



Arbitration CAS 2013/A/3237 Bratislav Ristic v. FK Olimpic Sarajevo, award of 14 March 2014

Panel: Mr Stuart McInnes (United Kingdom), Sole Arbitrator

Football

Termination of the employment contract

Definition of just cause

Principle in dubio contra stipulatorem

1. An employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there is “just cause” being a prevailing situation, in the presence of which the injured party cannot in good faith be expected to continue the employment relationship. In this respect, a breach of the contractual obligation to make payment of salary and other benefits falls within the definition of “just cause”. Moreover, the unilateral termination of the contract is accepted when the essential conditions under which the contract was concluded are no longer present.
2. In the case of ambiguity, the principle *in dubio contra stipulatorem* shall apply whereby an unfavourable interpretation of any clause against the author has to be adopted, as he had the power when drafting the clause to make the meaning plain.

I. INTRODUCTION

1. This appeal is brought by Mr. Bratislav Ristić (hereinafter referred to as the “Appellant”), against the decision taken by the Player’s Status Committee of the Football Federation of Bosnia and Herzegovina on 9 April 2013 by which the Appellant’s claim against FK Olimpic Sarajevo (hereinafter referred to as the “Respondent”) for outstanding salary was partially upheld.

II. THE PARTIES

2. The Appellant is a Serbian professional football player, born on 21 January 1980, currently resident in 18000 Nis, Republic of Serbia, who was contracted to play as a non-amateur football player for the Respondent under a Contract of employment dated 17 August 2012.
3. The Respondent is a professional football club, affiliated with the Football Federation of Bosnia and Herzegovina (hereinafter referred to as the “FFBH”), which in turn is affiliated with Fédération Internationale de Football Association (hereinafter referred to as “FIFA”).

III. FACTUAL BACKGROUND

4. The elements set out below are a summary of the main relevant facts, as established by the Sole Arbitrator on the basis of the written submissions of the Parties, the exhibits filed and the Appealed decision rendered by the Player's Status Committee of the FFBH. Additional facts may also be set out, where relevant, in the legal considerations of the present award.
5. On 17 August 2012, the Appellant and Respondent entered into a fixed-term Employment Contract (hereinafter referred to as the "Employment Contract"), valid from the above indicated date, until 17 August 2013.
6. Article 4 of the Annex of the Employment Contract stated the following (English translation provided by the Appellant):

Article 4

Article ____ of the main agreement is supplemented by adding a new paragraph which shall read: the obligations of the Club to the player are as follows;

- i. Monthly income of the player shall be 3,000.00 EUR*
 - ii. The club shall pay to the player 20,000.00 EUR as agreed obligation (first instalment of 10,000.00 EUR no later than 20 August 2012 and the second instalment no later than 30 August 2012).*
 - iii. The club shall pay to the player a bonus of 5,000.00 EUR in case of winning the Football cup of Bosnia and Hercegovina*
 - iv. The club shall pay to the player a bonus of 10,000.00 EUR in case of winning the first place in the Premier League of Bosnia Hercegovina*
 - v. The club shall provide accommodation and food to the player*
 - vi. The club shall provide premium in accordance with the club's regulations.*
7. Notwithstanding the provisions of Art 4 (ii), the Respondent failed to make payment of the second instalment of EUR 10,000 due on or before 30 August 2012.
8. Following an alleged meeting of the Respondent's Administrative Committee on 30 October 2012, the Appellant was fined BAM (Bosnian Convertible Marka) 30,000 by the club for alleged, but un-particularised, bad behaviour.
9. On 20 December 2012, the Appellant lodged a formal request with the Player's Status Committee of the Football Federation of Sarajevo Canton requesting the following relief:
 - i. confirmation that the Employment Contract dated 17 August 2012 was terminated.
 - ii. that the club pay unpaid salary due to the Appellant in the sum of 21,600 BAM.
 - iii. that the club pay the second instalment of 10,000.00 EUR pursuant to Art 4.ii of the Annex to the Contract of Employment dated 17 August 2012.
 - iv. Costs.

