite high possibility that this ban will not be released from our club during the coming winter transfer window (i.e. from 27 January till 26 February 2016) due to the certain financial problems being faced by our club at the current moment, including non-compliance with the terms of paying for transfer contracts and late payment of salaries to the players"*.

14. Having *"honestly forewarned"* the Appellant and his representative of the above, the Respondent expressed a readiness to either (a) allow the Appellant *"the possibility to refuse from conclusion of the employment contract with the club without payment of any compensation"* or (b) agree that the contract would be valid only on the condition precedent that the Respondent would be released of *"the ban for registration of the new players from FC Kuban no later than from 10 February 2016 (in order the player will be able to employ himself with another club before the winter transfer window is closed)"*.

15. On 14 December 2015, the Appellant's representative again recalled that the Respondent and the Appellant were *"contractually bound"* for the period commencing on 1 January 2016 and ending on 30 June 2018. Having emailed a copy of the Appellant's passport to the Respondent on 11 December 2015, the Appellant's representative insisted that the responsibility for the administrative procedures for the Appellant's visa lay primarily with the Respondent who also needed to supply the Appellant with an air ticket. Provided that he received an entry visa and an air ticket in due time, the Appellant reiterated that he would *"gladly travel"* as arranged to complete a medical.

16. In this letter of 14 December 2015, the Appellant rebuffed the two alternatives proposed by the Respondent on 10 December 2015 and also rejected as unnecessary the delay in paying the signing on fee instalment.

17. In the letter of 14 December 2015, the Appellant further instructed his representative to ask, as he had done in the letter of 27 November 2015, for the Respondent to send a preliminary draft FUR standard form employment contract, reflecting the parties' agreements under the initial Labor agreement, as amended, and including the offer letter dated 1 September 2015 in conjunction with its acceptance dated 18 September 2015. The Appellant stated if he received no response from the Respondent by 18 December 2015, he would assume that the Respondent wished to terminate the employment relationship with the Appellant without just cause and agree to pay him the entire value of the employment contract in the amount of EUR 1,664,828 net [*i.e.* EUR 344,828 + (6 x EUR 40,000) + (24 x EUR 45,000)] as compensation for breach of contract.

18. From 17 December to 30 December 2015, the parties exchanged correspondence on several matters relating to the FUR standard form contract and mainly to the financing of the air ticket, the scheduling of the instalments for the signing-on fee, and the proposal to include the aforementioned condition precedent in the new employment contract. The exchange of correspondence – in essence, negotiation – on the terms of agreement between the Appellant and the Respondent meant that the Appellant's medical did not take place as originally scheduled for 28 December 2015.

19. On 30 December 2015, the Respondent wrote to the Appellant confirming that a binding contract existed between the parties *"as revised on 31.08.2015 in conjunction with the offer dd. 01.09.2015, which had been accepted by the player on 18 September 2015 and became obligatory from the latter starting from the date mentioned above (…)* [and that] (…) *the binding contract is coming into effect on 01 January 2016 unconditionally"*. Further, in the letter of 30 December 2015, the Respondent then invited the Appellant to attend a club training camp on 8 January 2016 in Krasnodar and asked for his postal address in order to initiate the procedure for applying for his work visa for the period 1 January 2016 to 31 May 2018. The Respondent also asked the Appellant to confirm his *"readiness"* to join the club on 8 January 2016 so that it could book and pay for his tickets.

20. In the 30 December 2015 correspondence, the Respondent also confirmed that it agreed with the Appellant's recent amendments – made in correspondence from 17 December onward – relating to the salary and the signing-on fee but disagreed with some others contained initially in additional agreement No2. To this effect, the Respondent attached a new draft employment contact with addenda and stated that: *"In accordance with our usual practice, we would like to sign up the standard form of the employment contact after the player's coming to our club"*.

21. According to the new draft contract and addenda sent by the Respondent to the Appellant on 30 December 2015, the contract would run from 1 January 2016 until 31 May 2018 and the Appellant would be entitled to: EUR 45,977 per month for the period as of 1 January 2016 until 30 June 2016 and to EUR 51,724 per month as from 1 July 2016 until 31 May 2018. In addition, the Appellant would be entitled to a signing-on fee of EUR 344,828 paid in three instalments due on 2 February 2016, 1 May 2016 and 30 June 2016.

22. On 3 January 2016, the Appellant emailed the Respondent, stating that he was not able to apply for a visa before 11 January 2016, given that the Russian Embassy in Sofia was closed from 1 to 10 January. On 4 January 2016, the Respondent replied, suggesting now that the Appellant should join the team on 14 January 2016 at the club's training camp in Cyprus. The Respondent explained that during this training camp the Appellant would be able to obtain his visa and that the employment contract could be signed.

23. On 6 January 2016, the Appellant wrote to the Respondent confirming that he would join the Respondent's team in Cyprus on 14 January 2016. The Appellant further confirmed that he fully accepted the contents of the latest employment contact and the addenda (sent to him by the Respondent on 30 December 2015).

