CAS 2022/A/8829 Football Club Okzhetpes v. Gian Dos Santos Martins

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Jacopo Tognon, Professor and Attorney-at-law in Padua, Italy

in the arbitration between

Football Club Okzhetpes, Kökşetaw, Republic of Kazakhstan

Represented by Mr Yuriy Bondarenko, Acting Director, Kökşetaw, Republic of Kazakhstan

- Appellant -

and

Mr Gian Dos Santos Martins, Porto Alegre, Brazil

Represented by Mr Rustam Dzhanybayev, Association of Professional Footballers of the Kyrgyz Republic in Bishkek, Kyrgyz Republic, and by Mr Filip Blagojevic, Attorney-at-law in Belgrade, Serbia

- Respondent -

I. PARTIES

1. Football Club Okzhetpes (the "Appellant" or the "Club") is a football club based in the Republic of Kazakhstan, affiliated with the Kazakhstan Football Federation, which in turn is affiliated with the *Féderation Internationale de Football Association* ("FIFA").

2. Mr Gian Dos Santos Martins (the "Respondent" or the "Player") is a Brazilian professional football player.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows.[1] While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to its reasoning.

A. Background Facts

4. On 20 January 2020, the Appellant and the Respondent signed an employment contract (the "Employment Contract") valid from the date of its signature until 9 November 2020.

5. According to Article 3 of the Employment Contract, the Respondent was entitled to a monthly salary of ZKT 4,334,000.

6. In particular, Article 3 of the Employment Contract reads as follows:

"*3.1 The employer sets the Employee a monthly salary of 4334,000 (four million three hundred and thirty-four thousand) tenge.*

3.2 Wages are paid by cashless payment in cash in the national currency of the Republic of Kazakhstan, at least once a month is not too late the first decade of the next month.

3.3 In the payment of wages, the Employer shall, in written or electronic to inform the Employee about the parts of the wages due to him for the corresponding period, the size and bases of withheld, as well as the total amount of money to be paid.

3.4 All payments due to the Employee and reflected in the text of this employment contract are indicated without taking into account withholding taxes and other mandatory payments provided for by the laws of the Republic of Kazakhstan.

3.5 The Employer independently calculates, withholds and transfers taxes and other mandatory payments from the Employee's income provided for by the legislation of the

[1] Several of the documents submitted by the Parties and referred to in this Award contain various misspellings: for sake of efficiency, they are not all identified with a "[sic]".

Republic of Kazakhstan and received during the period of validity of this employment contract.

3.6 The Employer independently, with the consent of the Employee, withholds and transfers to the account of the trade union committee of FC "Okzhetpes" with the monthly salary of the Employee in the amount of 0.3% during the period of validity of this employment contract.

3.7 Payment for downtime due to the fault of the Employer is set at 50%.% percent of the average salary of the Employee and is paid within the terms stipulated by the legislation of the Republic of Kazakhstan.

3.8 Payment for downtime for reasons beyond the control of the Employer and the Employee is established in the amount of not less than the minimum wage and it is paid within the terms stipulated by the legislation of the Republic of Kazakhstan.

3.9 In case of transfer of the Employer's football team to a higher or lower level the Parties may, by mutual consent, review the working conditions provided for in this employment contract".

7. Furthermore, pursuant to Article 5.2 of the Employment Contract, the Respondent was entitled to 28 calendar days of paid annual work leave (in its exact wording, the Article states that "*The Employer provides the Employee with the main paid annual work leave of 28 calendar days (commitment to the minimum requirements of a standard player contract in the professional football sector in the EU and in the rest of UEFA*").

8. According to the Respondent, the Parties entered into a supplementary agreement pursuant to which the employment relationship was extended until 1 December 2020. However, the Respondent played his last match for the Club against Ordabasy on 30 November 2020.

9. On 19 March 2020, the Club made additions to Order No. 41-od according to which "*During the period of work stoppage, due to the cause beyond the reasonable control of the Employer the salary shall be established in the amount of 50% of the monthly salary of the Employee*". The decision to reduce the salaries was grounded on the Legislation of the Republic of Kazakhstan, Article 3.8 of the Employment Contract, a collective agreement No. 01-03 between the Club and its employees (the "Collective Agreement"), the Kazakh Labour Code and the economic situation of the Club during the COVID-19 pandemic. Throughout 2020, there were various issues, such as downtime for the Club, arising from the COVID-19 pandemic.

10. On 25 February 2021, the Player put the Club in default, requesting from the Club the payment of (i) KZT 13,616,40 as outstanding salaries for the months of March, April, October and November 2020, and (ii) KZT 3,864,600.90 as compensation for the unused annual work leave.

11. On 26 February 2021, the Club sent a letter to the Player stating that it would pay the relevant debt "*after conducting an audit appointed by* [its] *founder and additional funding until mid-April 2021*".

12. On 1 April 2021, the Player sent another letter to the Club informing it that he expected to receive the payment of the outstanding amounts by 15 April 2021.