10. On 18 January 2013, the Player's Status Committee of the Football Federation of Sarajevo Canton rendered a decision in which it partially upheld the request of the Appellant acknowledging:
 - i. *"Herewith is terminated the professional Football Player Agreement no. 580/12 as well as the Annex thereto, concluded on 17 August 2012 between the player Ristic Bratislav and FK "Olimpic" from Sarajevo.*
 - ii. *FK "Olimpic" from Sarajevo is ordered to pay to the player Ristic Bratislav the amount of 21, 600.00 BAM pertaining to unpaid salaries.*
 - iii. *FK "Olimpic" from Sarajevo is ordered to pay to the player Ristic Bratislav the amount of 1,142,40 BAM pertaining to the proceedings expenses.*
 - iv. *The obligations from paragraph 2 and 3 of this Decision, FK "Olimpic" is ordered to fulfil in three equal monthly instalments to the transaction account of the Law Office "Spaho", kept with Unicredit Bank NO. 3389002203066047".*
11. The Appellant subsequently lodged an Appeal against the decision of the Players Status Committee of the Football Federation of Sarajevo Canton before the Player's Status Committee of the FFBH in relation to the Respondent's non-payment of the second instalment of 10,000.00 EUR under Article 4.ii of the Annex to the Contract of Employment dated 17 August 2012.
12. By decision No. 02-721-1/13, dated 9 April 2013, the Player's Status Committee of the FFBH confirmed the decision of the Player's Status Committee of the Football Federation of Sarajevo Canton stating that the outstanding sum of 10,000.00 EUR was not due, because the Appellant terminated the Contract before its deadline, as follows:
 - i. *The appeal lodged by Ristić Bratislav against the decision no. 52/13 of 18 January 2013 passed by the Committee for Status and Transfer of players of the Football Association of Canton Sarajevo is rejected, and the first instance decision being herewith confirmed.*
 - ii. *Since the dispositive part of the first instance decision was not harmonized with the explanation of the first instance decision, this committee shall for purpose of cost effectiveness of the proceedings in accordance with article 139 of the Regulation on Registration, Status and Transfers of players of the football federation of B&H, supplement the First Instance Decision as to reject the request of Ristić Bratislav submitted to FK "Olimpic" Sarajevo for payment of the amount of 10,000.00 (ten thousand) EUR and accommodation expenses for 3 (three) months.*
13. Following a request made by to FIFA, which is not party to the present proceeding, by letter dated 24 June 2013, the Appellant was informed by FIFA that it was not possible to lodge a claim before its dispute resolution bodies, as the "Committee for Player's Status of Football Federation of Canton Sarajevo" had already rendered a decision; that FIFA is not a body of appeal for decisions taken by national decision making bodies and was accordingly not competent.

IV. PROCEEDING BEFORE THE CAS

14. On 25 June 2013, the Appellant filed his Statement of Appeal with the Court of Arbitration for Sports (hereinafter referred to as the “CAS”) against the decision no 02-721-1/13 of the Player’s Status Committee of the FFBH.
15. By letter of 27 June 2013, the CAS Court Office acknowledged receipt of the Statement of Appeal, but before initiating the arbitration procedure requested, in accordance with Article R48 of the Code of Sports-related Arbitration (“the Code”), that the following information be supplied:
 - i. a copy of the decision appealed against, together with proof of receipt of such decision.
 - ii. The nomination of the Arbitrator chosen by the Appellant from the CAS list, unless the Appellant requests the appointment of a sole arbitrator
 - iii. The evidence of the payment of the Court Office fee of CHF 1,000.
16. By letter of 4 July 2013, the CAS Court Office acknowledged receipt of the Appellant’s letter of 2 July 2013 providing the documentation requested, but sought translation of the documents into English as a pre-condition to processing the appeal.
17. By letter dated 10 July 2013 addressed to the FFBH, the CAS Court Office intimated the commencement of the Appeal and invited it to confirm whether it intended to participate as a party in the arbitration pursuant to Articles R54 and R41.3 of the Code and further, to provide an unmarked copy of the decision of the Player’s Status Committee of the FFBH together with the facsimile cover letter with which it was sent to the parties and the facsimile reports related to such notification. No response to that letter was received by the CAS Court Office.
18. On the same day, the CAS Court Office acknowledged receipt of the Statement of Appeal dated 25 June 2013 and forwarded copies to the Respondent inviting it to submit its Answer within 20 days of receipt of the letter containing *inter alia*:
 - statement of defence
 - any defence of lack of jurisdiction
 - any exhibits or specification of other evidence upon which the Respondent intends to rely
19. By letter dated 25 July 2013, the Respondent informed the CAS Court Office that in its view, there was no legal basis for resolving the Appeal, as the ‘Appeal’ was formulated as an Ordinary Arbitration, but was in addition an Appeal directed to annul decision No. 02-721-1/13 of the Player’s Status Committee of the FFBH. The Respondent made clear that there was no arbitration agreement between the parties under which the arbitration could be referred to as an Ordinary Arbitration to the CAS and proposed that the CAS should close the case and stay the proceedings.