24. On 14 January 2016, the Appellant flew from Sofia to Larnaca, Cyprus (accompanied by his agent). On 15 January, he passed a medical organised by the Respondent. Further meetings took place until 17 January between the parties – the Appellant supported by his agent; the Respondent generally represented by its then General Manager.

25. On 18 January 2016, the Appellant alleges that a meeting was held between him and his agent (Mr Vuchkov and another representative, a Mr Sergey Busuioc) and the Respondent (represented by the General Manager, Mr Statsenko, and a Mr Doronchenko). The Appellant alleges that, by way of an intervention from Mr Doronchenko, the Respondent suggested that the FUR's foreign player quota meant that they were prevented from concluding the agreement with the Appellant.

26. Details of this meeting were recounted by the Appellant's legal representative in a letter to the Respondent dated 18 January 2016. Noting that the foreign player quota had never been raised before in correspondence between the parties, the Appellant formally tendered his services to the Respondent, insisting *inter alia* that the standard form employment contract (contained in the 30 December correspondence) be signed by the Respondent – and that the Appellant's visa/work permit also be provided - and if not, then, by a deadline of close of business on 19 January 2016, the Appellant would consider that the Respondent was *"no longer interested in his services and the performance of the employment contract (…) and that consequently* [the Respondent] *(…) has terminated the employment relations between the parties without just cause, with effect from 19 January 2016* [default correspondence]*"*.

27. The 19 January 2016 deadline having passed without response or comment from the Respondent, the Appellant's legal representative then promptly faxed the Respondent stating that the Appellant considered the Respondent's *"decision to terminate the employment contract, with effect from 19 January 2016, as final and that he* [the Appellant] *is now released from all obligations under the employment contract* [default correspondence]*"*.

28. On 21 March 2016, the Appellant lodged a claim with FIFA's Dispute Resolution Chamber.

29. On 24 March 2016, the Appellant signed a contract with Coventry City FC, an English professional football club, valued from that date until 30 June 2017 and to which the Appellant was entitled to a fixed remuneration of EUR 160,000.

B. Proceedings before FIFA's Dispute Resolution Chamber

30. On 21 March 2016, the Appellant lodged a claim with FIFA's Dispute Resolution Chamber ("DRC") against the Respondent, requesting to be awarded the total amount of EUR 1,810,342 corresponding to the residual value of the contract, which the Appellant detailed as follows:

- EUR 344,828 relating to the signing-on fee;
- 6 months x EUR 45,977 corresponding to the salaries due from 1 January 2016 to 30 June 2016;
- 23 months x EUR 51,724 corresponding to the salaries due from 1 July 2016 to 31 May 2018;
- 5% of interest *p.a.* on the aforementioned amounts as from 20 January 2016 until the date of effective payment;
- a registration ban on the Respondent for two consecutive transfer periods.

31. The Appellant's case at the DRC was that the parties were contractually bound from 1 January 2016 to 31 May 2018 but that at a meeting on 18 January 2016 between the parties, and premised allegedly on the Respondent having difficulties with the FUR's foreign players quota, it was made clear to the Appellant that the Respondent was no longer interested in his services. This, the Appellant alleged, was further evidenced by the fact that the Respondent did not react to the default correspondence sent to them by the Appellant's legal representative. Consequently, the Appellant argued the Respondent was liable for breach of contract without just cause on 19 January 2016.

32. The DRC decision in this matter was passed on 19 January 2017 (the "DRC Decision"). Having established the DRC's jurisdiction or competence to hear the matter, and the relevant regulations under which it would be heard, the DRC focused its attention primarily on the question as to whether a legally binding employment contract had been concluded by and between the parties. The DRC, having referred to the exchange of documents between the parties from 31 August 2015 to 30 December 2015, concluded *"beyond doubt"* that the parties had entered an employment contract valid as of 1 January 2016 until 31 May 2018 in accordance with the terms set out in the documents attaching to the Respondent's correspondence of 30 December 2015.

33. Having established that employment relations existed, the DRC then considered two key issues: first, whether, as alleged by the Appellant, the Respondent should be held liable for termination of the employment contract without just cause; and, if the first matter could be answered in the affirmative, what might the consequence of said termination be.

34. In considering the first point, the DRC took account of the fact that the Appellant's default notice to the Respondent on 18 January 2018 gave the latter a one day deadline only to remedy the alleged breaches and that subsequently, and almost immediately after close of business on

19 January 2017, the Appellant's legal representative faxed the Respondent considering its lack of response as final confirmation of termination of contract. The DRC considered the Appellant's actions on 18/19 January to be precipitous in nature *i.e.*, that the Appellant did not wait a sufficient amount of time before terminating the contract. The rationale for this decision by the DRC related to information contained in FIFA's international transfer matching system (TMS) which highlighted that the player registration period in Russia was only set to open on 27 January 2016 and would remain open until 26 February 2016. Consequently, the DRC held that the Respondent did not have the opportunity to register the Appellant before 27 January 2016.

