



Arbitration CAS 2006/A/1152 ADO Den Haag v. Newcastle United FC, award of 7 February 2007

Panel: Prof. Massimo Coccia (Italy), President; Mr Manfred Peter Nan (the Netherlands); Mr Michael Beloff QC (United Kingdom)

Football

Transfer of a player

Training compensation

EU/EEA exception to the general principle of training compensation

Notion of “contract” in the sense of the FIFA Regulations

Interpretation of a rule issued by a sports federation

“Exception to the exception”

Justification for the entitlement to training compensation

1. For transfers occurring within the EU/EEA, Art. 6 para. 3 of Annex 4 to the FIFA Transfer Regulations is *lex specialis*, to be read as qualifying any general principle elsewhere in the regulations dealing with the obligation to pay training compensation.
2. Although it is true that amateurs do have agreements with their clubs – i.e. that the clubs will train them and they will play for the club in consideration of such training – such agreement is not a contract in the sense of Art. 2 para. 2 of the FIFA Transfer Regulations.
3. The language of a provision governs its interpretation, where the language is clear and explicit and does not involve an ambiguity or absurdity (*in claris non fit interpretatio*). Also, in the interpretation of a regulation issued by a sports federation, an excessively expansive interpretation might perhaps go beyond the intention of the legislating federation; thus, a judging body must adhere to what is in the text of the regulation and draw no material consequences from the regulation’s silence (*ubi lex voluit dixit, ubi noluit tacuit*).
4. If the training club does not offer a professional contract to one of its amateur players and the amateur player signs his first professional contract with another club, the training club is not entitled to training compensation “... unless the Former Club can justify that it is entitled to such compensation”. This last part of the first sentence of Art. 6 para. 3 must be construed as an “exception to the exception”. Therefore, if the training club can justify that it is entitled to training compensation – and the burden of proof lies with the training club – the exception to the exception is triggered and the new club which hired the trained player would be obliged to pay the training compensation to the former club.

- 5. A fundamental tenet of legal interpretation is the principle of effectiveness (*ut res magis valeat quam pereat*), according to which interpretation must give meaning and effect to all the terms of a provision. An interpreter must not adopt a reading that would result in making a substantial part of a provision redundant or without legal effect. Therefore, the only reasonable way of giving some meaning to the “justification” proviso set out by the last part of the first sentence of Art. 6 para. 3 is to construe such exception to the exception as saying that a training club not immediately offering a professional contract to one of its trainees can still justify its entitlement to training compensation if it proves a *bona fide* and genuine interest in keeping the player on the club’s roster or in its youth academy, with a view to keeping alive the option of granting him a professional contract at a later stage.**

The Appellant, ADO Den Haag (“Den Haag”), is a Dutch football club affiliated with the Koninklijke Nederlandse Voetbalbond (the “Dutch FA”) with headquarters in The Hague, the Netherlands. Den Haag plays in the “Eredivisie”, which is the highest football league in the Netherlands.

The Respondent, Club Newcastle United Football Co. Ltd. (“Newcastle United”), is a football club affiliated with the English Football Association, with headquarters in Newcastle upon Tyne, England. Newcastle United plays in the English Premier League, which is the highest football league in England.

The player, K. (“the Player”), born on 4 April 1988, was registered with Den Haag as an amateur from the 1996-1997 football season to the 2004-2005 football season.

Towards the end of the 2004-2005 season, Den Haag and the Player started negotiating the possibility of agreeing on a professional contract.

On 18 July 2005, the Player signed an employment contract as a professional football player with Newcastle United.

On 11 August 2005, Newcastle United registered the Player with the English Football Association as professional football player.

Newcastle United did not pay any training compensation to Den Haag for the Player.

Den Haag filed a complaint with the FIFA Dispute Resolution Chamber (DRC) asking for the payment of EUR 220,000 as training compensation for the transfer of the Player pursuant to Article 20 of the 2005 Regulations for the Status and Transfer of Players (the “2005 Transfer Regulations”).

The DRC decided on 27 April 2006 to reject Den Haag’s claim (the “Appealed Decision”), holding that no compensation was due by Newcastle United to Den Haag for the transfer of the Player. In

particular, the DRC held that Den Haag “*did not formally offer the player an employment contract and, therefore, should not be entitled to training compensation*”.

The Appealed Decision was based on Article 6 para. 3 of Annex 4 to the 2005 Transfer Regulations, pursuant to which: “*If the Former Club does not offer the player a contract, no Training Compensation is payable unless the Former Club can justify that it is entitled to such compensation. The Former Club must offer the player a contract in writing via registered mail at least 60 days before the expiry of his current contract. Such an offer shall furthermore be at least of an equivalent value to the current contract. This provision is without prejudice to the rights to Training Compensation of the player’s previous club(s)*”.