20. Alternatively, the Respondent intimated that if the Appeal lodged was against decision No. 02-721-1/13 of the Players Status Committee of the FFBH, it was filed outside the time limits prescribed by Article R49 of the Code, in that, Decision No. 02-721-1/13 of the Players Status Committee of the FFB was dated 9 April 2013 and that the *“Appellant’s representative must have received it during ...April 2013”*.
21. Further, the Respondent disputed the Appellant’s claim to payment of the sum of 10,000.00, EUR as the Appellant spent only 4 months with the Respondent club before his contract was terminated and requested that the Appeal be dismissed.
22. Pending receipt of the Appellant’s comments on the Respondent’s letter of 25 July 2013, by letter dated 26 July 2013 the CAS Court Office temporarily suspended the Respondent’s deadline to file its Answer.
23. By letter dated 31 July 2013, the Appellant submitted its comments on the matters raised in the Respondent’s letter dated 25 July 2013, dismissing the assertion that the Appeal was not made in accordance with Article R. 47 of the Code and/or that it was framed as an Ordinary Arbitration proceeding. The Appellant also submitted that the Appeal was filed in a timely manner in that decision No. 02-721-1/13 of the Players Status Committee of the FFBH was received by the Appellant’s attorney, by post, on 10 June 2013 as evidenced by the attorney’s date stamp endorsed on the left upper corner of the decision
24. By letter dated 5 August 2013, the Respondent acknowledged the Appellant’s right to file an Appeal at CAS under the Statutes of the FFBH and maintained its objection to the timeliness of the appeal.
26. By letter dated 24 October 2013, the CAS Court Office informed the parties of the creation of the Panel, composed as follows:

Sole Arbitrator: Mr Stuart McInnes, Solicitor in London, UK.
27. By letter dated 1 November 2013, the CAS Court Office, on behalf of the Sole Arbitrator, requested that the FFBH produce an English copy of the provision of the Regulations concerning appeals of any decision rendered by the FFBH to CAS. Furthermore, the Sole Arbitrator requested that the FFBH inform the CAS Court Office about the date of despatch of the decision appealed.
28. By letter dated 14 November 2013, the CAS Court Office informed the Parties of the failure of the FFBH to provide an answer to the Sole Arbitrator’s request, and invited the Parties to provide a copy of the regulations translated into English.
29. On 21 November 2013, the Appellant submitted an English translation of Article 69.4 of the FFBH Regulations and by letter dated 22 November, the Respondent again reiterated its lack of interest in and/or obligations toward the procedure and again requested that the CAS dismiss the Appeal.

30. On 3 December 2013, the CAS Court Office notified the parties that following the submissions of the parties and pursuant to Article R57 of the Code, the Sole Arbitrator decided not to hold a hearing in the present matter.
31. On 18 December 2013, the Appellant filed the signed Order of Procedure.
32. On 24 December 2013, the Respondent sent a further letter to the CAS Court Office communicating its lack of interest and/or any obligation to participate in the procedure and indicated that it accordingly had no obligation to sign the Order of Procedure, but sought additional time to reconsider the situation in light of legal advice.
33. By letter dated 17 January 2013, the CAS Court Office acknowledged the receipt of the Order of Procedure signed by the Respondent.

V. JURISDICTION OF THE CAS

34. Pursuant to Article R47 of the Code:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the Parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to his appeal, in accordance with the statutes or regulations of the said sports-related body”.

35. The jurisdiction of the CAS to hear this dispute derives from Articles 69.4 of the Statute of the FFBH, which provides:

“In cases that the decision of the body of the Football Federation of Bosnia and Herzegovina become finally and there is no other available legal remedy, the party that has standing to sue can lodge a claim on the passed decision to CAS with exclusion complaining to any other ordinary court” (translation provided by the Appellant).

