

**CAS 2021/A/8268 Jaime Moreira Pacheco v. El Zamalek Sporting Club**

**ARBITRAL AWARD**

**delivered by the**

**COURT OF ARBITRATION FOR SPORT**

**sitting in the following composition:**

President: Mr Ivaylo Dermendjiev, Attorney-at-law in Sofia, Bulgaria

Arbitrators: Mr Olivier Carrard, Attorney-at-law in Geneva, Switzerland

Mr Jan Brodec, Attorney-at-law in Prague, Czech Republic

**in the arbitration between**

**Mr Jaime Moreira Pacheco, Portugal**

Represented by Mr Nuno Rêgo, Attorney-at-law in Porto, Portugal

**- Appellant -**

**and**

**El Zamalek Sporting Club, Egypt**

Represented by Mr. Nasr Eldin Azzam and Mr Charles Felix, Attorneys-at-law in Maadi, Cairo, Egypt

**- Respondent -**

## **I. PARTIES**

1. Jaime Moreira Pacheco is a professional football coach of Portuguese nationality (the “Appellant” or the “Coach”).
2. El Zamalek Sporting Club (the “Respondent” or the “Club”) is a professional football club based in Cairo, affiliated to the Egyptian Football Association, which in turn is a member of the Fédération Internationale de Football Association (“FIFA”).
3. The Appellant and the Respondent will hereinafter be jointly referred to as the “Parties”.

## **II. FACTUAL BACKGROUND**

4. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced at the hearing. 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. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its award (the “Award”) only to the submissions and evidence it considers necessary to explain its reasoning.
5. On 23 September 2020, the Appellant entered into an employment contract with the Respondent (the “Employment Contract”). Said contract was supposed to end on 31 July 2021 or, alternatively, at the end of the 2020/2021 sporting season.
6. Under Article 3.2 of the Employment Contract, the Respondent owes the Appellant in consideration of his services a total salary of EUR 1,020,000 net, payable in 10 monthly installments from October 2020 until July 2021.
7. Pursuant to Article 6, the Club agreed to pay the Coach the following bonuses:

*“The first party agreed to pay the following bonuses to the second party:*

*6.1 Match Bonus*

*Home winning bonus: 8,000 EGP [...] NET of any taxes.*

*Away winning bonus: 10,000 EGP [...] NET of any taxes.*

*6.2 Bonuses related to competitions of season 2020-2021:*

*6.2.1 Achieving the Egyptian league title: 204,000 € [...] NET of any taxes.*

*6.2.2. Achieving the Egyptian cup title: 102,000 € [...] NET of any taxes.*

*6.2.3 Achieving the Egyptian Super cup title: 51,000 € [...] NET of any taxes.*

*6.2.4 Achieving the CAF African Champions League title: 306,00 € [...] NET of any taxes.*

*6.2.5 Achieving the CAF African Confederation Cup: 204,000 € [...] NET of any taxes.*

*6.2.6 Achieving the CAF African Super Cup: 102,000 € [...] NET of any taxes.*

*6.3 Regarding the competitions of season 2019-2020:*

*6.3.1 Achieving the Egyptian cup title: 102,000 € [...] NET of any taxes.*

*6.3.2 Achieving the CAF African Champions league title: 204,000 € [...] NET of any taxes.”*

8. According to Article 5 on termination compensation:

*“If any party for what so ever reason terminate the contract before the end of the contract, the terminating party will pay other party an amount of 204.000 € [...] NET of any taxes.”*

9. On 11 March 2021, the Respondent announced that the Appellant was dismissed.

10. On 12 March 2021, the Appellant received an e-mail from the Club, explaining the reasons for the termination of the former’s Employment Contract.

11. On 24 March 2021, the Coach sent an e-mail to the Respondent with his bank account details for payment of the compensation for the alleged termination without just cause of his Employment Contract.

12. On 24 August 2021, the Respondent became the national league champion of Egypt.

13. The Club has stated on their website that the 2020/2021 season in Egypt ended on 28 August 2021, due to a Covid-related postponement.

### **III. PROCEEDINGS BEFORE THE FIFA PSC**

14. On 12 April 2021, the Appellant filed a claim for compensation before the FIFA’s Player’s Status Committee (“FIFA PSC”).