13. On 22 April 2021, the Player sent an additional notice of default to the Club and invited the Appellant to make the payment by the end of April 2021.

14. It is undisputed that the Club did not subsequently pay these amounts.

B. Proceedings before the FIFA Dispute Resolution Chamber

15. On 10 December 2021, the Player lodged a claim (the "Claim") before the FIFA Dispute Resolution Chamber (the "DRC"), against the Club for breach of the Employment Contract, requesting the payment of the following amounts:

- KZT 13,616,400 as outstanding salaries as follows: KZT 1,083,500 as 25% of the salary for the month of March 2020, KZT 4,334,000 as full salary for the month of April 2020, KZT 4,334,000 as full salary for the month of October 2020 and KZT 3,864,900 as pro rata salary for the month of November 2020 (namely 25 days), plus 5% interest p.a. as from 1 April 2020 until the date of actual payment;

- KZT 3,864,900 as compensation for the unused work leave, plus 5% interest p.a. as from 25 November 2020 until the date of actual payment;

- EUR 879.12 as reimbursement of flight tickets.

16. In its reply, the Club challenged the validity of the Employment Contract and requested the termination of the proceedings "on the basis of fake contract" as follows:

> "*Dear Madam,*
>
> [The Club] *confirm the receipt of your correspondence dated December 13, 2021. We have carefully studied the materials of the claim and found that they are based on a fake contract that* [the Player] *attached to his claim.*
>
> *The document attached by* [the Player] *contains a stamp that is not familiar to us. The stamp has the form of the club's logo, but in reality the club uses a different stamp for documents. This can be easily verified through the FIFA TMS system.*
>
> *The signature of Mr. Botimbayev, as an employer, does not correspond to reality. As evidence we attached the real contract between* [the Club] *and the player Gian dos Santos Martins from Brazil (Attachment 1). You can easily verified this information through the FIFA TMS system (domestic transfers). Also this information can be confirm Kazakhstan Football Federation.*
>
> *Due to the fact that the claim is based on a fake contract, we are ready to give any comments on the employment relationship with Gian dos Santos Martins, and to respond to the claims set out in the lawsuit. We think that this claim was filed by fraudsters in order to receive money from the club. Other evidence and documents attached to the claim may also be fake.*
>
> *We ask you to terminate the proceedings on the initiates case on the basis of fake contract*".

17. On 9 February 2022, the FIFA DRC issued the decision as follows (the "Appealed Decision"):

"*1. The claim of the Claimant, Gian dos Santos Martins, is partially accepted.*

2. The Respondent, FC Okzhetpes, has to pay to the Claimant, the following amount(s):

- KZT 1,083,500 as outstanding remuneration plus 5% interest p.a. as from 1 April 2020 until the date of effective payment;

- KZT 4,334,000 as outstanding remuneration plus 5% interest p.a. as from 1 May 2020 until the date of effective payment;

- KZT 4,334,000 as outstanding remuneration plus 5% interest p.a. as from 1 November 2020 until the date of effective payment;

- KZT 3,864,600.90 as outstanding remuneration plus 5% interest p.a. as from 25 November 2020 until the date of effective payment; and

- KZT 3,864,900 as outstanding remuneration plus 5% interest p.a. as from 1 December 2020 until the date of effective payment.

3. Any further claims of the Claimant are rejected.

4. A warning is imposed on the Respondent.

5. Full payment (including all applicable interest) shall be made to the bank account indicated in the enclosed Bank Account Registration Form.

6. Pursuant to art. 24 of the Regulations on the Status and Transfer of Players (August 2021 edition) if full payment (including all applicable interest) is not made within 45 days of notification of this decision, the following consequences shall apply:

1. *The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.*

2. *The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.*

5. The consequences shall only be enforced at the request of the Claimant in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.

6. The decision is rendered without costs".

18. On 15 March 2022, the Appellant received the grounds of the Appealed Decision.

19. The reasons of the Appealed Decision can be summarized as follows:

- The Single Judge of the FIFA DRC, first of all, established that FIFA had jurisdiction to hear the case and affirmed that "*the October 2021 edition of the FIFA Procedural Rules Governing the Football Tribunal (hereinafter:* the Procedural Rules*)*" shall apply as well as the August 2021 edition of the FIFA Regulations on the Status and Transfer of Players ("RSTP").

- The Single Judge also stated that FIFA was not competent to decide upon matters of criminal law, such as the alleged falsification of signatures and documents.

- In any case, in consideration of the evidence submitted by the Parties, the FIFA DRC ascertained that the Club confirmed the existence of an employment relationship with the Player; however, the Club only provided an untranslated copy of an employment contract, which could not be used as valid evidence pursuant to Article 13 para. 1 of the FIFA Procedural Rules. Furthermore, the Club did not specify the differences between the Employment Contract submitted by the Player and the one submitted by the Club. In addition, the FIFA DRC noted that the Player sent three letters to the Club and the latter had never contested the validity of the Employment Contract nor the amount claimed. Moreover, with the letter dated 26 February 2021, the Club acknowledged its debt towards the Player.