35. It followed that, as the DRC held that the Respondent could not be held liable for the early termination of the employment contract without just cause, the Appellant's associated claim for compensation should also be rejected.

36. The DRC did however hold as *"uncontested"* that the Appellant had put himself at the disposal of the Respondent from 1 January 2016 until 19 January 2016 and therefore was entitled to be remunerated for the period. The DRC calculated the portion of salary that the Appellant was entitled to as EUR 28,179 (with interest at the rate of 5% pa on that amount as of 20 January 2016 until the date of effective payment).

37. The DRC Decision was passed on 19 January 2017 and was notified to the Appellant by way of a fax dated 18 April 2017. The Appellant, per Article 58.1 of the FIFA Statutes, then exercised his right of appeal before this Court. The operative part of the DRC Decision reads, *inter alia*, as follows:

> *"1. The claim of the Claimant, Vladimir Gadzhev, is partially accepted.*
>
> *2. The Respondent, FC Kuban, has to pay to the Claimant, within 30 days as of the notification of this decision, the amount of EUR 28,179 plus 5% interest p.a. as of 20 January 2016 until the date of effective payment.*
>
> *3. In the event that the aforementioned sum plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
>
> *4. Any further claim lodged by the Claimant is rejected".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

38. On 9 May 2017, the Appellant filed a Statement of Appeal with the CAS, pursuant to Article R48 of the Code of Sports-related arbitration ("the Code"). The Appellant requested that the case be submitted to a Sole Arbitrator pursuant to Article R50 of the Code and that, pursuant to Article R32 of the Code, a 4-day extension (until 23 May 2017) be granted to file the Appeal Brief.

39. On 11 May 2017, the CAS Court Office acknowledged in writing the receipt of the statement of appeal and granted the Appellant's request for a 4-day extension of the time limit for the filing of the Appeal Brief.

40. On 19 May 2017, the Appellant filed an Appeal Brief with the CAS, pursuant to Article R51 of the Code.

41. On 30 May 2017, the CAS Court Office informed the parties that a Sole Arbitrator had been appointed (and had accepted the appointment with full disclosure of information on his statement of independence) to the matter by the Division President in accordance with Article R54 of the Code. The correspondence also informed the parties of their right to object to said appointment pursuant to Article R34 of the Code.

42. No formal objection to the appointment of the Sole Arbitrator was made pursuant to Article R34 of the Code; nevertheless, and as a result of email correspondence on 30 May 2017 emanating from the Appellant, the appointed Sole Arbitrator, exceptionally decided to turn down his nomination. The CAS Court Office then informed the parties on 31 May 2017 that a new Sole Arbitrator would be appointed by the President of the CAS Appeals Arbitration Division.

43. Having received the Appellant's Appeal Brief on 5 June 2017, the Respondent then wrote to CAS, on 22 June 2017, requesting that the time limit to file its answer be fixed once the advance of costs had been paid by the Appellant. Accordingly, and pursuant to Article R55.3 of the Code, the CAS, by way of correspondence dated 22 June 2017, informed both parties that the time limit initially set out in the correspondence dated 22 May 2017 would now be set aside and a new time limited fixed upon the Appellant's payment of its share for the advance of costs.

44. On 27 July 2017, the present Sole Arbitrator was formally appointed to hear this matter.

45. On 27 July 2016, the CAS acknowledged receipt of the Appellant's payment of his share of the advance of costs in this matter. The same correspondence informed the Respondent that, pursuant to Article R55 of the Code, the Respondent must within twenty (20) days of receipt of said correspondence submit to the CAS an Answer to the Appellant's Appeal Brief.

46. On 16 August 2017, the Respondent filed its Answer with the CAS, the receipt of which was formally acknowledged by correspondence from the CAS Court Office dated 18 August 2017. In that correspondence, the CAS informed the parties the unless they agree or the Sole Arbitrator orders otherwise on the basis of exceptional circumstances, Article R56 of the Code provides that the parties shall not be authorised to further supplement or amend their submission. The parties were also asked, in this correspondence, whether they preferred a hearing to be held on the matter or for the Sole Arbitrator to issue an award based solely on their written submissions.

47. On 21 August 2017, the Appellant wrote to Counsel for the CAS, stating that he was happy to leave the decision as to the necessity for a hearing to the Sole Arbitrator but that if the Sole Arbitrator did decide to have a hearing, the Appellant would be available. In that

correspondence of 21 August, the Appellant also highlighted to the Sole Arbitrator that if a hearing were to take place, he would be adducing a named, *"pertinent"* CAS award to refute a specific, and again named, point made in the Respondent's Answer.

