



**Arbitration CAS 2006/A/1100 E. v. Club Gaziantepspor, award of 15 November 2006**

Panel: Prof. Ulrich Haas (Germany), President; Mr Efraim Barak (Israel); Mr Jean Philippe Rochat (Switzerland)

*Football*

*Contract of employment*

*Termination of the contract without valid reason*

*Breach of contract*

*Compensation*

1. **According to the jurisprudence of the Swiss Federal Tribunal the circumstances which occur after the declaration of termination shall not be taken into account while determining whether there was or not a valid reason to terminate a contract. Consequently newspaper articles published only after the letter of termination whereby the Player expressed that he no longer wished to resume his work with a club, may not constitute a valid reason for the Player to terminate the contract.**
2. **Only a breach which is of a certain severity justifies termination of a contract without prior warning. The late payments owed under a contract do not constitute a valid reason for the termination of the contract without a prior warning. This follows from the principle of good faith. In this regard, the overall circumstances of a case have to be taken into consideration and particularly the length of the employment, the club's precarious sporting situation and the key role which the player had in the club's team.**
3. **Under Swiss Law, even if a player has no valid reason to terminate the contract early, he cannot be compelled to remain in the employment of a particular employer. However the player is not withstanding the possibility of sporting sanctions - obliged to compensate for damages, if any.**
4. **Under FIFA Regulations, the player who has committed a breach of contract shall pay compensation. It is appropriate to respect FIFA's autonomy in this regard and to refer the dispute back to the DRC to calculate the compensation due to the club.**

The Appellant, E., ("the Player" or "the Appellant") is a football player.

The Respondent, Club Gaziantepspor, ("the Club" or "the Respondent") is a Turkish football club with its seat in Gaziantep in Turkey. The Club is affiliated to the Turkish Football Federation, which in turn is a member of the Fédération Internationale de Football Association (FIFA). FIFA is the

international sports federation governing the sport of football worldwide. FIFA is an association established in accordance with Art. 60 of the Swiss Civil Code and has its seat in Zurich (Switzerland).

On 15 June 2004 the Appellant and the Respondent concluded an employment agreement called “*protocole d’accord*” (“the Contract”), pursuant to which the Appellant would play for the Respondent starting on 1 July 2004 and expiring on 30 June 2007. The Contract provides *inter alia*:

“2/ *Le Club s’engage à garantir au Joueur les conditions financières ci-dessous:*

*Saison 2004/2005: [...] USD nets*

*Saison 2005/2006: [...] USD nets*

*Saison 2006/2007: [...] USD nets*

*Modalités de règlement des rémunérations:*

*Saison 2004/2005: [...] USD nets, soit:*

*[...] USD nets le jour de la signature du contrat officiel*

*[...] USD nets sous forme de salaire d’un montant de [...] USD nets par mois, pendant dix mois, d’août 2004 à mai 2005, payable au plus tard le 15 du mois suivant.*

*[...] nets au prorata des matchs de championnat de Turquie (présence dans les 18 joueurs sélectionnés), et payable tous les quatre matchs.*

...

*Saison 2005/2006: [...] USD nets, soit:*

*[...] USD nets au plus tard le 10/07/2005*

*[...] USD nets sous forme de salaire d’un montant de [...] USD nets par mois, pendant dix mois, d’août 2005 à mai 2006, payable au plus tard le 15 du mois suivant.*

*[...] nets, aux mêmes conditions que pour la saison 2004/2005.*

...

*6/ En cas de litige ou de non-respect de ce protocole, les parties s’engagent à respecter le Règlement de la FIFA qui jugera”.*

On 14 March 2006 the Appellant’s agent and legal counsel wrote a letter to FIFA in which he complained about repeated delays by the Respondent regarding the monthly payments. The letter reads *inter alia*:

*“... Currently our client has not been paid his salary for December 2005 and January 2006. His salary which was due to be paid on the 15<sup>th</sup> December 2005 was actually paid on the 6<sup>th</sup> February 2006.*

*This is completely unacceptable and we consider the Club have unilaterally breached our client’s Contract.*

*In the circumstances our client is treating the Contract as terminated and we have advised our client he is free to sign for another Club.*

*...”.*

On 17 March 2006 the Club lodged a claim with FIFA against the Player for unexcused absence as of 15 March 2006. It requested that the Appellant be ordered to return to the Club immediately.

