



Arbitration CAS 2004/A/642 Hertha BSC Berlin v. G. & Club Atlético River Plate & RCD Mallorca, award of 1 March 2005

Panel: Mr Peter Leaver QC (United Kingdom); Mr Hans Nater (Switzerland); Mr José Juan Pintó (Spain)

Football

Transfer

Principles for the construction of an employment contract

As with all issues of construction, the Panel must first consider the words of the relevant provision. If the meaning of those words is clear, it is not permissible for the parties to adduce evidence of their intentions. In a case where an employment contract was drafted by the Club's in-house lawyer, the provisions of the contract must, based on well-established principles, be construed *contra proferentem*.

All three of the football clubs involved in this arbitration are well-known. Hertha BSC Berlin ("Hertha") competes in the 1.Bundesliga (the first National League) in Germany. Club Atlético River Plate ("River Plate") competes in the First Division in Argentina. Real Club Deportivo Mallorca ("RCD Mallorca") competes in the Primera División in Spain.

G. is a professional footballer. He is an Argentine national. G. had joined River Plate when he was 16 years old. His contract with River Plate expired on 30 June 2004.

On 6 January 2004 G. signed an Employment Contract with Hertha ("the Hertha Employment Contract") to play for Hertha from 1 July 2004 until 30 June 2009. Such a contract is known in the football world as a "pre-contract". Although there is no specific reference to a "pre-contract" in the current FIFA Regulations (2001), such a contract was referred to in the previous edition of those Regulations (1997), and will again be referred to in the new edition of those Regulations, which was passed in December 2004 and which will come into force on 1 July 2005. In addition to signing the Hertha Employment Contract, G. also entered into an "Additional Agreement". That Additional Agreement, and, in particular, its construction, lies at the heart of this arbitration.

On 31 January 2004 G. entered into an employment contract with RCD Mallorca. That employment contract had immediate effect and continued until 30 Jun 2008. RCD Mallorca paid River Plate a fee of United States \$1 million for the transfer of G.'s registration.

When Hertha learned of G.'s transfer to CD Malorca, it complained to the FIFA Dispute Resolution Chamber (DRC). In its turn, River Plate complained to the DRC that, in breach of

Article 13 of the Regulations governing the Application of the FIFA Regulations for the Status and Transfer of Players (“the Application Regulations”), Hertha had approached G. without first obtaining River Plate’s permission to do so.

On 10 June 2004 the DRC rejected Hertha’s complaint in its entirety, and decided that Hertha had been in breach Article 13 of the Application Regulations. It fined Hertha CHF 50,000.

Hertha appeals to the CAS from both parts of the DRC’s decision.

LAW

CAS Jurisdiction

1. Hertha’s appeal is made pursuant to Articles 59 and 60 paragraph 1 of the FIFA Statutes.
2. The jurisdiction of the CAS is also based upon the signature of all the parties to the Order of Procedure.
3. There is, therefore, no dispute as to the jurisdiction of the CAS.

The Application Regulations

4. Article 13 is in Chapter V of the Application Regulations. Chapter V is entitled “Stability of contracts”. Article 13 is in the following terms:
 - “1. *A club wishing to engage the services of a player who is at present under contract with another club is obliged to inform the club and player before commencing negotiations with either of them.*
 2. *For any violations of the foregoing obligation, the offending club will be subject to a fine of at least CHF 50,000.*
 3. *Such a fine can be imposed by the Dispute Resolution Chamber, pursuant to Article 42 of the FIFA Regulations for the Status and Transfer of Players. Appeals against any decision to impose a fine can be lodged pursuant to the provisions of the same article”.*
5. Hertha’s case was that the Application Regulations are secondary legislation, and that Article 13 should be construed so that it did not apply to approaches to players who were in the last 6 months of their contract.
6. The Panel rejects that submission. There is no justification for construing Article 13 in such a limited way. The wording of Article 13 is clear. In the Panel’s opinion, Article 13 applies to any approach to a player who is under contract to another club.

