



Arbitration CAS 2010/A/2049 Al Nasr Sports Club v. F. M., award of 12 August 2010

Panel: Prof. Petros Mavroidis (Greece), Sole Arbitrator

Football

Unilateral termination of the employment contract without just cause

Unauthorised leave

Bad performance

Sanction imposed on the player

Liability of the club for the sign-on fee

- 1. If, in accordance with the employment contract, a club can penalise a player for late returning from international duty, but doesn't take action for ten months, this passage of time creates a rebuttable presumption to the effect that the player might legitimately believe that he is exonerated from any liability. It is then for the club to adduce evidence to rebut this presumption. In the absence of any evidence, the club has no just cause for terminating the employment contract.**
- 2. In the absence of strict contractual language, inadequate sporting performance cannot constitute a just cause for a club to terminate the employment contract.**
- 3. A contract might be legitimately terminated for reasons of violation of *jus cogens*, not explicitly mentioned in a contractual arrangement. Such motives for termination of contract though, are of such importance that termination must occur within the briefest of all deadlines. Therefore a club has no valid just cause for terminating the employment contract if, after serving a disciplinary sanction for inadequate behaviour, the player continued to play for the club without the latter reacting for some four months after the incident.**
- 4. Unlike premiums or bonuses which necessarily depend on the player's performance, a sign-on fee is a contractual obligation and is not performance-related. If a club has been found to have illegally terminated the employment contract, it is liable for its contractual obligations, including payment of the sign-on fee.**

Al Nasr Sports Club (the “Club” or the “Appellant”) is a football club based in Dubai, United Arab Emirates (UAE) and plays in the UAE Premier League.

F. M. (the “Player” or the “Respondent”) is a professional football player and was born in Tehran, Iran in 1977.

It is not disputed that the parties entered into an employment contract commencing on 1 July 2006, for a duration of two years, that is, until 30 June 2008 (the “Contract”). The Contract provided that the Club would pay the Player the total amount of USD 2,000,000 over the term of the Contract, pursuant to a specified payment schedule.

Clause 2.L. of the Contract provided, *inter alia*, that the Player undertook “*Not to depart the country without a written permission from the club management. If the Player’s return is late beyond the agreed date, the player will be fined (5000) USD (five Thousands) USD for each day delayed, and two month salary if he delays more than five days*”.

By letter dated 24 June 2007, the Club terminated the Contract invoking three distinct grounds in order to justify the termination, namely, that the Player had taken unauthorised leave, was not performing at an adequate level, and was involved in a racist incident while on loan to another club, Al Ahli F.C., originating in Dubai.

The Player filed a claim with the Dispute Resolution Chamber (DRC) of the Fédération Internationale de Football Association (FIFA) for breach of contract.

By decision dated 16 April 2009, the FIFA DRC partially accepted the Player’s claim and ordered the Club to pay the Player USD 822,000 (the “Decision”).

On 31 January 2010, the Club filed an appeal at the Court of Arbitration for Sport (CAS) against the Decision pursuant to Article R47 of the Code of Sports-related Arbitration (2010 edition) (the “Code”).

On 14 February 2010, the Club filed its appeal brief, requesting the following relief:

- “1. *To annul the decision of the FIFA Dispute Resolution Chamber dated 16 April 2009 notified to the club on 13 January 2010.*
2. *To establish that the player F. M. has breached the Employment contract entered with the Appellant.*
3. *To condemn the Respondent to the payment of the proceeding costs before The CAS.*
4. *To condemn the Respondent to the payment of the legal expenses incurred by the Appellant in the amount of USD 30,000”.*

On 5 March 2010 the Player filed his answer, requesting the following relief:

- “1. *The plea of the Appellant be dismissed*
2. *The costs of the proceedings be imposed on the Appellant*

By way of precaution it is also applied that

2a. The Appellant be sentenced to pay to the Respondent USD 822,000.00 plus interest in accordance with the FIFA rules and regulations”.