- In consideration of the above, the FIFA DRC concluded that the Club could not establish that the document submitted by the Player was forged and the Club failed to meet its burden of proof. Indeed, the Club only contested the validity of the Employment Contract, but it did not provide any evidence or different position with respect to the outstanding salaries and compensation for unused labour leave, which, therefore, remained uncontested by the Club.

- Therefore, the FIFA DRC concluded that, based on the principle of *pacta sunt servanda*, and in light of Articles 3 and 5.2 of the Employment Contract, the Player was entitled to receive the amount of KZT 13,616,400 as outstanding salaries as well as the amount of KZT 3,864,600.90 as compensation for unused annual work leave.

- With respect to the claimed reimbursement of the flight tickets in the total amount of EUR 879,12, the FIFA DRC noted that the request lacked a contractual basis and it was never mentioned in the correspondence sent to the Club. This part of the claim was, thus, rejected.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 4 April 2022, the Appellant filed its Statement of Appeal, which it also designated to serve as its Appeal Brief, against the Player before the Court of Arbitration for Sport (the "CAS") in accordance with Articles R47, R48 and R51 of the Code of Sports-related Arbitration (2020 edition) (the "CAS Code") challenging the FIFA DRC Decision. In its Statement of Appeal, the Appellant requested for a Sole Arbitrator to decide upon the case at stake, with which the Respondent subsequently agreed.

21. On 5 May 2022, the Respondent agreed with the appointment of a Sole Arbitrator and requested that the time limit to file his Answer be fixed once the advance of costs had been

paid by the Appellant, and indicated that he would not pay his share of the advance of costs for this proceeding.

22. On 6 May 2022, the CAS Court Office confirmed that, pursuant to Article R55 para. 3 of the CAS Code, the Respondent's deadline to file the Answer set out in the CAS letter dated 27 April 2022 was set aside and a new time limit would be fixed upon the Appellant's payment of its share of the advance of costs.

23. On 9 May 2022, FIFA informed the CAS that it renounced to its right to request an intervention in this proceeding further to Article R41.3 of the CAS Code.

24. On 15 June 2022, the CAS Court Office acknowledged receipt of the Appellant's payment of the total of the advance costs of this procedure and ordered the Respondent to file his Answer within twenty (20) days, further to Article R55 of the CAS Code.

25. On 1 July 2022, the Respondent filed his Answer dated 30 June 2022, in accordance with Article R55 of the CAS Code.

26. On 6 July 2022, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division, pursuant to Article R54 of the CAS Code, had decided that the Sole Arbitrator appointed to decide the case was constituted as follows:

Sole Arbitrator: Mr Jacopo Tognon, Attorney-at-Law, Padova, Italy

27. On 5 July 2022, the the Respondent stated that he preferred the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

28. On 11 July 2022, the Appellant stated that it preferred that a hearing be held in this proceeding by videoconference and requested that the Parties be granted the opportunity to file a second round of written pleadings.

29. On 14 July 2022, the Respondent objected the Appellant's request to be permitted to file a second round of written submissions.

30. On 19 July 2022, the Parties were informed that the Sole Arbitrator had decided not to grant the Appellant's 11 July 2022 request that the Parties be permitted to file a second round of written submissions. The CAS Court Office further notified the Parties that, pursuant to Articles R44.2 and R57 of the CAS Code, the Sole Arbitrator had decided to hold a hearing in this matter, to be held by videoconference, further to Articles R44.2 and R57 of the CAS Code.

31. On 28 July 2022, after consulting the Parties as to their availability, the CAS Court Office inter alia confirmed that the hearing would be held on 18 August 2022 by videoconference.

32. On 29 July 2022, the Respondent indicated that it had engaged an additional counsel, namely Mr Filip Blagojevic, Attorney-at-law from Serbia, Belgrade, to represent him in this proceeding.

33. On 2 August 2022, the CAS Court Office issued, on behalf of the Sole Arbitrator, an order of procedure (the "Order of Procedure"), which was signed by the Appellant on 9 August 2022 and by the Respondent on 15 August 2022.

34. On 2 August 2022 and on 4 August 2022, the Respondent and the Appellant, respectively, provided the CAS Court Office with the names of their hearing attendees.

35. On 18 August 2022, in addition to the Sole Arbitrator and Ms Kendra Magraw, CAS Counsel, the following persons attended the hearing:

On behalf of the Appellant:

- Mr Anton Golubev, representative of FC Okzhetpes;

On behalf of the Respondent:

- Mr Gian Dos Santos Martins, the Player;
- Mr Filip Blagojevic, legal counsel;
- Mr Alessandro Zocca, interpreter;
- Mr Rustam Dzhanybaev, representative.

36. At the opening of the hearing, the Parties confirmed that they had no objections to the appointed Sole Arbitrator. During the hearing, the Parties made submissions in support of their respective cases.