The Hertha Contract and the additional agreement

7. The Hertha contract was in common form, and it is not necessary to set out its terms in detail in this Award. The Panel has been provided with an English translation, which was signed by Hertha and G. In this Award, the Panel will use the English translation, although it is specifically provided that the German version alone is authentic and legally valid.

8. The relevant provision of the Hertha contract is contained in Paragraph 9, which is in the following terms:

“§ 9 Commencement and Termination of Contract

a) This Contract shall enter into force on 01.07.2004. Conditions for its validity are:

***see additional agreement** (emphasis as in the contract)*

1. the Player's acceptance into the Ligaverband's transfer list, provided this is required under § 13 of the Lizenzordnung Spieler (LOS) of the Ligaverband.

2. the granting of entitlement to play by the Ligaverband and the Liga GmbH, respectively.

b) The Contract shall end on 30.06.2009 (see additional agreement)...”.

9. The Additional Agreement, of which the Panel has again been provided with an English translation, was between Hertha and G. Again, the Panel will use the English translation, although the Additional Agreement also specifically provides that the German version alone is authentic and legally valid.

10. Paragraph 1 of the Additional Agreement is in the following terms in the authentic German text:

“§1 Der Arbeitsvertrag und die Zusatzvereinbarung werden nur zusammen wirksam und nur dann, wenn folgende Voraussetzungen kumulativ erfüllt sind:

1. Erteilung der Spielgenehmigung durch dieDFL.

2. Wirksame Beendigung seines Arbeitsvertrages mit dem Verein River Plate zum 30.06.2004. Der Spieler wechselt ablösefrei zu Hertha BSC.

3. Das Vorliegen einer Sporttauglichkeitsbestätigung durch den Vereinsarzt von Hertha BSC.

4. Zugehörigkeit von Hertha BSC zur 1. Bundesliga in der Saison 2004/2005.

5. Der Vertrag ist nur gültig, wenn Hertha BSC in der Saison 2004/2005 in der 1. Bundesliga spielt.

Die Parteien sind sich einig, dass aus diesem Vertrag keinerlei wechselseitige Verpflichtungen hergeleitet werden können, wenn vorstehende Bedingungen nicht erfüllt sind”.

The English translation is in the following terms:

“§1. The Employment Contract and the additional agreement will be effective, if the following preconditions are fulfilled:

1. The enrolment of the player in the transfer list of the German Football Federation.

2. *Play permission by the German Football Federation.*

3. *The player will finish his Employment Contract with the Club River Plate Buenos Aires with effect on 30.06.2004 and will change the club without transfer fee.*

4. *Confirmation of sports fitness by the doctor from Hertha BSC (medical checkup).*

5. *The contract is only valid if the club is play in the 1. Bundesliga within the season 2004/2005.*

Both parties agree that there are no obligations on both sides if the above mentioned preconditions are not fulfilled”.

11. The Panel will treat, as the parties did, the German text as both authentic and valid.

The issues

12. Although the parties made lengthy and detailed submissions on a number of matters, it seems to the Panel that the principal issues which it must decide, and which will decide this appeal, are twofold.
13. First, the Panel must decide whether Hertha was in breach of Article 13 of the Application Regulations. In order to decide this issue, the Panel must decide whether Hertha informed River Plate that it wished to engage the services of G. before commencing negotiations with him (“The Negotiations Issue”).
14. Secondly, the Panel must decide what is the true construction of sub-paragraph 3 of Paragraph 1 of the Additional Agreement (“The Construction Issue”).
15. The Panel will consider those issues in the order in which they are set out above.

A. The negotiation issue

16. Hertha relies upon the evidence of four witnesses, each of whom was involved in the negotiations with G. Those negotiations took place in Berlin. G. had flown to Berlin at Hertha’s expense.
17. The negotiations were conducted between Mr Dieter Hoeness, Hertha’s Chief Executive Officer, Mr Jochen Sauer, Hertha’s Assistant Chief Executive Officer and Legal Counsel, and Mr Rainer Störk and Mr Hernan Berman, each of two participated “*as representative of Mr Marin*”, who is said to have been G.’s FIFA’s registered agent.
18. Nowhere in the evidence adduced on behalf of Hertha is it stated, far less suggested, that Hertha had informed River Plate that it wished to engage G.’s services before commencing negotiations with him. Indeed, it is Hertha’s case that it was G. who “offered himself” to Hertha.