48. On 4 September 2017, and on instruction of the Sole Arbitrator, the CAS Court Office wrote to the parties informing the Respondent that it had until 7 September to reply as to the necessity to have a hearing and, similarly, by that date, to comment on the Appellant's wish to adduce the above *"pertinent"* CAS award, noted in the Appellant's correspondence on 21 August 2017.

49. On 7 September 2017, the Respondent replied that it was happy to leave the decision as to the necessity for a hearing to the Sole Arbitrator and that the admissibility of the *"pertinent"* CAS jurisprudence, adduced by the Appellant on 21 August 2017, was also a matter for the Sole Arbitrator. If, however, that jurisprudence was deemed admissible by the Sole Arbitrator, the Respondent decided in this 7 September correspondence to go on and provide reasons as to why it should be distinguished from the matter at hand.

50. On 8 September 2017, the Appellant replied that the Respondent's correspondence of 7 September was of such a substantive nature and including an amendment to the Respondent's initial request for relief, that it was, in effect, a supplementary submission and, as such, not being authorised by the Sole Arbitrator, should not be deemed admissible pursuant to Article R56 of the Code. In the 8 September 2017 correspondence, the Appellant also took the opportunity to include a new request for relief.

51. On 22 September 2017, the CAS Court Office, on the instruction of the Sole Arbitrator, wrote to the parties declaring inadmissible all and any submissions made in and by the Appellant's letters of 21 August 2017 and 8 September 2017 and by the Respondent's letter of 7 September 2017. Furthermore, the Sole Arbitrator, pursuant to Article R57 of the Code, advised the parties that he deemed himself sufficiently well informed to decide the matter based solely on the parties' written submissions and without the need to hold a hearing. Finally, the 22 September 2017 correspondence from the CAS included the Order of Procedure for the referenced matter.

52. The Order of Procedure was signed by the Appellant on 22 September 2017 by the Respondent on 27 September 2017. By the signature of the order of procedure, the parties expressly confirmed that their right to be heard had been respected.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

53. The Appellant's submissions, in essence, may be summarized as follows:

54. The Appellant's submissions were fourfold in nature: allegations of procedural impropriety in the DRC Decision; whether the parties had concluded a valid and binding employment contract; if yes, which party terminated that contract and when; what might the legal consequences be arising out of that termination and for whom.

1. Allegations of procedural impropriety

55. On the first point, the Appellant argued that part of the timeline of events between 11 and 18 January 2016 was *"inexplicably missing"* from the factual section of the DRC Decision and that this omission was not only a failure by the DRC to fully and properly inform themselves of all the facts but that it also directly resulted in the DRC erroneously declaring that the Appellant (and not the Respondent) had terminated the employment relationship.

56. Moreover, the Appellant contented that the DRC Decision was in breach of Article 14, para. 4(f) of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("the Procedural Rules") in that it did not contain *"the reasons for the findings"*. Specifically, the Appellant argued, the DRC failed adequately to explain, in the context of the Respondent's conduct on 17-19 January 2016, what it considered to be *"a sufficient amount of time* [that the Appellant should have waited] *before terminating the contract on 19 January 2016"*.

57. Noting the Sole Arbitrator's powers under Article R57, para. 1, of the Code – full power to review the facts and the law and including the issuing of a new decision which replaces the decision challenged or annul the decision and have it remitted – the Appellant asked that the Sole Arbitrator use his *de novo* powers to *"cure"* the alleged procedural defects in the DRC Decision.

2. Did the parties conclude a valid and binding employment contract?

58. The DRC, having referred to the exchange of documents between the parties from 31 August 2015 to 30 December 2015, concluded *"beyond doubt"* that the parties had entered an employment contract valid as of 1 January 2016 until 31 May 2018 in accordance with the terms set out in the documents attaching to the Respondent's correspondence of 30 December 2015. Averring to the principle of *res judicata* the Appellant submitted that this aspect of the DRC Decision should be fully respected as final and binding.

3. The termination of the employment contract

59. Article 14 of FIFA's Regulations on the Status and Transfer of Players ("RSTP") holds that a contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is "just cause". Given, as the Appellant asserted, the RSTP does not define when there is "just cause" to terminate a contract, one must fall back on Swiss law for guidance.

60. The Appellant's summary of Swiss law in this regard was as follows: in the absence of mutual agreement between the parties, an employment contract for a fixed term can only be terminated prior to the expiry of term if there are "valid reasons". Valid reasons are considered to be, in particular, any existing circumstances under which the terminating party could not, in good faith, be expected to continue in the employment relationship. In assessing such valid reasons for termination, Swiss case law, according to the Appellant, suggests that not only should the overall circumstances of the case be taken into account but also particular emphasis should be

placed on the nature of the disputed breach of contractual obligation. If the nature of the breach clearly and severely undermines the fundamental nature of the employment relationship, which is based on mutual trust and confidence between the parties, then just cause may be found, though the instances in which such early termination for valid reasons will be made out will be *"restrictively admitted"* (Appellant citing, case law: ATF 110 I 167, ATF 108 II 44, ATF 101 Ia 545, ATF 127 III 153, ATF 121 III 467, ATF 1176 II 560, and ATF 116 II 145; citing, legislation: Article 337 para. 2 of the Swiss Code of Obligations; citing, commentary, STEHELIN/VISCHER, Kommentar zum Schweizerischen Zivilgesetzbuch, Teilband V 2c, Der Arbeitsvertrag, Zurich, 1996, TERCIER P., Les contrats spéciaux, Zurich, 2003, and WYLER R., Droit du travail, Berne, 2002).