A hearing was held on 28 June 2010 at the CAS headquarters in Lausanne. Neither party raised objections as to the constitution of the Panel, and, at the conclusion of the hearing, the parties confirmed that they were satisfied with the procedure.

LAW

Jurisdiction of the CAS

1. 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 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 the appeal, in accordance with the statutes or regulations of the said sports-related body.

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance”.

2. The Appellant relies on Article 63 par. 1 of the FIFA Statutes to base his right of appeal to the CAS. The jurisdiction of the CAS was not contested by the Respondent and was further confirmed by the parties’ signing the Order of Procedure.

3. The Sole Arbitrator is therefore satisfied that the CAS has jurisdiction in this matter.

Applicable Law

4. 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

5. Article 62 paragraph 2 of the FIFA Statutes provides that the:

“Provisions of the CAS Code of Sport-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

6. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FIFA shall apply primarily and Swiss Law shall apply subsidiarily.

Admissibility

7. Article 63 par. 1 of the FIFA Statutes provides that the statement of appeal must be sent to the CAS within 21 days of receipt of notification of the DRC Decision.
8. The DRC Decision was notified to the parties on 13 January 2010. The Statement of Appeal was filed on 31 January 2010. It follows that the appeal was filed in due time and is admissible.

Merits of the Appeal

9. The Contract at issue stipulates the rights and obligations of each party, including reasons for termination. The questions to be addressed by the Sole Arbitrator include:
 - I. Whether the Appellant justifiably terminated the Contract; and
 - II. What are the legal consequences of the breach depending on whether it was or was not justifiable.

A. Grounds for Termination

10. Recall that in the letter of termination sent by the Appellant, three reasons are given for the termination of the contract: (i) unauthorised leave; (ii) bad performance (based, *inter alia*, on the report by the coach); and (iii) the Al Ahli incident, that is, the condemnation of the Player for racist behaviour. The DRC dismissed all grounds for termination advanced by the Appellant. The DRC then calculated the compensation due to the Player based on the value of Contract; it subtracted from the total amount the compensation that had already been paid to the Player, and also the monetary sums that the Player received by virtue of his subsequently signing a contract with Esteghlal, an Iranian football club, for whom he played after the Club had terminated the Contract with him. Note that the Player played for Esteghlal and received monetary compensation for his services during the second year of his contract with the Club (since his contract was terminated at the end of his first season with the Club).
11. Unauthorised leave: There is no dispute between the parties that the Club had agreed to release the Player from his obligations if the latter were called upon to represent his country, Iran, and play for the national team. In its appeal and before the Panel, the Appellant complained that the Player was absent without informing the Club for the following periods: 5-18 August 2006; 27-29 August 2006; 29 August-7 September 2006; 7-13 October 2006. During that period, according to the Appellant, Iran played games on 8 August 2006; 16 August 2006; 2 September 2006; 6 September 2006; 4 October 2006; 6 October 2006; 11

October 2006. Since the Player must be back within 24 hours after the match for which he was called upon, the Player was unjustifiably away from the Club from 5-13 August 2006; 17-18 August 2006; 27-29 August 2006; 7-8 October 2006; 12-13 October 2006. The Panel notes the following: first, it is for the Club to prove its assertion, so there should be no doubt as to the burden of production of proof. Second, there is discrepancy between the Club's assertions and the fax submitted to the Panel by the Respondent where the game of 8 August 2006 is not mentioned, but one additional game (15 November 2006) is. This fax is an official request to the UAE FA to release the Player for 5 games. Third, according to the Contract (clause 2.L.), the Club could have penalized the Player for every day of delay with USD 5,000. Moreover, according to clause 9(d), it could penalize the Player for being late in training with USD 500. It did none of the above. The Club did not take action against the Player for 10 months, until 24 June 2007 when it decided to terminate the Contract for, *inter alia*, being late when coming back from international duty. This passage of time creates, in the eyes of the Panel, a rebuttable presumption to the effect that the Player might have legitimately believed that, assuming *arguendo*, he had been late returning to the Club after he had completed his international duty, he was exonerated from any liability. The Club adduced at the hearing no evidence at all to rebut this presumption. At the request by the Sole Arbitrator to what extent the Club could produce evidence to this effect, the Appellant repeated what already had been included in the Appeal. Against this background, the Panel sees no reason to disturb the corresponding findings in the DRC Decision and rejects the claims by the Club in their entirety.