Furthermore, jurisdiction was confirmed by the Parties, when signing the Order of Procedure.

36. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law and may issue a *de novo* decision superseding, partially or entirely, the appealed decision.

VI. ADMISSIBILITY

37. In the absence of any response from the FFBH to provide evidence of the date on which the decision appealed against was sent to the Appellant, and/or with evidence of despatch and in the absence of any evidence to the contrary from the Respondent, the Sole Arbitrator determines that that he must accept the evidence of the Appellant, that decision No. 02-721-1/13 of the Players Status Committee of the FFBH was received by the Appellant's attorney, by post, on 10 June 2013, as evidenced by the attorney's date stamp endorsed on the left upper corner of the decision on the copy document exhibited to the Statement of Appeal.

38. On the basis that the decision appealed against was so notified to the Appellant on 10 June 2013 and that the Statement of Appeal was filed on 25 June 2013, the time-limit prescribed by Articles 67 of the FIFA Statutes and R49 of the Code shall be considered respected and consequently, the appeal shall be deemed admissible.

VII. APPLICABLE LAW

39. Article R58 of the Code provides that the Sole Arbitrator 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 Sole Arbitrator deems appropriate.
40. The Employment Contract dated 17 August 2012 does not include reference to an applicable law.
41. In his Statement of Appeal, the Appellant did not address the issue of the applicable law and likewise, in its Answer, the Respondent did not address the issue of the applicable law.
42. Article 66 paragraph 2 of the FIFA Statutes provides that the CAS shall primarily apply the various Regulations of FIFA, and additionally Swiss law. The Sole Arbitrator therefore decides that the provision of chapter 12 of the Swiss Private International Law (PILA) shall apply.

VIII. THE POSITION OF THE PARTIES

A. The position of the Appellant

43. The Appellant alleges that the Employment Contract was terminated in accordance with the findings of the Player's Status Committee of Football Association of Sarajevo Canton because the Respondent did not fulfil its contractual obligations.
44. Furthermore, the Appellant alleges that the decision was received by his lawyer on 10 June 2013, as demonstrated by the stamp impressed by the income post office of the Law firm.
- a) *As the main issue*
45. Under the terms of the Employment Contract and in particular under Annex art. 4, the Respondent expressly agreed to pay to the Appellant:
- i. EUR 3,000.00 as a monthly salary (art. 4i Annex);

- ii. EUR 20,000.00 in two instalments of EUR 10,000.00 each, (first instalment no later than 20 August 2012 and the second instalment no later than 30 August 2012) (art.4.ii Annex);
 - iii. A bonus of EUR 5,000.000 EUR in case of winning the Football Cup of Bosnia and Herzegovina (art 4.iii);
 - iv. A bonus of EUR 10,000.000 in case of winning the first place in the Premier League of Bosnia and Herzegovina Premier League (art. 4.iv Annex);
 - v. Furthermore, the contract provided for expenses related to food and accommodation as well as prizes in accordance with Club's regulations (at.4.v- 4.vi Annex).
46. Payment of the EUR 20.000 (Art. 4.ii of the Annex) is a contractual obligation and is not conditional on any other provision or article in the Employment Contract.
47. The payment was triggered by execution of the Employment Contract and represented a signing on fee, liability for which was acknowledged by payment of the first instalment.

b) Appellant's Prayer for relief

- i. The request of the Appellant is accepted.
- ii. The decision of the Players Status Committee of Football Federation of Bosnia and Herzegovina is annulled.
- iii. The Respondent is obliged to pay EUR 10,000 to the Appellant with 5% interest from 30 August 2012, within 30 days following the date of the communication of the present decision.
- iv. The Respondent is obliged to cover the Appellant's cost of proceedings.

B. The position of the Respondent

48. The position of the Respondent can be summarized as follows:
- i. The Appellant's Appeal was filed out of time;
 - ii. The Appeal is not founded on real facts;
 - iii. The Appellant has already exhausted all remedies available to him;
 - iv. The Appellant has no right to request the payment of the amount of 10.000 EUR due to the fact that he spent only four months as a member of the club;

- v. The Appellant committed several breaches of contract in terms of conduct and was fined 30.000 BAM as per decision no. 229-11/12 dated 30 October 2012, and that he failed to discharge the imposed fines;
- vi. The Appellant do not have any legal right to the second instalment according to the article 4.ii of the Annex, as he failed to comply with the terms and provisions of the Employment Contract, and was no longer a member of FK Olympic when payment of the second instalment of 10.000 EUR was due.