61. In light of the above, and informed by the principled approach in *CAS 2006/A/1062*, the Appellant argued that the conduct of the Respondent during the Cyprus pre-season training camp of mid-January 2016 (and including the failure to sign the draft contract, the Respondent's reticence to organise the Appellant's work permit and visa, the introduction of the foreign players quota issue at the meeting of 18 January 2016 and the failure to respond to the Appellant's default letters of 18 and 19 January) clearly and unequivocally demonstrated, according to the Appellant, the Respondent's *"complete lack of interest"* in the services of the Appellant and in the performance of the accompanying employment contract and that collectively the circumstances led the Appellant to conclude that he was being summarily dismissed by the Respondent.

4. Legal consequences of the termination of the employment contract

62. The Appellant argued that the principal legal consequence of termination of the employment contract without just cause was that, pursuant to Article 17, para. 1 RSTP, the party in breach is required to pay all outstanding payments as well as compensation to the injured part, pursuant to the principle of *pacta sunt servanda*. Article 17, para. 1 of RSTP itself, on the consequences of terminating a contract without just cause, holds as follows:

> *"In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".*

63. In calculating the outstanding payments and compensation owed in this case, the Appellant noted two, overlapping factors. First, and citing *CAS 2006/A/1062* and Article 337c of the Swiss Code of Obligations, the Appellant argued that as a party to a fixed-term employment contract, which had been unduly and prematurely terminated by the other party, he was entitled by way of compensation for his damages to payment of the salary he would have earned until the scheduled end of the contract, with the provision that he has the duty to mitigate the damages incurred by him. Second, and citing *CAS 2014/A/3706*, *CAS 2016/A/4679* and Article 362, para. 1 of the Swiss Code of Obligations, the Appellant argued that as the injured

party he was entitled to damages pursuant to the principle of "positive interest" under which compensation for breach must have as its objective the aim of reinstating the injured party to the position it would have been in had the contract been performed until its expiry.

64. Applying the above principles, the Appellant calculated the amount of compensation owed as follows: the total amount of the employment contract expiring on 31 May 2018 (EUR 1,810,342) less the values of the employment contract signed by the Appellant with Coventry FC valid as from 24 March 2016 to 30 June 2017 (EUR 160,000) for a total amount of EUR 1,650,342. The Appellant's view of the amount awarded by the DRC to him for the contractual period 1 January 2016 to 19 January 2016 (EUR 28,179) was that the part of the DRC Decision had *res judicata* effect and was not being challenged by him or relevant to stated CAS proceedings - only that it should, of course, remain awarded to him.

65. Citing Articles 102; 104; 339, para. 1; and Article 362, para. 1 of the Swiss Code of Obligations, the Appellant was of the view that in the present matter, interest of 5% *p.a.* should accrue on the claimed amount and that that interest should accrue as of the date of the official termination of the employment contract until the date of effective payment (Appellant citing variously in support from *CAS 2006/O/1055*; *CAS 2006/A/1061*; *CAS 2007/A/1298-1230*; *CAS 2008/A/1519*; *CAS 2010/A/2145-2147*; *CAS 2015/A/4055*; *CAS 2015/A/4067& 4068*).

5. Requests for relief

66. In light of the above, the Appellant requested that the CAS *"revise and complete the decision passed on 19 January 2017 by the DRC, as follows:*

> *1.* [The Respondent] *has unilaterally terminated the employment contract with [the Appellant] without just cause, with effect from 18 January 2016; or, alternatively from 19 January 2016.*
>
> *2.* [The Respondent] *shall pay* [the Appellant] *the amount of* ***EUR 1,650,342*** *plus interest of 5% per annum as from the date of the official termination of the employment relationship between the Parties until the date of effective payment.*
>
> *3.* [The Respondent] *shall bear all the costs incurred with the present procedure.*
>
> *4.* [The Respondent] *shall pay* [the Appellant] *a contribution towards his legal and other costs, in an amount to be determined at the discretion of the* [Sole Arbitrator]*".*

B. The Respondent

67. The Respondent's submissions, in essence, may be summarized as follows:

68. On giving an account of what it considered to be the factual timeline of events surrounding this matter, the Respondent then made legal submissions that were threefold in nature and dealt with the following: whether the parties had concluded a valid and binding employment contract; if yes, which party terminated that contract and when; what might the legal consequences be arising out of that termination and for whom.