On 17 and 18 March 2006 reports appeared in Turkish newspapers in which the Vice-President of the Club was cited as having said: *"We are the son of an old bull fighter and campaigner. In our understanding who escaped from war got an execution of the death penalty. Our way with E. is separated. We will take necessary procedures against him"*. The President of the Club is cited as having said: *"I will terminate him. He should know he will never return to Gaziantep and he will never play football any more"*.

Shortly after the newspaper articles were published the Appellant left Turkey. By letter of 20 March 2006 the Appellant's agent and legal counsel asked the President of the Club to refrain from making statements that appear to be an attempt to smear the Appellant's integrity and that harm his reputation both in the Turkish Community and abroad.

By letter of 24 March 2006 FIFA asked the Club to state its position regarding the Player's claim, including written evidence of its fulfilment of all its financial obligations towards the Player.

By letter of 4 April 2005 to FIFA the Respondent commented on the Appellant's allegations. In said letter the Respondent claimed that it had fulfilled all of its obligations under the Contract. For this purpose it submitted copies of payment receipts which show the following payments:

- 13.07.2005: USD [...]
- 28.09.2005: USD [...]
- 28.09.2005: USD [...]
- 27.10.2005: USD [...]
- 27.10.2005: USD [...]
- 24.11.2005: USD [...]
- 24.11.2005: USD [...]
- 24.11.2005: USD [...]
- 19.12.2005: USD [...]
- 19.12.2005: USD [...]
- 31.01.2006: USD [...]
- 31.01.2006: USD [...]

In addition the Respondent requested that the Appellant be ordered to return to the Club immediately.

By letter of 12 April 2006 to FIFA the Appellant commented on the Respondent's letter and pointed out that the Respondent's details on when the payments were made were not correct. Furthermore, he pointed out that he did not receive any payment whatsoever on 31 January 2006 and did not sign any payment receipt for USD [...] and that therefore the payment receipt dated 19

December 2005 was a forgery. He therefore requested the Club to submit the originals of the payment receipts so that their authenticity could be examined.

By letter of 20 April 2006 the Respondent submitted the original payment receipts to the FIFA Dispute Resolution Chamber (DRC). By letter of 26 April 2006 the Appellant requested the DRC that all of the payment receipts be examined to see whether they were forgeries.

Following an investigation of the matter by the DRC, the DRC decided on 27 April 2006 (the "Decision") that the Appellant's claim to payment of outstanding salary be rejected and that the Respondent's request that the Appellant be ordered to resume duty with the Respondent immediately be upheld. The DRC further stated that *"in the event that the Player E. does not comply with the present decision, the matter shall be submitted to FIFA's Disciplinary Committee, so that the necessary disciplinary sanctions may be imposed"*.

By letter dated 6 June 2006 the Appellant filed with CAS his statement of appeal against the Decision.

By letter dated 16 June 2006 the Appellant filed his appeal brief, in which he requested, *inter alia*, temporary relief, namely

- (1) *"to grant the Appellant a temporary allowance to sign a new contract with a new club without penalty and without transfer fee and providing that the contract will be immediately terminated without penalties being due in the unlikely case that the CAS would uphold the decision of the DRC"*, and
- (2) *"to stay the execution of the decision of the DRC on the claim presented by Player E. against Club Gaziantepspor, rendered on 27 April 2006"*.

In his appeal brief the Appellant requests, *inter alia*, that:

- a) *"the CAS "annul the decision" of the DRC dated 27th April 2006"*;
- b) *"the CAS confirm that E. has acted at all times in a professional manner and in accordance with his contractual obligations towards the Club"*;
- c) *"the CAS to rule that the Club has unilaterally terminated the contract with E. without just cause by reason of persistent and repeated late payment of salary and bonuses and being three months in arrears with payment"*;
- d) *"the CAS confirm that E. is now a free agent and may sign a new contract with a new club without any penalty and without payment of a transfer fee by the new club to Gaziantepspor"*;
- e) *"the CAS order the Club to pay E. compensation comprising of*
  - *three and a half months arrears of salary and bonuses for the period 1<sup>st</sup> December 2005 to the 14<sup>th</sup> March 2006; and*
  - *compensation for the period from the 15<sup>th</sup> March 2006 up to the first payment date of any new contract signed with a new club calculated at the rate of USD [...] per annum net of tax pro rata"*;

- f) *“the CAS impose sanctions against the Club in respect of the defamation of E.’s character contained in the Turkish sporting media”*; and
- g) *“the CAS order the Club Gaziantepspor to pay all costs and expenses relating to the preparation and conduct of the proceedings before the DRC and of this arbitration including, but not limited to, those of its attorneys and advisors details of which the Appellant shall produce in due course within the deadline to be set to this effect by the Arbitral Tribunal”*.