37. The Sole Arbitrator heard the testimony of the Respondent.

38. In particular, the Player confirmed that the Club had never informed him about the decision of the latter to reduce the Respondent's salary by 50%. Even when the Employment Contract was prolonged as a consequence of the pandemic, such unilateral decision was never communicated to the Player. The Respondent further stated that he had never talked with the Club about a possible reduction of his salaries. With respect to the Employment Contract, the Player affirmed that he did not remember the contents of Articles 3.6, 3.7 and 3.8. Moreover, he did not remember how many matches he had played; in any case, such information would be easy to find since all matches are recorded. The Respondent stated that he remembered the suspension of the activities due to Covid pandemic, but he also stressed he had always respected the instruction provided by the Club and he had never stopped training, even alone, in order to maintain his fitness. Finally, the Player confirmed that the amount requested as unused labour leave is correct because during the contractual relationship, he did not take any holidays.

39. At the closing of the hearing, the Parties confirmed that they had no objections with respect to their right to be heard and that they had been given the opportunity to fully present their cases.

40. Also on 18 August 2022, after the hearing, the CAS Court Office, on behalf of the Sole Arbitrator and pursuant to *inter alia* Articles R44.3, R56 and R57 of the CAS Code, invited the Parties to submit very short Post-Hearing Briefs. Therefore, the Appellant was granted a deadline of until 25 August 2022 to file its Post-Hearing Brief only addressing the content of paragraph 22 of the Appeal Brief.

41. On 24 August 2022, the Appellant filed its Post-Hearing Brief.

42. On 8 September 2022, after having been granted an extension, the Respondent filed his Post-Hearing Brief.

IV. SUBMISSIONS OF THE PARTIES

43. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every argument advanced by the Parties. The Sole Arbitrator has nonetheless carefully considered all the claims made by the Parties, whether or not there is a specific reference to them in the following summary.

A. The Appellant

44. The Appellant's submissions, in essence, may be summarised as follows.

45. The Appellant first states that the Employment Contract was valid from 20 January 2020 until 9 November 2020 and the relevant salary was equal to KZT 4,334,000 gross.

46. The Appellant affirms that during the validity of the Employment Contract, there was downtime from 16 March 2020 until 31 May 2020 and from 4 July 2020 until 8 August 2020. Indeed, on 15 March 2020, the President of the Republic of Kazakhstan introduced a state of emergency as a consequence of the COVID-19 pandemic and from 16 March 2020 the Professional Football League of Kazakhstan announced the suspension of all competitions.

47. The Club, thus, suspended all the activities, including training, from 16 March 2020 until 15 April 2020.

48. The Club affirms that the situation was a forced downtime within the meaning of Article 12 of the Labour Code of the Republic of Kazakhstan according to which "*the procedure for registration of downtime and the terms of payment for Work stoppage for reasons beyond the control of the employer and the employee are determined by labour, collective agreements and are established in an amount not lower than the minimum salary*".

49. Therefore, the Appellant states that on 19 March 2020, the Club made additions to Order No. 41-od according to which "*During the period of work stoppage, due to the cause beyond the reasonable control of the Employer the salary shall be established in the amount of 50% of the monthly salary of the Employee*". The decision to reduce the salaries was grounded on the Legislation of the Republic of Kazakhstan, Article 3.8 of the Employment Contract, a collective agreement between the Club and its employees, the Kazakh Labour Code and the economic situation of the Club during the COVID-19 pandemic.

50. The Appellant further states that the downtime continued until the end of May 2020 and that the Club resumed its activities in June 2020, when the Player received his full salary.

51. However, the Appellant argues that from 4 July 2020 until 8 August 2020, there was another period of downtime and the Player received a salary equal to 50% in the periods from 16 March 2020 until 30 May 2020, and from 4 July 2020 until 8 August 2020.

52. The Appellant therefore affirms that, at the end of the employment relationship with the Player, the Club had a debt towards the Player equal to KZT 7,475,325, which includes the compensation for unused work leave.

53. The Appellant also submits that the claim before the FIFA DRC was based on a fake contract. Furthermore, according to the Club, the Player used an additional agreement to prolong the duration of the Employment Contract until 25 November 2020, which was not signed by the Player nor by the Club.

54. Finally, the Appellant alleges that the FIFA DRC did not consider that the salary was gross and that the Club paid taxes according to Articles 3.4 and 3.5 of the Employment Contract.

55. In its Post-Hearing Brief, the Appellant specifies that downtime periods mentioned in the Appeal Brief shall be taken into account in the determination of the amount that the Player is entitled to receive from the Club.

56. Furthermore, the Appellant states that from the payment due to the Player, a deduction must be made for taxes equal to 10% of the relevant amount.

57. Therefore, according to the Appellant, the total amount that the Club has to pay to the Player is equal to KZT 7,475,325 net.