1. Did the parties conclude a valid and binding employment contract?

69. The Respondent denied that a valid binding contract of employment ever existed between the parties. The Respondent argued that by way of Article 2, para. 2 of the RSTP and Article 6, para. 5 and Article 7, para. 1 of the FUR's RSTP and further in light of Article 13, para. 1 and Article 14, para. 1 of the Swiss Code of Obligations, a contract between a football player [employee] and the club [employer] must be in writing, signed by both parties in a manner definitive enough to facilitate the player's subsequent registration. Taking into account the above-mentioned regulation and the particular factual matrix and circumstances of the case, the Respondent argued that none of the numerous drafts of the employment contract, exchanged between the parties in their correspondence from August 2015 to January 2016, had ever been collated into a single, identifiable, written and binding contract containing all appropriate conditions and terms upon which an application for that player's registration could subsequently be made.

70. In effect, the Respondent argued that the correspondence between the parties from August 2015 to January 2016 never crystallised into full and binding contractual form and that what had occurred during the stated period were simply negotiations based on exchanges of draft contracts between the Respondent (who, in any event, the Respondent argued, were not at the material time represented by an officer of the club authorised to sign contracts) and the Appellant's legal representative and from which it was hoped such negotiations would conclude in a contract signed by both parties at the Cyprus training camp of mid-January 2016. At best, the Respondent conceded, what existed was in line with Article 22 of the Swiss Code of Obligations – an agreement to conclude a binding contract at a later date.

2. The termination of the employment contract

71. Keeping in mind the Respondent's contention that contractual relations never existed between the parties, the Respondent argued here, based on a review of the correspondence between the parties, that the reason why the employment contract negotiations between the parties did not conclude into full and binding form was due solely to the Appellant's conduct. The Respondent further noted that an opportunity to conclude contractual negotiations was, in effect, spurned by the Respondent when it had offered to conclude the contract at the medical arranged for the Appellant in Krasnodar on 28 December 2015.

72. The Respondent also contested that Appellant's claims surrounding the purported 18 January 2016 meeting between the Appellant and his representatives and the Respondent, as represented allegedly by Mr Statsenko and Mr Doronchenko.

73. The Respondent summarised their view of the Appellant's actions as *"an artificial and premediated creation of legal basis for the subsequent charging of the Respondent with the amount of compensation for the alleged early termination of the employment contract without just cause"*.

3. Legal consequences of the termination of the employment contract

74. In recap, the Respondent argued that full contractual relations never existed between the parties or that at best what existed was an agreement to conclude a contract at a later date. Given this approach, the Respondent argued that Article 17 of the RSTP did not apply – as its application is predicated on the existence of a contract and that, in any event, if a contract did exist, its early termination was attributable to the Appellant and not the Respondent and thus no compensation was owed by the Respondent. Without prejudice to the above position, the Respondent then stated that if compensation were to be paid, they would dispute the manner in which it was calculated by the Appellant and principally that the Appellant's calculations on compensation were inflated by being based on gross income and not net income (allowing for personal income tax deduction) and thus not in line with what the Respondent alleged was a proper reading of clause 5.3 of the Labor Agreement of 31 August 2015.

4. Requests for relief

75. In light of the above, the Respondent requested that the CAS:

1. Reject the claims filed by the Appellant;

2. Order that the Appellant bear all the costs of the present procedure, legal and other costs.

V. JURISDICTION

76. Article R47 of the Code provides as follows: *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".*

77. Both parties agreed that the jurisdiction of the CAS in this matter was contained in Article 58.1 of the FIFA Statutes: *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question".*

VI. ADMISSIBILITY

78. The Sole Arbitrator finds that the appeal is admissible.

79. The Appellant filed his appeal within the deadlines contained in Article 58.1 of the FIFA Statutes and in compliance thereafter with Articles R49 and R51 of the Code. The Respondent filed its answer in compliance with the timeline contained in Article R55 of the Code.

80. To reiterate, and as noted in paragraph 51 above, on 22 September 2017, the CAS Court Office, on the instruction of the Sole Arbitrator, wrote to the parties declaring inadmissible all and any

submissions made in and by the Appellant's letters of 21 August 2017 and 8 September 2017 and by the Respondent's letter of 7 September 2017.

VII. APPLICABLE LAW

81. Article R58 of the Code provides as follows: *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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

82. Pursuant to Article R58 of the Code and in conjunction with Article 57, para. 2 of the FIFA Statutes, in the stated case the CAS shall primarily apply the various regulations of FIFA – and namely the RSTP (and aspects thereof which are elaborated upon in the FUR's RSTP) and the FIFA Rules Governing the Procedures of the Players' Status Committee and the Procedural Rules and the 2015 edition/version of same referred to in the DRC Decision on this matter. Swiss law applies subsidiarily.