IX. MERITS

- 49 The following sections refer to the substance of the Parties' allegations and arguments without listing them exhaustively. The Sole Arbitrator has nevertheless examined and taken into account all of the Parties' allegations, arguments and evidence on record, whether or not expressly referred to in what follows.

A. The termination of the contract

- 50 The Parties do not dispute that they entered into a fixed-term Employment Contract dated 17 August 2012, expressed to be for a term of one season ending on 17 June 2013.
51. Following established CAS jurisprudence, an employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there is "just cause" being a prevailing situation, in the presence of which the injured party cannot in good faith be expected to continue the employment relationship.
52. In this respect, a breach of the contractual obligation by the Respondent to make payment of salary and other benefits to the Appellant, falls within the definition of "just cause". Moreover, the unilateral termination of the contract is accepted when the essential conditions under which the contract was concluded are no longer present. In this regard, the Sole Arbitrator agrees with the decisions rendered by both the Football Association of Sarajevo Canton and the Players Status Committee of the FFBH which recognised the breach of contract for just cause.
53. Although both decisions acknowledge the Respondent's breach of the Employment Contract, neither recognizes the Respondent's liability to discharge any payment other than the outstanding salary; the Sole Arbitrator believes that the liability of the Respondent for the outstanding contractual payments remains extant.

B. Interpretation of the clause 4.2 of the Annex to the Employment Contract

54. The Sole Arbitrator believes that the drafting of Para 4.2 of the Annex to the Employment Contract is clear, but in addition relies on the principle *in dubio contra stipulatorem*.
55. It is undisputed by the Parties that the Employment Contract was drafted by the Respondent. According to Swiss law, in the case of ambiguity, the principle *in dubio contra stipulatorem* shall apply whereby an unfavourable interpretation of any clause against the author has to be adopted, as he had the power when drafting the clause to make the meaning plain (ATF 99 II 75 ff.; 100 II 153 ff.) (CAS 2007/A/1219).
56. The obligation is clear and the provision is mandatory: *“The club shall pay to the player 20,000.00 EUR as agreed obligation (first instalment of 10,000.00 EUR no later than 20 August 2012 and the second instalment no later than 30 August 2012)”*.
57. The Respondent is of the opinion that Appellant is not entitled to payment of the second instalment as he was employed for only four months out of the total twelve months anticipated under the Employment Contract.
58. The Sole Arbitrator however believes the payment due under Art.4.ii did not form part of the Appellant’s salary, but was intended as a signing on fee payable in two instalments on dates certain, namely, by two instalments of EUR 10,000 the first payable no later than 20 August 2012 and the second instalment no later than 30 August 2012 and was not in any way conditional upon the Appellant being employed for the whole contractual term. The payment has to be considered as an autonomous obligation payable without deduction.
59. Given that the second instalment was payable *“no later than 30 August 2012”*, the Sole Arbitrator rejects the Respondent’s assertion that payment could be withheld as the Appellant was no longer a member of the club. Likewise the Sole Arbitrator rejects the Respondent’s submission that it is entitled to make a deduction from the second instalment payment as it has failed to evidence any conduct of the Appellant justifying the imposition of fines or sanction.

X. CONCLUSION

60. Having taken into consideration all the facts, evidence and legal arguments (even if not directly referred to in the present award) made by the Parties in their written submissions, the Sole Arbitrator considers that the appealed decision of the FFBH does not properly take account of the autonomy of the contractual obligation of the Respondent under the employment agreement and concludes that the Appellant was entitled to terminate the contract with just cause on the Respondent’s failure to make payment of salary and other benefits payable under the contract and is further entitled to payment of the sum of EUR 10,000 pursuant to Article 4.ii of the Annex to the Contract of Employment without deduction.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules that:

1. The appeal filed by Mr Bratislav Ristic against the decision 02-721-1/13 of 9 April 2013 issued by Football Federation of Bosnia and Herzegovina is upheld.
 2. FK Olympic Sarajevo is ordered to pay the amount of EUR 10,000.00 plus the 5% of interest from the date in which the amount was due as 30 December 2012.
- (...)
5. All other and further claims are dismissed.