58. The Appellant's Requests for Relief contained in the Appeal Brief are as follows:

"*1. Accept this appeal for consideration;*

2. Consider this dispute of the sole arbitrator of the Court of Arbitration for Sport;

3. Review the decision of the DRC FIFA taking into account the periods of downtime of FC Okzhetpes in 2020, as well as taking into account the Player's income tax paid by the Club to the tax authorities;

4. Review the decision of the DRC FIFA about the period of contract. According to the Employment contract it was valid till November 9, 2021".

B. The Respondent

59. The Respondent's submissions, in essence, may be summarised as follows.

60. The Respondent points out that the Employment Contract was extended until 1 December 2020 pursuant to a supplementary agreement. Indeed, the Player played his last match with the Club on 30 November 2020.

61. The Player further argues that the Appellant is committing an abuse of procedural rights in these proceedings since in this appeal, the Club adopted a new and different line of defence with respect to the one submitted before the FIFA DRC, and filed new documents and evidence.

62. In this respect, the Respondent claims that the documentation submitted in this appeal was also available during the proceedings before the FIFA DRC, but the Club intentionally decided not to file it.

63. Thus, the Respondent requests the Sole Arbitrator to exclude the documentation and argumentation now submitted by the Club based on Article 57 para. 3 of the CAS Code.

64. The Player states that the Appellant did not develop a specific argument with respect to the supposed forgery of the Employment Contract submitted by the Respondent, either before the FIFA DRC or before CAS. In fact, the Club did not specify the differences between the contract submitted by the Respondent and the one filed by the Appellant in either proceeding. According to the Player, both contracts are identical. In any case, the Appellant did not demonstrate the alleged forgery.

65. The Respondent affirms that the FIFA DRC was right in establishing that the employment relationship was in place until 25 November 2020. Indeed, the Employment Contract was extended by virtue of a supplementary agreement. Moreover, when the Player requested to the Club the payment for 25 days of the month of November 2020, the Club did not contest such circumstance and confirmed the debt. In addition, the Player performed his duties in favour of the Club until 30 November 2020, when he played the last time for the Club.

66. The Player further states that he requested the payment of the full salary of April 2020. The Appellant, indeed, did not prove that it paid the 50% of the April 2020 salary. Furthermore, the unilateral reduction made by the Club further to COVID-19 cannot be accepted since there was no agreement and the Player had not been informed about such decision. Moreover, the debt was acknowledged by the Club without reservation. In any case, the Appellant did not prove that during the downtime periods it was allowed to reduce salaries.

67. Furthermore, the Respondent argues that the legal provisions quoted by the Appellant shall not be considered as evidence. Indeed, the Appellant did not claim that Kazakhstan law is applicable to this dispute. Moreover, the Club only cited a supposed translation of certain provisions, which is not sufficient to comply with its burden of proof.

68. The Respondent states that according to the Appellant, the reduction was agreed pursuant to a collective agreement dated 28 March 2016, amended on 13 March 2020. However, such collective agreement was not mentioned in the Employment Contract. In addition, the Appellant did not demonstrate that such collective agreement is applicable to players and, specifically, to the Respondent. The Appellant did not demonstrate that the agreement was registered with the Kazakh Football Federation.

69. The Respondent raises also doubts with respect to the fact that the decision of reducing the salaries was adopted by the Club on 13 March 2020, whilst the state of emergency was declared only on 15 March 2020. On 13 March 2020, moreover, there was no player attending the meeting. Furthermore, any collective agreement concerning professional players should have been agreed upon with the collective representatives of the Player, namely the Association of Professional Football Players of Kazakhstan or FIFPRO.

70. With respect to the tax issue, the Respondent recalls that, according to Article 3.4 of the Employment Contract, he was entitled to a net salary. In any case, the Appellant did not demonstrate that it paid the Respondent's taxes.

71. With reference to the October 2020 salary, the Respondent notes that the Appellant did not contest the Player's request and it did not prove that it paid the relevant salary for such month. Also with regard to the unused labour leave, the Respondent emphasises that the Appellant explicitly acknowledged its debt in the Appeal Brief.

72. In his Post-Hearing Brief, the Respondent states that the Appellant's calculation is in contradiction with the words of the Employment Contract, since it assumes that the Respondent's salaries are gross and not net.

73. The Respondent further emphasises that it is uncontested that the 'downtime period' is not related to the months of October 2020 and November 2020.

74. In any case, the Appellant wrongfully calculates the daily amount of the Respondent's compensation to be equal to KZT 144,186.66. Indeed, according to the Respondent, the Appellant did not indicate any legal basis for taking into consideration the salary reductions during the 'downtime' period. In any case, such reduction could not be used with respect to the sum due as unused work leave.