19. Significantly, in his fax to the President and General Manager of River Plate dated 2 February 2004, Mr Hoeness, inter alia, says:
- “We presume that G. has already informed you that he has concluded a valid Employment Contract with Hertha BSC from 1st July 2004 for the next 5 years. In accordance with the international transfer regulations this contract is deposited with the German league association DFL.”*
20. In its response dated 3 Feb 2004, River Plate stated:
- “We hereby refer to the fax sent by you on February 2nd 2004, at 6.35 p.m. Berlin Time regarding the player G., in order to state the following:*
- 1) Such notice is time-barred, false and unfounded. Time-barred, since an act carried out behind the FIFA regulations’ back and concealed from us was not timely notified, fact that makes it not good against us in the current situation. False, since it stated our Club proceeded in an inappropriate way with the player G., who freely made his own decisions. On the contrary, you have not complied with the proper proceedings to which you were obliged towards our Club. Unfounded, since you never notified the commencement of negotiations with such player and - according to the copy sent by you - with Players’ Agent, concealing that from our Club.*
 - 2) You are misjudging. Neither G. nor the Players’ Agent indicated by you, or – what would have been more appropriate – yourselves, have informed us of such situation at any time, which makes you completely responsible.*
 - 3) We are not aware of the contract mentioned by you or the persons who might have subscribed the same; thus denying all effects in relation to Club Atlético River Plate and holding it as invalid since it prevented the exercise of our legal rights.*
 - 4) Club Atlético River Plate currently complies with all the federative regulations, and you are not entitled to remind us of our obligations. Hertha BSC is the one that violated them. We are the ones to inform the FIFA of such misconduct”.*
21. Hertha does not appear to have responded to River Plate’s accusations. The Panel finds that failure or omission surprising. It is Hertha’s case that it was at G.’s request that River Plate was not informed of the agreement between himself and Hertha. It is implicit in that case that Hertha accepts that it did not comply with Article 13.
22. In the circumstances, the Panel has no hesitation in finding that Hertha was in breach of Article 13 of the Application Regulations.
23. Although the contrary was strenuously argued on behalf of Hertha, the Panel is of the opinion that this breach is an important aspect of the background of this appeal. It is not, of itself, decisive of the Construction Issue, but it is undoubtedly a relevant background fact, which is to be taken into account when considering the provisions of the Employment Contract and of the Additional Agreement.
- B. *The construction issue*
24. The text of Paragraph 1 of the Additional Agreement has been set out above.

25. It is Hertha's case that the only reason for the inclusion of that provision was that G. was unable to prove that he was free to enter into a new Employment Contract with effect from 1 July 2004. Hertha also says that it was the "understanding" of all those who participated in the negotiations that G. "*should not be allowed to enter in (sic) an other employment agreement with a third club that was valid beyond June 30th 2004*".
26. As with all issues of construction, the Panel must first consider the words of the relevant provision. If the meaning of those words is clear, it is not permissible for the parties to adduce evidence of their intentions. An additional factor in the present case is that both the Hertha Employment Contract and the Additional Agreement were drafted by Hertha's in-house lawyer, Mr Jochen Sauer, and must, therefore, on well-established principles, be construed *contra proferentem*.
27. The Panel has no doubt as to the meaning of Paragraph 1 of the Additional Agreement. There is no ambiguity in the words "*The Employment Contract and the additional agreement will be effective, if the following preconditions are fulfilled*" (emphasis added). The words plainly mean that the Employment Contract and the additional agreement would only come into effect if the stated conditions precedent ("preconditions") were satisfied. One of those conditions precedent was that G. would finish his Employment Contract with River Plate on 30 June 2004.
28. There is nothing in Paragraph 1 of the Additional Agreement that states that G. must continue to be employed by River Plate until 30 June 2004. Indeed, as the transfer of his registration to Hertha was to be "*without transfer fee*", it is improbable that the parties could have intended (if that were relevant, which, in the Panel's view it is not) that he should be so employed. Hertha knew that G. wanted to leave River Plate, but that he was not able to do so before 30 June 2004 without River Plate's consent. That consent was unlikely to be given unless a fee for the transfer of G.'s registration was paid by the club acquiring his services. Hertha could not enter into agreement with G. which would have the effect of preventing River Plate from receiving a fee. It is precisely in order to prevent such conduct that FIFA has enacted Article 13 of the Application Regulations.
29. The Panel is of the clear view that Paragraph 1 of the Additional Agreement provides that neither it nor the Employment Contract would come into effect unless the stated conditions precedent were satisfied; that those conditions precedent were not satisfied because G. did not finish his Employment Contract with River Plate; and that Hertha's appeal fails on the Construction Issue.
30. During the hearing reliance was placed by Hertha on a third document, which was entitled as "Declaration" in the English translation. This was a document that Hertha always required a player, whose registration it was acquiring, to sign to confirm that he was able to become an employee. Significantly, the Declaration made by G. was that "*as from 1st July 2004 I have no further legal bonds with other clubs*". In the Panel's view, the Declaration did not improve Hertha's case. It was clear that G. was simply stating that as at the date of the Declaration his existing contract with River Plate would come to an end.