By decision of 6 July 2006 the President of the Appeals Arbitration Division decided to allow the application by E. to stay the decision issued on 27 April 2006 by the FIFA Dispute Resolution Chamber.

On 14 July 2006 the Panel issued an order, according to which: *“The application by Club Gaziantepspor for the payment by E. of USD 1,000,000 as a security into a CAS escrow account is dismissed”*.

By letter dated 11 July 2006 the Respondent filed its answer in accordance with Art. R55 of the Code.

In his answer the Respondent requests to

- a) *“reject in full the Appeal”*;
- b) *“establish that the Respondent has acted in perfect accordance with its contractual obligations towards the Appellant”*;
- c) *“establish that the Appellant is still contractually bound to the Respondent and that he must hence perform the contract dated 15 June 2004”*;
- d) *“establish that the Appellant shall immediately resume duty with the Respondent”*;
- e) *“condemn the Appellant as the only responsible of this trial, to the payment in the favour of the Respondent of the legal expenses incurred”*;
- f) *“establish that the costs of the arbitration procedure shall be borne by the Appellant as the only responsible of this trial”*.

Subsidiarily the Respondent requests – *inter alia* - to

- a) *“reject in full the Appeal”*;
- b) *“establish that the Respondent has acted in perfect accordance with its contractual obligations towards the Appellant”*;
- c) *“establish that the Appellant has breached his employment contract without just cause during the protected period”*;
- d) *“assess the amount of compensation for breach of the contract which should be paid by the Appellant to the Respondent in the amount of USD [...]”*;
- e) *“establish that the Appellant’s next club will be jointly and severally liable with him to pay the compensation due to the Respondent”*;
- f) *“impose a sporting sanction on the Appellant in accordance with Art. 17 (3) of the Regulations”*;

- g) *“impose a sporting sanction on the Appellant’s next club for inducement to breach of contract in accordance with Art. 17 (4) of the Regulations”;*
- h) *“condemn the Appellant as the only responsible of this trial, to the payment in the favour of the Respondent of the legal expenses incurred” and*
- i) *“establish that the costs of the arbitration procedure shall be borne by the Appellant as the only responsible of this trial”.*

By letter dated 14 July 2006 the CAS informed the Appellant that the Respondent had filed a counterclaim in its answer and granted the Appellant a deadline of 20 days to lodge a reply to the counterclaim. This time limit was subsequently extended until 9 August 2006.

By letter dated 9 August 2006 the Appellant submitted its reply.

By letter dated 11 August 2006 the CAS informed the parties that the Panel had decided to order the expert opinion, requested by the Appellant, on the authenticity of the signatures on the receipts dated 19 December and 31 January, which had allegedly been signed by the Player. In addition, the parties were informed of the name of the expert appointed by the Panel, *i.e.* Mr Christian Jaccard. In order to proceed with the expert opinion the Respondent was ordered to submit all originals of the receipts to CAS and the Appellant was ordered to provide CAS with the documentation required for such an expert opinion. Furthermore the parties were invited to express any comment on the person of the expert to be appointed and on the mission of the expert opinion on or before 16 August 2006.

The hearing was held on 6 September 2006 at the CAS headquarters in Lausanne, Switzerland.

## LAW

### Jurisdiction and Mission of the Panel

1. Art. R27 of the Code provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement. *In casu* the jurisdiction of CAS is based on Art. 59 *et seq.* of FIFA’s Statutes and is confirmed by the signature of the order of procedure dated 22 August 2006 whereby the parties have expressly declared the CAS to be competent to resolve the dispute. Moreover, in their correspondence with the CAS, the parties have at no time challenged the CAS’s general jurisdiction.
2. The mission of the Panel follows from Art. R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Art. R57 of the Code

provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

### **The Applicable Law**

3. Art. R58 of the Code provides that 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.
4. Art. 59 para. 2 of the FIFA Statutes further provides for the application of the various regulations of FIFA, and, additionally, Swiss law.
5. The parties have not expressly chosen any specific rules of law to be applicable to their contractual relationship. As the seat of the CAS is in Switzerland, this arbitration is subject to the rules of Swiss private international law (“LDIP”). Article 187 para. 1 LDIP provides that the arbitral tribunal decides in accordance with the law chosen by the parties or, in the absence of any such choice, in accordance with the rules with which the case has the closest connection. Although the parties have not expressly chosen any specific law, there is, in cases of appeals against decisions issued by FIFA, a tacit and indirect choice of law, in accordance with Art. R58 of the Code and Art. 59 para. 2 of the FIFA Statutes. Such tacit and indirect choice of law is considered as valid under Swiss law and complies in particular with Art. 187 para. 2 LDIP (see for instance KARRER T., *Basler Kommentar zum Internationalen und Privatrecht*, 1996, N. 92 & 96 ad Art. 187 LDIP; PLOUDRET/BESSON, *Droit comparé de l’arbitrage international*, 2002, N. 683, page 613; DUTOIT B., *Droit international privé suisse, Commentaire de la Loi fédérale du 18 décembre 1987*, Bâle, N. 4 ad Art. 187 LDIP, page 657; CAS 2004/A/574). Indeed, these rules provide for the application of the FIFA Regulations and, subsidiarily, Swiss law.
6. Art. 26 of the FIFA Regulations 2005 provides that any case brought to FIFA before the FIFA Regulations 2005 come into force shall be assessed according to the previous regulations and that, as a general rule, all other cases shall be assessed according to the FIFA Regulations 2005, with the exception of disputes regarding training compensations, solidarity mechanisms and labour disputes relating to contracts signed before 1 September 2001. As this dispute was referred to FIFA in March 2006, the FIFA Regulations 2005 apply to this matter. Furthermore, any issues which are not addressed by the FIFA Regulations 2005 shall be decided upon in accordance with Swiss law.

### Admissibility of Appeal and Counterclaim

5. The statement of appeal filed by the Appellant was lodged within the deadline provided by Art. 60 of the FIFA Statutes, namely 21 days from notification of the decision. It further complies with the requirements of Art. R48 of the Code.
6. In appeal arbitration procedures the prerequisite for admissibility in Art. 47 para. 1 of the Code must also be complied with. According thereto the appeal is only admissible if 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*”. This prerequisite has not been fulfilled insofar as the Appellant is seeking a decision on a matter that was not the subject matter of the federation’s internal proceedings; for in that case there is no decision of a sports-related body against which the appeal could be made. The Appellant is, *inter alia*, pursuing a request “*to impose sanctions against the Club in respect of the defamation*” of the Appellant. The Appellant made this request for the first time in the proceedings before the CAS. The Appellant has therefore not exhausted the federation’s internal proceedings with regard to the matter in dispute with the consequence that this request must be dismissed from the outset.
7. With its requests the Respondent is pursuing a counterclaim. This has been admissibly raised in the present case (Art. R55 of the Code) and is covered by the arbitration clause.

### Merits

8. At the centre of the present proceedings are two questions: firstly, whether the Appellant or the Respondent committed a breach of the Contract and secondly what the consequences thereof are.
9. By his agent’s letter of 14 March 2006 the Appellant notified FIFA that he considered the Contract to be terminated with immediate effect and that he was thinking of entering into a new contract with another club. As of 15 March 2006 the Appellant no longer appeared for training and otherwise no longer fulfilled his obligations under the Contract. Instead he travelled to Antalya on 15 March 2006 and left Turkey shortly afterwards. The letter of 14 March 2006 must therefore be considered to be a termination of the Contract by the Appellant.
10. Art. 13 of the FIFA Regulations 2005 provides that – in principle – a contract between a professional and a club may only be terminated on expiry of the term of the contract or by mutual agreement. According to Art. 14 of the FIFA Regulations 2005 each party can also terminate the contract – without consequences of any kind – if there is “just cause”.
11. Although Art. 15 of the FIFA Regulations 2005 determine for which sporting just cause a player may terminate his contract, namely when he appears in less than 10% of the Official Matches in which his club has been involved, the FIFA Regulations 2005 do not define when there is a “just cause” to terminate a contract. One must therefore fall back on Swiss law.