75. The Respondent's Requests for Relief contained in the Answer are as follows:

"*1. Reject the Appeal of the Appellant;*

2. Confirm the decision of the FIFA DRC judge;

3. Order the Appellant to pay the full arbitration costs;

4. Order the Appellant to pay the Respondent an amount towards his costs".

V. JURISDICTION

76. Article R47 of the CAS 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".*

77. Article 58 para 1 of the FIFA Statutes provides as follows:

> "*Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question.*"

78. Article 23 para 4 of the FIFA RSTP provides as follows:

> *"(…) Decisions reached by the single judge or the Players' Status Committee may the appealed before the Court of Arbitration for Sport (CAS)".*

79. The jurisdiction of CAS derives from Article 58 para 1 of the FIFA Statutes, Article 23 para 4 of the FIFA RSTP and Article R47 of the CAS Code. Furthermore, the jurisdiction of the CAS is not contested by the Respondent and is confirmed by the signature of the Order of Procedure. Therefore, it follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

80. Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".*

81. Furthermore, Article 58 para 1 of the FIFA Statutes provides that:

> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question".*

82. The reasons of the Appealed Decision were notified to the Appellant on 15 March 2022 and the Appellant filed its Statement of Appeal on 4 April 2022. Therefore, the 21-day deadline to file the appeal was met.

83. The Sole Arbitrator finds, therefore, that the appeal is admissible.

VII. APPLICABLE LAW

84. Article R58 of the CAS Code states 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".*

85. Article 57 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 apply the various regulations of FIFA and, additionally, Swiss law*".

86. Accordingly, the Sole Arbitrator shall decide the present matter according to the relevant FIFA regulations, and more specifically the FIFA RSTP, August 2021 edition, and the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "Procedural Rules"), October 2021 edition, and Swiss law shall be applied subsidiarily.

VIII. MERITS

87. As a preliminary matter, the Sole Arbitrator recalls that Article 8 of the Swiss Civil Code provides with respect to burden of proof that: "*Unless the law provides otherwise, each*

party shall prove the facts upon which it relies to claim its right." This same standard has also been applied in CAS cases (see CAS 2020/A/6796, para. 98).

88. Bearing this in mind, the main issues to be resolved by the Sole Arbitrator in deciding this dispute are the following:

(a) Shall the Sole Arbitrator refuse the evidence submitted by the Appellant in these arbitration proceedings on the basis of Article R57.3 of the CAS Code?

(b) Is the Player entitled to receive the amount awarded by the FIFA DRC?

89. The Sole Arbitrator will address these issues in turn below.

(a) Shall the Sole Arbitrator refuse the evidence submitted by the Appellant in these arbitration proceedings on the basis of Article R57.3 of the CAS Code?

90. The first issue to be resolved is whether the Sole Arbitrator shall refuse the new evidence submitted by the Appellant in these arbitration proceedings.

91. Indeed, the Respondent in his Answer argued that the Appellant adopted a completely new strategy of defence, compared to the one embraced during the proceedings before the FIFA DRC, and submitted several new documents as evidence.

92. In this respect, the Respondent pointed out that, pursuant to Article R57.3 of the CAS Code, the Sole Arbitrator is entitled to refuse to admit such new evidence in view of the fact that the documentation filed in this appeal was already available to the Appellant during the proceedings in front of the FIFA DRC, but it intentionally decided not to submit it.

93. Thus, according to the Respondent, the Club interpreted and used these proceedings not as an appeal procedure, but rather as a first instance one.

94. In this respect, Article R57 para. 3 of the CAS Code reads as follows:

> "*The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply.*"

95. Article R57 of the CAS Code confers on the Sole Arbitrator the full power to examine all facts and legal issues of a dispute *de novo*. Indeed, the Sole Arbitrator shall be entitled not only to examine the formal aspects of the Appealed Decision, but also to evaluate all facts and legal issues involved in a dispute.

96. However, pursuant to Article R57.3 of the CAS Code, the Sole Arbitrator has discretion to exclude evidence submitted by a party if such evidence was already available or could reasonably have been discovered during the proceedings before the first instance body.

97. Whilst Article R57.3 of the CAS Code entitles the Sole Arbitrator to exclude certain evidence, such provision is carefully used within the scope to not jeopardize the *de novo* character of the review by CAS (see MAVROVATI D., REEB M., *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*). Indeed, the standard of review should not be undermined by an overly restrictive interpretation of this rule. As such, the discretion

to exclude evidence should be exercised with caution, for example in situations where a party may have engaged in abusive procedural behaviour or in any other facts or circumstances where the Sole Arbitrator might, in his discretion, consider it to be either unfair or inappropriate to admit new evidence.

98. The Swiss Federal Tribunal held that Article R57.3 of the CAS Code is in principle not problematic in cases in which the decision under appeal emanates from the FIFA DRC (see BGer. 4A_246/2014 para. 6.4.3.2).

99. Given the above, the Sole Arbitrator notes that the Club, during the proceedings before the FIFA DRC, limited its defense to challenging the validity of the Employment Contract, without providing evidence or an alternative plea.