VIII. MERITS

83. At first instance, this is an unusual case: the Respondent denies that full contractual relations ever existed between the parties. In its submissions, the Respondent does however concede that an agreement to conclude a binding contract may have existed but that their intention to conclude it (at the Cyprus training camp of mid-January 2016) was frustrated by the Appellant's conduct and notably the default correspondence of 18 and 19 January 2016. In contrast, the Appellant argues that full contractual relations did exist but that the actions of the Respondent at the Cyprus training camp in mid-January 2016 indicated that it had no intention of fulfilling its obligations thereunder and that as a result of that breach without just cause, compensation for an amount equivalent to the full contract is now owed to the Appellant pursuant to Article 17 of the RSTP. The DRC took the view that contractual relations existed between the parties that it was the Appellant who in effect sundered the agreement by way of the default correspondence of 18 and 19 January and which included conditions and a deadline which the Respondent could not reasonably be expected – indeed, some of which were impossible – to fulfil within the stated period.

84. Focusing on the correspondence exchanged between the parties from end August 2015 to end December 2015, the Sole Arbitrator agrees with the DRC's view that the parties had entered an employment contract valid as of 1 January 2016 until 31 May 2018 in accordance with the terms set out in the documents attaching to the Respondent's correspondence of 30 December 2015. At a minimum, but more importantly in substance, the above correspondence of 30 December 2015 contained the *essentialia negotii* of a contractual relationship. The fact that the surrounding or concluding formalities - noted in Article 6 and Article 7 of the FUR's RSTP - had yet to be agreed by the parties does not take away from the existing substantive nature of the contractual agreement. Indeed, one of the reasons for the Respondent's invite to the Appellant to join the Cyprus camp was to conclude these formalities and to elevate the existing essential terms of the

contractual agreement into the format required by the FUR's RSTP so that the Appellant's registration could be facilitated and completed at a later date.

85. As noted, the matter then moves to the Cyprus training camp of mid-January 2016. The actions of the Appellant, as evidenced in the default correspondence of 18 and 19 January 2016, is probably best described as a response to what might be called an anticipatory breach of contract (which the Appellant argues was without just cause) by the Respondent. Simply put, and responding directly to what is alleged to have been said by a Mr Doronchenko at the purported meeting of 18 January 2016, the Appellant anticipated as inevitable at this point that the Respondent would not live up to its contractual obligations in a manner which equated to termination of that contract without just cause and thus triggering the compensation provisions of Article 17, para. 1 of the RSTP.

86. The DRC view was that the Appellant's interpretation of the events on 18 January unnecessarily and precipitously conflated a possible difficult with the player's registration into a "without just cause" termination claim for compensation (the Respondent, of course, appears to deny that the 18 January 2016 meeting ever took place). Moreover, the DRC argued that the timeline given by the Appellant to the Respondent to resolve the issue – close of business 19 January 2016 – was an impossible one for the Respondent to fulfil given that the next registration period for players in Russia did not open until later in that month (27 January 2016).

87. To recap, the Appellant prompted by the alleged *"foreign players quota"* meeting of 18 January 2016 with representatives of the Respondent, took the view immediately thereafter that an anticipatory breach of contract was inevitable. The default correspondence of 18 and 19 January 2016 by the Appellant to the Respondent must be seen in this light. In the Sole Arbitrator's view, the key question that follows is whether the Appellant was justified in treating the statement and conduct of the Respondent's representatives at the 18 January 2016 meeting as a repudiation without just cause of the contract as whole. Aligned with Swiss law on "valid reasons" for prematurely terminating a contract (outlined in para. 60 above), the question is whether in the totality of the factual circumstances, the specifically threatened non-performance of contract by the Respondent (relating to difficult in registering the player given the foreign player quota) would, taking an objective approach, have the general effect of depriving that Appellant of the substantial benefit of the contract as whole?

88. Subjectively, the Appellant thought that a fundamental (and without just cause) breach had occurred post the 18 January 2016 *"foreign players quota"* meeting and thus in good faith he could not reasonably be expected to continue the employment relationship. Objectively however, the Sole Arbitrator agrees with the reasoning of the DRC to the effect that the Appellant's assessment that he was entitled to conclude that Respondent no longer intended to be bound by the employment contract's provisions, thus justifying the issuing of the default correspondence, was both premature and peremptory in nature given that in just over a week the next registration period would have opened and an assessment, as to the Respondent's intentions towards the Appellant, could have been better, and even definitively, clarified.

89. The Appellant further relies on *CAS 2006/A/1062* in support of his assessment that the foreign player quota issue was being used as an excuse by the Respondent *"to get rid of"*, or not live up

to its contractual obligations towards the Appellant. In *CAS 2006/A/1062*, and in contrast to the present proceedings, the Appellant was a football club and the Respondent a player. They entered a contract of employment. The Respondent claimed at the DRC that the Appellant had prematurely breached the contract and had dismissed him without good cause and that consequently he was entitled to compensation. The DRC agreed and the Appellant club appealed unsuccessfully to the CAS.