Pursuant to this, 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 are “valid reasons” or if the parties reach a mutual agreement as to the end of the contract (see also ATF 110 I 167; WYLER R., *Droit du travail*, Berne 2002, p. 323; STAEHELIN/VISCHER, *Kommentar zum Schweizerischen Zivilgesetzbuch, Teilband V 2c, Der Arbeitsvertrag*, Zurich 1996, n. 17 ad Art. 334, p. 479). In this regard art. 337 para. 2 of the Code of Obligations (CO) states – according to the translation into English by the Swiss-American Chamber of Commerce: “*A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship*”. According to Swiss case law, whether there is “good cause” for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446). Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545). In other words, it may be deemed as a case of application of the *clausula rebus sic stantibus*. According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties such as a serious breach of confidence (WYLER R., *Droit du travail*, Berne 2002, p. 364; TERCIER P., *Les contrats spéciaux*, Zurich *et al.* 2003, n. 3402 p. 496). Pursuant to the jurisprudence of the Swiss Federal Supreme Court, the early termination for valid reasons shall be however restrictively admitted (ATF 127 III 351; WYLER R., *Droit du travail*, Berne 2002, p. 364; TERCIER P., *Les contrats spéciaux*, Zurich *et al.* 2003, n. 3394, p. 495).

12. In the present case the Appellant is claiming various reasons for being able to terminate the Contract early, namely that he did not receive some of the payments owed under the Contract, the Respondent made some of the payments owed under the Contract late and that it had become unreasonable to expect the Appellant to continue with the employment relationship due to the articles in the Turkish newspapers published on 17 and 18 March 2006.
13. In the Panel’s opinion the newspaper articles, even if the Panel would have found that the citations referred to the Vice-President of the club were indeed said by him, may not constitute a valid reason for the Appellant to terminate the Contract, as the newspaper articles were published only after the letter of termination and therefore at a time when the Appellant had left his place of residence and had gone to Antalya and had thereby expressed that he no longer wished to resume his work with the Respondent. This opinion is confirmed by the jurisprudence of the Swiss Federal Supreme Court. The latter considers indeed that the circumstances which occur after the declaration of termination shall not be taken into account while determining whether there was or not a valid reason to terminate a contract (SJ 1995, 802; WYLER R., *Droit du travail*, Berne 2002, p. 373; TERCIER P., *Les contrats spéciaux*, Zurich *et al.* 2003, n. 3406, p. 496).

14. In the Panel's opinion and pursuant to the above-mentioned jurisprudence, the fact that the payments owed under the Contract were made late does not either constitute a valid reason for the termination of the Contract.
15. It is not disputed that the Respondent - largely - made the payments owed under the Contract late. This is so even if one assumes the facts submitted by the Respondent. The only thing disputed between the parties is how late the payments were made. However, in the final analysis, this question can be left unanswered.
16. For, a prerequisite for terminating because of late payment is that the Appellant should have given a warning. This follows from the principle of good faith; for the breach of duty is – objectively – from the outset not so grave that it would have been unreasonable to expect the Appellant to continue the employment. However, if that is the case the Appellant must – before he terminates the Contract – let the Respondent know firstly that he is complaining that the Respondent's conduct is not in accordance with the Contract and secondly that he is not prepared to accept such breaches of contract in future.
17. Although the Appellant submits in his written pleadings of 16 June 2006 that he repeatedly complained to the Respondent about the unpunctual payments, said submissions, which are moreover disputed by the Respondent, have, however, not been very much substantiated. Thus, for example, no submissions have been made about which belated payments the Appellant complained about, to whom and when. The Appellant also cannot furnish any other evidence of having given any warning, e.g. by producing appropriate correspondence. It would therefore appear that the Appellant acquiesced to the delays in payment, which on the whole were slight. An argument to support this is that the Appellant had legal representation and advice during the period in question. Therefore, had the Appellant wanted to do something about the Respondent's payment behaviour, he would have been able to without difficulty. The pleadings by the Appellant's lawyer and agent, Mr Brennan, in the oral hearing indicate the same. He pointed out that the Appellant always has sufficient funds, that he always received his money – at least up until November – and that therefore he saw no reason to complain to the Respondent in writing.
18. However, if the Appellant did not at the time consider the belated payments to be a "significant" breach, then this fact cannot on its own later constitute a valid reason for termination of the Contract. Instead, the Appellant's silence must be considered to be acceptance of the Respondent's conduct, which would make it appear to be in bad faith to justify termination of the Contract by reference to the belated payments. According to the jurisprudence of the Swiss Federal Supreme Court, the party who terminates the contract and who blames the other party must act without delay; if he does not act immediately he is deemed to have renounced the termination (ATF 123 III 86). This is all the more so in that the Appellant was represented by a lawyer during the period in question.
19. The Appellant is pleading not only unpunctual payments, but also that he did not receive his salary at all for December and January until his termination. It is questionable whether arrears of salary justify extraordinary termination without prior warning. This will depend on the