100. The Sole Arbitrator further points out that that the defense adopted in this CAS sppeal as well as the documentation submitted for the first time in these arbitration proceedings should have been available to the Appellant also during the procedure before FIFA DRC and that Appellant has not attempted to establish that they were not. This may leave as conclusion that these documents are not admissible in the present proceedings. In any case, the Sole Arbitrator determines that this issue can remain open because the Sole Arbitrator does not consider that such documents are decisive for the outcome of this Award.

(b) Is the Player entitled to receive the amount awarded by the FIFA DRC?

101. As indicated above, in accordance with the principle of the burden of proof, which is a basic principle in every legal system that is also established in Article 8 of the Swiss Civil Code, each party to a legal procedure bears the burden of corroborating its allegations. In other words, any party deriving a right from an alleged fact shall carry the burden of proof (see IBARROLA J., *La jurisprudence du TAS en matière de football – Questions de procédure et de droit de fond*, in BERNASCONI/RIGOZZI (eds.), CAS 2009/A/1810 & 1811; CAS 2017/A/5182).

102. Therefore, the Sole Arbitrator has to determine whether the Appellant has discharged its burden of proof in establishing the facts it alleged in its Appeal Brief.

103. In particular, with respect to the Appellant's argument that the Employment Contract was forged, the Sole Arbitrator notes that the Club did not submit any concrete evidence, either during the proceedings before the FIFA DRC nor during this CAS arbitration proceeding, to substantiate its allegation.

104. In this respect, the Sole Arbitrator points out that the Appellant submitted in front of the FIFA DRC a contract in its original language of Kazakh, without providing any translation. Thus, in accordance with Article 13 para. 1 of the FIFA Procedural Rules, it shall not be considered as a valid piece of evidence. Furthermore, it failed to specify in which part the agreement submitted by the Club differs from the one filed by the Player.

105. In this appeal procedure the Club did not submit any different version of the contract with the Player from the one provided by the Respondent. This element is crucial to determine that there is no objection to the content of the employment relationship.

106. In any case, the Sole Arbitrator is of the opinion that the Appellant itself confirmed the existence of an employment relationship with the Respondent.

107. In view of the above, the Sole Arbitrator deems that the Appellant did not discharge its burden of proof with respect to the alleged invalidity of the Employment Contract.

108. As far as the duration of the Employment Contract, the Appellant argued that it was in force from 20 January 2020 until 9 November 2020. In this regard, the Club further stated that the additional agreement submitted by the Respondent to prolong the duration of the employment relationship was not signed by either the Club or the Player.

109. The Respondent, besides, affirmed that the Player and the Club agreed to an extension of their working agreement until 30 November 2020, even if the Player was not in possession of a signed copy of the supplementary agreement. In any case, the Player pointed out that he played his last match for the Club on 30 November 2020 and, thus, their agreement could reasonably be interpreted as tacitly extended. Furthermore, the Respondent stressed that in the first default notice, he summoned the Club to pay, with respect to the month of November 2020, a partial payment corresponding to the salary for 25 days only of such month, and that the Club acknowledged its debt.

110. Based on the above, the Sole Arbitrator deems that the relationship between the Club and the Player was actually extended and did not terminate on 9 November 2020. Indeed, the Respondent performed his duties in favour of the Appellant until 30 November 2020, when he played his last match.

111. In any case, the Sole Arbitrator notes that the Appellant recognised its debt towards the Player with respect to the month of November 2020 at least for 25 days of such month, which is the amount requested by the Respondent in his first default notice of 25 February 2021 as well as before the FIFA DRC.

112. Therefore, the Sole Arbitrator finds that the FIFA DRC was right in concluding that the employment relationship between the Player and the Club lasted at least until 25 November 2020.

113. The Appellant further argued that the Player was not entitled to receive the entire amount awarded in the FIFA DRC Decision since a reduction should apply because of the occurrence of downtime periods.

114. In particular, the Appellant stated that due to the COVID-19 pandemic, the activities of the Club stopped from 16 March 2020 to 15 April 2020, and, then, until the end of May 2020. The normal activities commenced again in June 2020, but from 4 July 2020 until 8 August 2020 there was another downtime.

115. According to the Appellant, during downtime, the Player was entitled to receive only 50% of the amount agreed in the Employment Contract.

116. To support its allegations, the Appellant mentioned Article 112 of the Labour Code of the Republic of Kazakhstan. Furthermore, the Appellant alleged to have amended on 19 March 2020 its Collective Agreement on the basis of Article 3.8 of the Employment Contract, by adding that during periods of work stoppage due to causes beyond the Club's control, the latter is entitled to reduce the relevant agreed monthly salary by 50%.

117. In this respect, the Sole Arbitrator first notes that that the Appellant did not submit any evidence, either in the original language nor translated, of the provisions of the Kazakhstan law it mentioned. The Sole Arbitrator further points out that the Club did not make any argument according to which such provisions, and more generally Kazakhstan law, should apply in these proceedings. Indeed, as previously addressed, the law applicable to the present dispute are the FIFA Regulations and, subsidiarily, Swiss law.

118. In view of the above considerations, the Sole Arbitrator shall not take into consideration the provisions of Kazakhstan law mentioned by the Club.