Two fundamental issues were raised in front of the DRC: a) whether the above rule applies to amateur players signing a professional contract for the first time and, if so, b) whether Den Haag can justify that it is entitled to such compensation.

As to the first issue, the DRC rejected Den Haag’s submission that the above rule would apply only to players already under contract and not to amateur players: “*the Chamber emphasizes that it is the spirit and purpose of the said provision to penalize clubs which are obviously not interested in the player’s services as a professional, no matter if the club would have to offer the player for the first time an employment contract or a renewal due to the ordinary expiration of an already existing contract [...]*”.

As to the second issue, the DRC held that Den Haag could not justify that it was entitled to the training compensation. In particular the DRC concluded that: “*the Claimant’s decision to refrain from making an adequate and concrete offer to the player must have been motivated by its low interest at the end of the season 2004/2005 in having him in his squad as a professional [...]*”.

On 30 August 2006, Den Haag filed a statement of appeal with the Court of Arbitration for Sport (CAS).

LAW

Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from Articles 60-62 of the FIFA Statutes (in their version entered into force on 1 August 2006) and R47 of the Code, and it is further confirmed by the order of procedure duly signed by both parties.
2. It follows that the CAS has jurisdiction to decide the present dispute.

Applicable Law

3. Article R58 of the Code reads 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

4. Then, Article 60 para. 2 of the FIFA Statutes provides as follows:

“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

5. The Panel observes that the “applicable regulations” are indeed all FIFA rules material to the dispute at stake, including in particular the 2005 Transfer Regulations entered into force on 1 July 2005.
6. Then, the Panel notes that none of the agreements entered into by the parties and the Player contains an express choice of law. However, Art. 60 para. 2 of the FIFA Statutes contains an election of Swiss law, which is deemed to be applicable in addition to the FIFA Regulations. Under the literature and CAS jurisprudence, such a choice of law, by reference to the FIFA Regulations, is both admissible and binding on the parties (KARRER P., Basler Kommentar zum Internationalen Privatrecht, 1996, no 92 and 96 ad art. 187 LDIP; POUURET/BESSON, Droit comparé de l'arbitrage international, Zurich et al. 2002, no 683, p. 613; DUTOIT B., Droit International Privé Suisse, Bâle 2005, no 4 ad art. 187 LDIP, p. 657; CAS 2004/A/574; TAS 2005/A/983 & 984).
7. Therefore, the Panel holds that the dispute must be decided in accordance with FIFA statutes and regulations and, complementarily, with Swiss Law.

Discussion

A. *The General Principle: Training Compensation Is Due when a Player Signs His First Professional Contract*

8. It is undisputed that, as a general principle, training compensation must be paid to a player's training club(s) when a player signs his first professional contract and on each further transfer until the end of the football season of his 23rd birthday (Article 20 of the 2005 Transfer Regulations).
9. The rationale of the above general principle is explained in the FIFA Principles for the amendment of the FIFA rules regarding international transfers, agreed in 2001 by FIFA, UEFA and the European Commission:

“In order to promote player talent and stimulate competition in football it is recognised that clubs should have the necessary financial and sportive incentives to invest in training and education of young players.”

10. In this case, the Player has played as an amateur with Den Haag for eight seasons. He then signed his first professional contract with Newcastle United and, at the moment of the transfer, he was under the age of 23. It is evident that in principle, in accordance with Article 20 of the 2005 Transfer Regulations, Den Haag would be entitled to the payment of training compensation. However, the 2005 Transfer Regulations sets out certain exceptions to such general principle.

B. The EU/EEA Exception to the General Principle

11. Article 6 para. 3 of Annex 4 to the 2005 Transfer Regulations sets out an exception which applies specifically to players moving from one football association to another inside the territory of the EU/EEA, which nowadays includes twenty-seven member States of the European Union plus three States pertaining to the European Economic Area. In other terms, for transfers occurring within the EU/EEA – such as that of the Player K., moving from the Netherlands to England – the Panel is of the opinion that Article 6 para. 3 is *lex specialis*, to be read as qualifying any general principle elsewhere in the regulations dealing with the obligation to pay training compensation.