circumstances of the individual case. What is of importance is whether the salary has already been in arrears for a considerable amount of time or whether the arrears amount to a considerable amount. However, what is also of importance is whether the debtor simply refuses to make payment or whether there are circumstances that could easily be resolved through a warning notice. In the present case the Appellant terminated without taking the Respondent to task about the alleged breach of duty thereby allowing the latter to put things right. At the time of the termination, the Appellant had no reason to assume that a warning notice would not change the Respondent's conduct. In particular the Appellant has not submitted that the Respondent had seriously and finally refused performance. The Panel is therefore of the opinion that - due to the overall circumstances of the case, particularly the length of the employment, the Respondent's precarious sporting situation and in view of the key role which the Appellant had in the Respondent's team - it would in good faith have been reasonable to expect the Appellant to first warn the Respondent prior to terminating the Contract (see also CAS 2005/A/893). Since the Appellant did not do this, the Panel is of the opinion that the Appellant has, from the outset, not made convincing submissions of just cause for the Appellant's termination of the Contract.

20. As an adjunct, the Panel points out that the non-payment and therefore the Respondent's breach of duty, has not been established to the Panel's satisfaction.
21. From the two payment receipts submitted by the Respondent the Panel concludes that the Respondent did pay the amounts owed for the months of December and January. Said two payment receipts show the - alleged - signature of the Appellant and were issued, in the one case, on 19 December 2005 ("the First Receipt") and, in the other case, on 31 January 2006 ("the Second Receipt"). Said receipts are private documents. If the authorship thereof is disputed - as it is in the present case by the Appellant - they can act as evidence of payment only once they have been found to be genuine, for unlike in the case of public documents, there is no presumption of their genuineness.
22. The Panel concludes that the two receipts are genuine not only on the basis of the graphological expert opinion of the appropriately trained expert who has many years of professional experience, Mr Christian Jaccard ("the Expert"), Lausanne, for his examination did not result in a clear conclusion. The Expert understandably and plausibly demonstrated that, on the one hand, the signatures on the receipts have a great similarity with the Appellant's handwriting samples, but, on the other hand, also that certain features, such as the beginning, the position, the stroke, the pressure, etc. or the writing differ between the signatures on the receipts and the samples provided by the Respondent for the purpose of the expertise. In this regard the Expert put forward three hypotheses. It is conceivable that the signature on the receipts is the Appellant's signature which, however, - as can always happen - differs by chance or accidentally from the features of his "normal" signature. However, it is also conceivable that a third party forged the signature or that the Appellant himself forged his own signature. The Expert was unable to say with the requisite certainty which of these possibilities was given in the present case; he was not even able to say in terms of probability. Finally, attention is drawn to the fact that - insofar as the Expert in his expert opinion states a slight tendency in one direction or another - said conclusions must be

evaluated with the greatest care; for – as the Expert himself expressly stated in the oral hearing – the data material for preparing the expert opinion is extremely narrow, for the Appellant provided the Expert with only three original signatures made under normal conditions, upon which the Expert could base his graphological opinion. It must also be pointed out that deviations from one’s “normal signature” can depend on a great number of parameters, about which as little is known in the present case as is known about the conditions under which the signatures requested and made for comparing the handwriting.