119. The Appellant argued that the Player was entitled to receive only 50% of his salary for the months of March 2020 and April 2020. However, the Club did not prove that it made any partial payment. In this regard, the Appellant did not submit any evidence corroborating its allegations and, therefore, it did not discharge the burden of proof which falls upon the Club.

120. In any case, the Sole Arbitrator notes that the Appellant and the Respondent did not sign any agreement with respect to the alleged reduction of the Player's salaries and the Appellant did not submit any evidence even with reference to alleged negotiations and agreement about such reduction. References to the Collective Agreement or to the decision allegedly made on 13 March 2020 are of no avail. Indeed, the Sole Arbitrator finds no indication according to which the Collective Agreement mentioned by the Appellant is applicable towards the Player.

121. Furthermore, it is at least strange that the decision of the Club to reduce the relevant salaries was adopted on 13 March 2020, whilst the declaration of emergency by the Kazakh authorities due to the COVID-19 pandemic was on 15 March 2020 and the decision to suspend activities was made on 16 March 2020.

122. Also in the testimony rendered by the Player during the hearing, he confirmed that there was no discussion or negotiation with respect to the possibility to partially reduce his salary.

123. In consideration of the above and of the fact that in any case the Appellant did not contest the amount requested by the Player in his first default notice, but rather confirmed that the Appellant would pay the unpaid salaries (once an internal audit was conducted), the Sole Arbitrator does not find any evidence that would lead to a reduction of the Player's salary as demanded by the Appellant.

124. Regarding tax, the Appellant affirmed that the amount awarded in the Appealed Decision should be reduced in consideration of the fact that the salary agreed in the Employment Contract was gross and, thus, the Club had to pay taxes equal to 10% of the relevant amount.

125. However, the Sole Arbitrator was not pointed to by the Parties, nor can he find, in the Employment Contract any provision according to which the salary should be considered gross. It is also recalled that Article 3.4 of the Employment Contract states that "*All payments to due the Employee and reflected in the text of this employment contract are indicated without taking into account withholding taxes and other monetary payments provided for by the laws of the Republic of Kazakhstan*".

126. In this respect, the Sole Arbitrator points out that, according to the principle of the burden of proof as recalled above, the Appellant bears the burden to prove that the amounts set forth in

the Employment Contract should be considered gross and the intention of the Parties was to consider such sums as gross.

127. However, the Appellant did not prove that it paid the taxes that should be deducted from the relevant amount to be paid towards the Respondent.

128. Furthermore, the Club did not produce any evidence to prove that the other sums previously and actually paid to the Player pursuant to the Employment Contract were different from the amounts requested because of the deduction of the relevant taxes.

129. Moreover, the Sole Arbitrator notes that the Player sent three letters to the Club requesting the payment of his outstanding salaries as a net amount and the Club had never contested the amount claimed, and neither did the Club specify that the sum requested should have been reduced by taxes.

130. It follows that also this argument submitted by the Appellant shall be rejected.

131. Finally, with respect to the unpaid sum of unused work leave, the Sole Arbitrator takes note that the Club did not contest the requested payment and, therefore, such sum shall be considered as rightly awarded by the FIFA DRC.

132. In conclusion, after having fully analysed all the factual elements provided by the Parties and the substantive law and regulations applicable to the merits, the Sole Arbitrator considers that the appeal is rejected and the Appellant must pay the total amount awarded in the Appealed Decision. In other words, the Sole Arbitrator upholds the Appealed Decision.

IX. CONCLUSIONS

133. In conclusion, after having fully analysed all the factual elements provided by the Parties and the substantive law and regulations applicable to the merits, this Sole Arbitrator considers that the Appellant's appeal is not successful and the Appellant must pay to the Respondent the amounts as follows:

- KZT 1,083,500 as outstanding remuneration plus 5% interest p.a. as from 1 April 2020 until the date of effective payment;

- KZT 4,334,000 as outstanding remuneration plus 5% interest p.a. as from 1 May 2020 until the date of effective payment;

- KZT 4,334,000 as outstanding remuneration plus 5% interest p.a. as from 1 November 2020 until the date of effective payment;

- - KZT 3,864,600.90 as outstanding remuneration plus 5% interest p.a. as from 25 November 2020 until the date of effective payment; and

- KZT 3,864,900 as outstanding remuneration plus 5% interest p.a. as from 1 December 2020 until the date of effective payment.

134. The Appealed Decision is, therefore, confirmed.

135. The above conclusion, finally, makes it unnecessary for the Sole Arbitrator to consider the other requests submitted by the Parties to the Sole Arbitrator. Accordingly, all other prayers for relief are rejected.

X. COSTS

(…).

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Football Club Okzhetpes on 4 April 2022 is dismissed.

2. The decision issued by the FIFA DRC dated 9 February 2022 is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 23 October 2023

THE COURT OF ARBITRATION FOR SPORT

Jacopo Tognon
Sole Arbitrator