C. Application of Article 6 para. 3 of Annex 4 to the 2005 Transfer Regulations to Amateur and Professional Players

12. The first issue to be determined is whether and to what extent the special exception of Article 6 para. 3 of Annex 4 to the 2005 Transfer Regulations applies to the present transfer case. In particular, the parties disagree as to whether the first sentence of Article 6 para. 3 is to be applied to an amateur player signing his first professional contract for another club.
13. Den Haag argues that the first sentence of Article 6 para. 3 (*“If the Former Club does not offer the player a contract, no Training Compensation is payable unless the Former Club can justify that it is entitled to such compensation”*) should be construed in the context of the second and third sentences (*“The Former Club must offer the player a contract in writing via registered mail at least 60 days before the expiry of his current contract. Such an offer shall furthermore be at least of an equivalent value to the current contract”*). Den Haag points out that since the second and third sentences clearly apply only to players under contract, i.e. professional players, the first sentence should also be construed as applying exclusively to professional players. Newcastle United replies that the second and third sentences can apply to amateurs as well, as they also have a form of contract with their club entailing mutual obligation. The Panel is of the view that both constructions are to be disregarded for the following reasons.
14. As to the interpretation asserted by Newcastle United, the Panel notes that although it is true that amateurs do have agreements with their clubs – i.e. that the clubs will train them and they

will play for the club in consideration of such training – such agreement is not a contract in the sense in which the FIFA Regulations use that word. Article 2 para. 2 of the 2005 Transfer Regulations provides as follows: “*A Professional is a player who has a written contract with a club and is paid more than the expenses he effectively incurs in return for his footballing activity. All other players are considered as Amateurs*”. In the Panel’s view, the clear implication of Article 2 para. 2 is that only professional players have written contracts and are paid more than the reimbursement for expenses, whereas amateur players have no genuine contracts – in the sense of the FIFA transfer rules – and are only reimbursed for their expenses at most. As a consequence, the second and third sentence of Article 6 para. 3 apply only to professional players.

15. As to Den Haag’s proposed interpretation, the Panel observes that the language of a provision governs its interpretation, where the language is clear and explicit and does not involve an ambiguity or absurdity (*in claris non fit interpretatio*). In this case, the language of the first sentence of Article 6 para. 3 is clear and explicit and does not contain any explicit limitation to its application. The Panel is also of the view that, in the interpretation of a regulation issued by a sports federation, an excessively expansive interpretation might perhaps go beyond the intention of the legislating federation; thus, a judging body must adhere to what is in the text of the regulation and draw no material consequences from the regulation’s silence (*ubi lex voluit dixit, ubi noluit tacuit*). Therefore, upholding the DRC’s interpretation, the Panel is of the view that the first sentence of Article 6 para. 3 of Annex 4 to the 2005 Transfer Regulations does cover both amateur and professional players. If FIFA had wished to limit the application of the first sentence of Article 6 para. 3 to professional players it should have so provided explicitly.
16. It seems to the Panel that its preferred construction of the first sentence does not contradict the ensuing sentences of Article 6 para. 3. The second and third sentences apply, in fact, to situations when a professional contract is already in existence, setting out certain requirements which the training club must meet in order to retain a right to compensation if a player moves to another club: (i) an offer for a new contract 60 days before the expiry of the current contract; (ii) a notice of the offer sent by registered mail; (iii) financial terms of the offer at least as favourable as those in the current contract. In other terms, the language itself of Article 6 para. 3 makes it clear that the first sentence covers both players with and players without a contract (i.e. both amateurs and professionals), whereas the second and third sentences cover only players who are already under contract, i.e. only professionals.
17. Accordingly, under the above construction, if the training club does not offer a professional contract to one of its amateur players and the amateur player signs his first professional contract with another club, the training club is not entitled to training compensation “... *unless the Former Club can justify that it is entitled to such compensation*” (last part of the first sentence, Article 6 para. 3 of Annex 4 to the 2005 Transfer Regulations).
18. The Panel is of the opinion that this last part of the first sentence of Article 6 para. 3 must be construed as an “exception to the exception”. Therefore, if the training club can justify that it is entitled to training compensation – and the burden of proof lies with the training club – the

exception to the exception is triggered and the new club which hired the trained player would be obliged to pay the training compensation to the former club.