23. In order to decide whether the signatures under both receipts are genuine or not, the Panel is not limited to the expert opinion as the source of its finding. Rather, the principle of freedom to evaluate the evidence applies with the consequence that the Panel can form its firm belief on the basis of the entire content of the oral hearing. According to this, it seems to the Panel to be out of the question that the signatures on the two receipts were forged by the Respondent.
24. The Appellant was – according to the consistent statements of both parties – a key player and the star of the Respondent’s team. In other words, the Respondent was dependent on the Appellant. This was particularly true for the period February to March 2006, for in that period the Respondent was in an extremely difficult sporting phase, for it faced being relegated to the second league. The Respondent therefore had little reason to risk termination of the Contract by one of its best players by not paying the remuneration owed under the Contract.
25. It also seems practically out of the question to the Panel that the Respondent was financially unable to pay the Appellant, for there is no indication that the Respondent was in a financially difficult situation at the turn of the year 2005/2006. This has neither put forward as an argument by the Appellant, nor is there any knowledge of other of the Respondent’s players having complained – e.g. to FIFA – that the Respondent was not fulfilling its contractual obligations. Another argument against there having been a financially difficult situation is that the Appellant is not claiming that he did not receive any payments whatsoever any more after a certain time, rather only that he did not receive certain payments.
26. The Vice-President’s account whereby the Appellant asked for an advance payment also appears plausible to the Panel. Although the Appellant raises as an objection that he had sufficient funds in his bank account, it must be pointed out that the advance – as submitted by the Vice-President – was paid in cash on 19 December 2005 and the next day the Appellant left Turkey to go home because of the winter break.
27. In the present case whether the deviation from the normal signature is by chance or whether there has been a forgery by the Appellant can be left unanswered, for in both cases the genuineness of the document would be established. For the sake of good order, it should, however, be pointed out that a forgery by the Appellant of his own signature does not appear to be absurd from the outset. It is not disputed that the Appellant already wanted to leave the Respondent after the 2004/2005 season. The Appellant’s agent and legal counsel, Mr Brennan, kept contacting those responsible at the Respondent in order to obtain the Appellant’s release. However, the Respondent did not want to dismiss the Appellant from the

ongoing Contract. According to the consistent statements of both parties, the Appellant's desire to leave the Respondent became stronger and stronger towards the end of 2005; firstly because the Respondent's sporting situation kept worsening and secondly because there was more and more tension between the Respondent's coach at the time and the Appellant. The Respondent's breach of contract alleged by the Appellant therefore suited the Appellant extremely well. This is shown, not least, by the fact that the Appellant did not take the Respondent to task about the alleged non-payment, rather he immediately terminated the Contract and immediately thereafter left his place of residence and training venue. It is also noteworthy that at no time after the Respondent produced the corresponding receipts did the Appellant report the Respondent to the police for forging documents or fraud.

28. The Panel also find important to point out, that although the Appellant raised in his claim and in his appeal with CAS severe allegations of forgery against the Club, he preferred not to attend the hearing. Thus, preventing from the Respondent's attorney as well as from the Panel the possibility of direct questioning the Appellant and getting a direct impression from his answers which may be of essence in such cases.
29. To sum up therefore, the Panel is satisfied that the Respondent did not commit a breach of contract and that the Appellant therefore has no valid reason to terminate the Contract early. If the Respondent did not commit a breach of contract, then the Appellant's requests b)-e) and g) must be dismissed as unfounded. At the same time the Respondent's requests b) and c) must be allowed.
30. Even if the Appellant did not have a valid reason to terminate the Contract early, the DRC's decision of 27 April 2006 cannot be upheld. At the time, the DRC came to the conclusion that the Contract was still valid and that the Appellant was therefore obliged to immediately resume his services for the Respondent. The Panel does not share this opinion. Instead, the Panel is of the opinion that a player cannot be compelled to remain in the employment of a particular employer. If a player terminates his employment contract without valid reason, then the latter is not withstanding the possibility of sporting sanctions - obliged to compensate for damages, if any, but is not obliged to remain with the employer or to render his services there against his will. This is at least the position under Swiss Law (Art. 337d CO; see also WYLER R., *Droit du travail*, Berne 2002, p. 388 *et seq.*) and under CAS jurisprudence (Preliminary Decision in the matter CAS 2004/A/678; Preliminary Decision and award in the matter CAS 2004/A/691). The Appellant's request must therefore be granted and the DRC's decision must be set aside.
31. Insofar as the Respondent is, with its request, seeking "compensation" from the Appellant by way of a counterclaim, the request is well-founded on the merits because the Appellant committed a breach of contract. This is clearly stated in Art. 17 para. 1 of the FIFA Regulations 2005. This reads: "*In all cases, the party in breach shall pay compensation*". The only question is the amount of said compensation. In this regard Art. 17 para. 1 of the FIFA Regulations 2005 provides:

*"... compensation 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 and incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period”.*

32. Because of its erroneous legal opinion the DRC did not make any comments on the amount of the compensation payable nor did it see any reason to investigate the facts of the case. Since the application of the criteria stipulated in Art. 17 para. 1 of the FIFA Regulations 2005 allows a considerable leeway in the calculation of the compensation, the Panel considers it appropriate to respect FIFA's autonomy in this regard and to refer the dispute back to the DRC to calculate the compensation due to the Respondent.
33. However, the Panel offers the DRC the following guidelines for the making of its decision:
34. The amount of compensation must particularly be guided by the loss suffered by the Respondent. For the question of how this is to be calculated, particular importance is attached to the “law of the country concerned”. In the present case this is Swiss law. The latter – sometimes – allows damages to be calculated as an agreed lump sum as liquidated damages. That is, for instance, the case under Art. 337d para. 1 CO. Said provision grants an employer the right to receive compensation for the damage due to termination of the contract by the employee if the latter, without a valid reason, does not appear at the working place, or if he leaves it without notice. The amount of compensation equals to one quarter of the wage of one month. Pursuant to the jurisprudence of the Swiss Federal Supreme Court related to Art 337d(1), the employer shall not prove any damage whatsoever, because the amount of compensation provided for under Art. 337d para. 1 CO has to be considered as liquidated damages (ATF 118 II 312; WYLER R., *Droit du travail*, Berne 2002, p. 389-390). Whether the Respondent can invoke this provision in the present case is questionable: for Art. 337d para. 3 CO provides that the claim to compensation lapses if it is not asserted by legal action within 30 days from the failure to appear at or the leaving of the working place. The DRC will therefore have to review whether the Respondent complied with said deadline.
35. The Respondent is – in principle – not prevented from claiming compensation for additional damages that goes beyond that in Art. 337d para. 1 CO (see last sentence of Art 337d para. 1 CO). However, the general principles then apply, in particular Articles 42 to 44 CO (CAS 2005/A/893; STAEHELIN/VISCHER, *Kommentar zum Schweizerischen Zivilgesetzbuch*, Teilband V 2c, *Der Arbeitsvertrag*, Zurich 1996, n. 11 ad Art. 337d, p. 680; WYLER R., *Droit du travail*, Berne 2002, p. 390; TERCIER P., *Les contrats spéciaux*, Zurich *et al.* 2003, n. 3435, p. 501-502). Contrary to Art. 337d para 1 CO, the starting point for calculating the compensation is accordingly Art. 42 para. 1 CO, pursuant to which whoever claims damages must prove the damage. The Respondent has, so far, hardly made any submissions in this regard. Of course the requirements in this regard may not be exaggerated. For Art. 42 para. 2 CO provides that if the existence or the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and the measures taken by the damaged party in equity and on the basis of the ordinary course of the events (ATF 118 II 312; see also CAS 2005/A/893; CAS 2005/A/902 & 903).

36. When calculating the damages, the DRC will therefore have to review what economic loss the Respondent suffered by the Appellant's termination of the Contract. A possible head of damages might therefore be the "excess payment" made by paying the advance payment. Possibly the Respondent can also demand back the payment of USD [...] – which became due at the beginning of the season at the latest – *pro rata* for the period between 14 March 2006 and the end of May 2006.
37. To the extent that the Respondent is, with its counterclaim, seeking a sporting sanction against the Appellant and against the new club, the Panel also refers the dispute back to the DRC; for also as far as this is concerned the DRC – because of its erroneous legal opinion – did not have any possibility of adequately investigating the facts and making a decision. However, in so doing the DRC will – except as otherwise provided by the presumption rule – have to bear in mind that sporting sanctions against the new club are only lawful under Art. 17 para. 4 of the FIFA Regulations 2005 if "*the new club is found to be in breach of contract or found to be inducing a breach of contract during the Protected Period*".

**The Court of Arbitration for Sport rules:**

1. The appeal by E. against the decision issued on 27 April 2006 by the FIFA Dispute Resolution Chamber is partially upheld.
2. The counterclaim filed by Club Gaziantepspor is partially upheld.
3. The decision issued on 27 April 2006 by the FIFA Dispute Resolution Chamber is set aside and referred back to FIFA for a new decision in accordance with the grounds of the present award.

(...)