90. The Sole Arbitrator in *CAS 2006/A/1062* upheld the DRC's decision and in assessing (in the negative) as to whether there were valid reasons for the premature termination of the contract of employment, the Sole Arbitrator noted the following three points.

91. First, the Sole Arbitrator in *CAS 2006/A/1062* noted that one aspect of the Appellant club's motive for *"getting rid of"* the Respondent player related to the fact that that if the Appellant club did register the player, the Appellant club would have exceeded the foreign player quota imposed by the regulations of the national federation in question. The factual matrix in *CAS 2006/A/1062* differs markedly however from the present circumstances in that the club in question in *CAS 2006/A/1062* had an opportunity to register the player but did not do so because it was uncontested that they could not, given that they had exceeded their foreign player quota. In contrast, in the present proceedings, the Respondent club was never given an opportunity to (attempt to) register the Appellant – the default notice coming a week or so in advance of the next registration period; and, in any event, it being strongly contested by the Respondent that their foreign player quota was ever at issue and/or that the meeting in which the issue was purportedly raised ever took ever took place on 18 January 2016.

92. Second, and as noted by the Sole Arbitrator in *CAS 2006/A/1062*, the primary motive of the Appellant club to *"get rid of"* the Respondent player related to a dispute as to the player's injury status and appearances at training and whether "good cause" for prematurely terminating the player's contract could be founded on same. Although no great weight attaches to it, returning to the present proceedings, it must be noted that neither cause applies here. In fact, the Appellant in the present proceedings, and based on an existing contract of employment, accepted the invite from the Respondent to attend the Cyprus training camp of mid-January 2016, and while there passed a medical.

93. Third, in *CAS 2006/A/1062*, the Appellant club argued that what had occurred was not a premature termination of contract but an offer to mutually terminate the contract. The Sole Arbitrator in *CAS 2006/A/1062* dismissed this argument noting that it was not in dispute that the parties had previously discussed severance payments for the Respondent and it followed that there was no reason to do this if the Appellant had not previously terminated the contract. Again, nothing of that nature is applicable to the present proceedings. In fact, the only two express instances of a party in the present proceedings seeking to sever the parties' relations emanated from the Appellant: (a) and as outlined in paragraph 17 above, when in a letter dated 14 December 2015 the Appellant set a deadline of response for the Respondent of 18 December 2015 and (b) in the default correspondence of 18 to 19 January 2016.

94. The Appellant's assessment of an anticipatory breach of contract, seen in the form of the default correspondence of 18 and 19 January 2016, was precipitous in nature and did not equate to a

just cause termination claim for compensation pursuant to Article 17, para. 1 of the RTSP. The reaction of the Respondent thereafter – by way of silence – appears consistent with their earlier offer to the Appellant on the possibility of not concluding the employment contract without payment of any compensation.

95. Given that the Sole Arbitrator has decided that the Appellant's contention that the Respondent should be held liable for the early termination of the employment contract without just cause has not been made out, the consequences in terms of compensation payable pursuant to Article 17, para. 1 of the RSTP need not be assessed. That being said, the Sole Arbitrator agrees with the DRC Decision that the Appellant did put himself at the disposal of the Respondent as of 1 January 2016 until 19 January 2016. The Sole Arbitrator further agrees with the DRC's conclusion that the Appellant is entitled to the portion of the salary for the period 1 January 2016 to 19 January 2016 (namely EUR 28,179) as awarded at the rate of 5% *p.a.* on that amount as of 20 January 2016 to the date of effective payment.

96. Finally, and for the sake of completeness, the Appellant made some points about alleged procedural irregularities in the DRC Decision. These points are summarised in para. 55-57 above and relate to *"inexplicably missing"* facts in the timeline of events and a claim that the DRC Decision did not adequately contain *"the reasons for the findings"*, contrary to Article 14, para. 4(f) of the Procedural Rules. From reading the DRC Decision it is clear to the Sole Arbitrator that the DRC did fully and properly inform itself to all relevant facts and submissions on the matter and did so in strict compliance with the general procedural principles required of it under Article 5 of the Procedural Rules. This is evidenced by the fact that, in strict application of Article 9, para. 3 of the Procedural Rules, the DRC in this instance did not take into account the Respondent's reply, given that it was filed after the time limit set by the DRC and thus the DRC took its decision only on those documents provided prior to the DRC deadline, *in casu* on the statement and documents provided by the Appellant.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Vladimir Gadzhev on 9 May 2017 against FC Kuban with respect to the decision issued on 19 January 2017 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is dismissed.

2. The decision issued on 19 January 2017 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* on 19 January 2017 is confirmed.

(…)

5. All other motions or prayers for relief are dismissed.