D. *The Justification for the Entitlement to Training Compensation*

19. The Panel must now determine what – short of offering a professional contract – can be considered as a justification for the entitlement to receive payment of training compensation, under the last part of the first sentence of Article 6 para. 3. In order to determine this issue, it is necessary to interpret the meaning of the term “*justify*” in light of the purpose of Article 6 para. 3 itself as well as of the whole set of FIFA rules on transfers.
20. The Panel does not share the DRC’s view that the purpose of the first sentence of Article 6 para. 3 is to penalise clubs which do not offer professional terms to their amateur players. Rather, in the Panel’s opinion, the purpose of the above provision is to ensure that no player, whether amateur or professional, in whom the training club has no interest is impeded to accept the offer of another club because he carries some sort of “compensation price tag”.
21. Indeed, in case a club is not interested anymore in the services of one of its amateur players and decides to write off the investment made for his training, the player should be free to move to another club with no strings attached. In other terms, the application of an automatic compensation price tag to all amateur players should be deemed to be unreasonable.
22. On the other hand, the Panel remarks that it would also be unreasonable to require a club to offer a professional contract to all of its young amateur players in order to avoid the risk of forfeiting all rights to training compensation. It would be too costly and it would contravene the spirit and purpose of the FIFA transfer rules, which are set out in order to grant to clubs “*the necessary financial and sportive incentives to invest in training and education of young players*” (see above). In the Panel’s view, the last part of the first sentence of Article 6 para. 3 indicates that, even without offering a professional contract, clubs have an opportunity to protect their investment on young players.
23. Therefore, in the Panel’s opinion, if a club wants to retain the right to training compensation in respect of one of its amateur players, it must “justify” it under Article 6 para. 3 by taking a proactive attitude vis-à-vis that individual player so as to clearly show that the club still counts on him for the future season(s). Accordingly, the training club must either offer the concerned player a professional contract or, short of that, it must show a bona fide and genuine interest in retaining him for the future. In other words, a training club not immediately offering a professional contract to one of its trainees can still justify its entitlement to training compensation if it proves that it desires to keep the player on the club’s roster or in its youth academy, with a view to keeping alive the option of granting him a professional contract at a later stage.
24. It seems to the Panel that the above construction of the “justification” proviso set out by the last part of the first sentence of Art. 6 para. 3 is the only reasonable way of giving some

meaning to such exception to the exception. Indeed, a fundamental tenet of legal interpretation is the principle of effectiveness (*ut res magis valeat quam pereat*), according to which interpretation must give meaning and effect to all the terms of a provision. An interpreter must not adopt a reading that would result in making a substantial part of a provision redundant or without legal effect.

E. Den Haag has Shown a Bona Fide and Genuine Interest in Keeping the Player

25. The Panel is of the view that Den Haag has shown sufficient evidence of its good faith and genuine interest in keeping the Player. Indeed, on 30 April 2005, Den Haag handed a letter to the Player stating that it wished to retain the Player as an amateur for the 2005-2006 season. The relevant part of the letter reads as follows: *“this is to let you know that during the 2005-2006 season you will be part of ADO Den Haag’s training and education programme again”* (translation provided by Den Haag). The Dutch FA has confirmed in writing that it *“received a copy of the letter of ADO Den Haag dated 30 April 2005 to player K. in accordance with the regulations of the KNVB”* and that Dutch *“regulations do not require that such a letter should have been sent by registered mail to either the KNVB or player K.”* (translation provided by Den Haag).
26. Indeed, Article 48 of the Professional Football Regulations of the Dutch FA states that *“a professional football organisation that wishes to retain a young player in its youth training programme, who is an active amateur [...] must under the terms of the Pool Training Programme Regulations provide written notice to the player concerned by 1 May at the latest of the calendar year”* (translation provided by Newcastle United).
27. Furthermore, Den Haag submitted evidence that in May 2005 it began negotiating with the Player for a professional contract. Although, no written offer was ever put forward by Den Haag to the Player, the negotiation is still evidence of Den Haag’s interest in retaining the Player on its roster.
28. Finally, Den Haag has provided evidence that it properly trained the Player for eight seasons. The Player has, in fact, reached a good footballing level and has been part of the Dutch under 17 selection. Moreover, the April 2005 Assessment Form submitted by Den Haag shows that the Player was regarded by Den Haag as one of the best players of its class.
29. In light of all the above evidence, it would be contrary to common sense to conclude that Den Haag was not at all interested in keeping the Player any longer. Accordingly, the Panel finds that Den Haag has shown persuasive evidence of a bona fide and genuine interest in retaining the Player on its roster for the following season. As a consequence, the Panel holds that Den Haag has justified under Article 6 para. 3 of Annex 4 to the 2005 Transfer Regulations that it is entitled to training compensation.

F. The Amount of Training Compensation Due

30. Den Haag has requested training compensation in the amount of EUR 220,000.
31. At the hearing, Newcastle United explicitly stated that, if the Panel were to find that training compensation was due, it accepted that the amount indicated by Den Haag was correct.
32. Therefore the Panel finds, and so holds, that Newcastle United must pay Den Haag EUR 220,000 as training compensation for the transfer of the Player.

The Court of Arbitration for Sport rules:

1. The appeal filed by ADO Den Haag on 30 August 2006 is upheld and the Decision issued on 27 April 2006 by the FIFA Dispute Resolution Chamber is reversed.
2. Newcastle United Football Co. Ltd. is ordered to pay to ADO Den Haag the amount of EUR 220,000 (two hundred twenty thousand Euro) as training compensation for the transfer of the player K.
3. All other motions or prayers for relief are dismissed.

(...)