12. Inadequate sporting performance: The Club may have been legitimately disappointed with the performance of the Player, especially since they made an investment of a reasonable size. However, nothing in the Contract justifies termination of contract based on sporting performance. Moreover, it happens quite frequently that clubs sign players who subsequently disappoint with their sporting performance. In the absence of strict contractual language, inadequate sporting performance can hardly constitute a legitimate breach of contract. This is not to say that the Club cannot terminate the contract in such cases, provided of course, that it has reached an agreement with the Player in this regard. This has not been the case here. For these reasons, this plea must be rejected as well.

13. Al Ahli incident: The incident occurred on 23 February 2007. The Player was sanctioned by the UAE FA and then continued to play after he had served the sanction imposed on him. There is some doubt as to whether the behaviour of the Player could indeed qualify as racist. The Panel however, decided not to delve into this issue any further. The reasons are the following. Undeniably, contracts cannot (and should not) be read in clinical isolation of the legal regime within which they operate. For reasons of violation of *jus cogens*, not explicitly mentioned in a contractual arrangement, a contract might, in the view of the Panel, be legitimately terminated. Such motives for termination of contract though, are of such importance that termination must occur within the briefest of all deadlines. There are two reasons to believe that this had not been the case here: first, the UAE FA sanctioned the Player with a rather routine sanction. Second, the Club did not react until June 2007, that is, some four months after the incident had been produced. Under the circumstances, the Appellant did not manage to persuade the Panel that this is legitimately grounds for

terminating the Contract and, consequently, this ground for lawfully terminating must be rejected as well.

14. Based on the above, the Sole Arbitrator concludes that all the grounds invoked as justification for termination of contract must be dismissed. Therefore, the Contract has been terminated illegally. As a result, the Club must bear all consequences for unlawful termination of the Contract that bound it with the Player.

B. Calculation of compensation

15. In relation to the Appellant's claim that the signing fee is comparable to bonuses or premiums and only due when the player is still under contract, the Panel notes that the Contract provides that "*the player shall receives (sic) or transferred to his account an amount of (700.000) USD (Seven Hundred Thousands) USD as a signing fee for the second year of contract*". The signing fee is a contractual obligation and is not performance-related (unlike premiums or bonuses which necessarily are dependent on a player's performance). As the Panel has found that the Club terminated the Contract illegally, the Club is liable for its contractual obligations, including payment of the USD 700,000 signing fee for the second year. The burden of proof to show why the sum of USD 822,000 (which includes the USD 700,000 signing fee) that had been inflicted on the Club as a result of the unlawful breach of contract by the DRC, rests on the Appellant. Alas, the Club did not manage to adduce any proof that would cast doubt on the soundness of the DRC Decision. As a result, the Panel sees no reason to deviate from the DRC findings in this respect and decides that the Club shall pay the Player the sum of USD 822,000.

Conclusion

16. In light of the foregoing, the Sole Arbitrator dismisses the Appellant's appeal and upholds the Decision of the FIFA DRC.

The Court of Arbitration for Sport rules:

1. The appeal filed by Al Nasr Sports Club on 31 January 2010 is dismissed.
2. The decision of the FIFA Dispute Resolution Chamber taken on 16 April 2009 is confirmed.
- (...)
5. All other or further claims are dismissed.