31. For the sake of completeness, the Panel wishes to make it clear that it endorses both the DRC's decision and its reasoning.
32. It was submitted on behalf of Hertha that by acting as he did, G. made it impossible for the conditions precedent to be met. In the Panel's opinion, that submission stands the contract on its head. The Employment Contract did not, and could not, come into force until 1 July 2004. It could then only come into force if G. was still employed by River Plate on 30 June 2004, and if no transfer fee was payable. Up to the end of G.'s contract, River Plate would have been entitled either to agree a new contract with him, or to negotiate a fee for the transfer of his registration. Although that fee might have been comparatively small, it was still a possibility. It is in that regard that the breach by Hertha of Article 13 becomes relevant.
33. In the Panel's opinion, it is a novel concept that the action of G. and the improper conduct of Hertha could preclude or limit G.'s employer's, River Plate, right to transfer his registration during the life of the contract.
34. By virtue of the terms in which the Employment Contract and the Additional Agreement were drafted, G. was within his rights to enter into an agreement with RCD Mallorca, and River Plate was within its rights to transfer G.'s registration to RCD Mallorca. This is not a case in which a party has prevented or precluded the satisfaction or performance of a condition precedent. It is a case in which a party, G., has acted within his contractual rights.
35. Notwithstanding its finding that G. acted within his rights, the Panel cannot accept that G.'s conduct was of the highest moral standing. He had flown to Berlin and negotiated a contract with Hertha, which he then ignored. The Panel would not wish it to be thought that in accepting that by virtue of the drafting of the Hertha Employment Contract and Additional Agreement G. was able to enter into an agreement with RCD Mallorca, it was approving such conduct.
36. Finally, it was submitted that River Plate and were in breach of Article 23 of the FIFA Statutes. In the light of the Panel's conclusion that the Hertha Employment Contract did not come into force until 1 July 2004, the Panel rejects that submission. Both River Plate and RCD Mallorca were entitled to act as they did.

Conclusion

37. For the reasons set out above, the Panel dismisses Hertha's appeal.
38. For the sake of completeness, the Panel makes it clear that it has read carefully the detailed submissions of the parties before making this Award. Although there are many factual issues raised in those submissions, the Panel does not think it necessary to resolve those issues in order to decide this appeal. The only finding of fact that it is necessary for the Panel to make rises in relation to the Negotiations Issue. The Panel has found as a fact that Hertha did not comply with Article 13 of the Application Regulations by informing River Plate that it was going to negotiate with G. before commencing those negotiations.

The Court of Arbitration for Sport rules:

1. The appeal by Hertha BSC Berlin is dismissed.
2. The decision issued on 10 June 2004 by the FIFA Dispute Resolution Chamber is affirmed, and Hertha BSC Berlin is ordered to pay to FIFA the fine of CHF 50,000 (Fifty Thousand Swiss Francs) within 30 days of the date of this Award.

(...).