15. The Appellant requested that the FIFA PSC held the following:

*“a) the Respondent has unilaterally terminated the employment contract with the Claimant without just cause;*

*b) the Claimant is entitled to receive payment of outstanding salaries and bonuses from the Respondent in the total net amount of EUR 246.962,50 plus 5% interest as from the respective due dates, as follows:*

- i. EUR 102.000,00 net plus 5% interest from 31 January 2021;*
- ii. EUR 102.000,00 net plus 5% interest from 28 February 2021;*
- iii. EUR 40.800,00 net plus 5% interest from 31 March 2021;*
- iv. EUR 432,50 net plus 5% interest from 19 January 2021;*
- v. EUR 432,50 net plus 5% interest from 28 January 2021;*
- vi. EUR 432,50 net plus 5% interest from 07 February 2021;*
- vii. EUR 432,50 net plus 5% interest from 17 February 2021;*
- viii. EUR 432,50 net plus 5% interest from 11 March 2021.*

*c) the Claimant is entitled to receive compensation for the unilateral termination without just cause, in the total amount of EUR 1.455.065,50, plus 5% interest as from 12 March 2021;*

*d) the Respondent shall cover all costs of these proceedings and make a contribution towards the Claimant's legal costs."*

16. On 30 June 2021, the Single Judge of the FIFA PSC rendered his decision (the "Appealed Decision"), the grounds of which were notified to the Parties on 6 August 2021.
17. In the Appealed Decision, the Single Judge partially accepted the Appellant's claims, finding that the Respondent owed the Appellant compensation in the following amounts:

*"- EUR 244,800 and Egyptian Pounds ("EGP") 40,000 as outstanding remunerations plus 5% interest p.a. as follows:*

*o On EUR 102,000 from 1 February 2021 until the date of effective payment.*

*o On EUR 102,000 from 1 March 2021 until the date of effective payment.*

*o On EUR 40,800 from 12 March 2021 until the date of effective payment.*

*o On EGP 8,000 from 19 January 2021 until the date of effective payment.*

*o On EGP 8,000 from 28 January 2021 until the date of effective payment.*

*o On EGP 8,000 from 7 February 2021 until the date of effective payment.*

*o On EGP 8,000 from 17 February 2021 until the date of effective payment.*

*o On EGP 8,000 from 11 March 2021 until the date of effective payment.*

*- EUR 204,000 as compensation for breach of contract without just cause plus 5% interest as from 12 March 2021 until date of effective payment.”*

18. The grounds of the FIFA decision were:

*“...The Single Judge examined Art. 5 and confirmed that it reciprocal, that is, the same amount would apply equally to both parties in case of termination. Furthermore, the Single Judge observed that the relevant clause did not pose an excessive commitment from any of the parties; in other words, the Single Judge found, while conducting his consolidated practice of a case-by-case analysis, that the clause was to be considered reasonable.*

*Moreover, the Single Judge turned to the arguments brought forward by the Claimant challenging the validity of this clause, as allegedly was only intended to benefit the Claimant.*

*The Single Judge decided the Claimant had not met his standard of proof in this regard and therefore this argument cannot be upheld based on the literal wording of the clause and the principle in claris non fit interpretatio.*

*Based on the foregoing, the Single Judge confirmed that Art. 5 of the Agreement constitutes a legitimate, reciprocal and proportionate liquidated damages contractual stipulation and accordingly, shall be enforced.”*

#### **IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

19. On 27 August 2021, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “Code”), the Appellant filed his Statement of Appeal.

20. On 27 September 2021, in accordance with Article R51 of the Code, the Appellant filed his Appeal Brief.

21. On 9 November 2021, pursuant to article R54 of the Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the case was constituted as follows:

President: Mr Ivaylo Dermendjiev, Attorney-at-law in Sofia, Bulgaria

Arbitrators: Mr Olivier Carrard, Attorney-at-law in Geneva, Switzerland

Mr Jan Brodec, Attorney-at-law in Prague, Czech Republic

22. On 15 November 2021, the CAS Court Office acknowledged the receipt of the Respondent’s Answer to the Appeal Brief (the “Answer”) dated 7 November 2021, noting that it was untimely.

23. On 22 November 2021, the Appellant filed with the CAS Court Office his position on the admissibility of the Respondent's Answer.
24. On 24 November, the Respondent submitted its comments regarding the admissibility of its Answer.
25. On 8 December 2021, the Respondent submitted further comments regarding the admissibility of its Answer.
26. On 23 December 2021, the CAS Court Office informed the Parties of the Panel's decision that the Respondent had failed to timely file its Answer in accordance with Article R55 and Article R56 of the CAS Code, and, as a result, the Answer would not be admitted into the file. The Respondent was also advised of the consequences of its failure to timely file an Answer in the present proceedings.
27. With the same letter dated 23 December 2021, the CAS Court Office invited the Parties to advise whether they preferred a hearing to be held in this matter, or for the Panel to issue an award based solely on the Parties' written submissions.
28. By letters dated 29 December 2021 and 30 December 2021, the Respondent and the Appellant respectively agreed that a hearing was necessary in this matter.
29. In accordance with Article R57 of the CAS Code, a hearing was convened and held on 28 March 2022 in Lausanne, Switzerland. The Panel was assisted at the hearing by Ms. Lia Yokomizo, Counsel to the CAS. The following persons attended:
  - A. For the Appellant:
    - i. Mr Nuno Rêgo, counsel;
    - ii. Mr Nuno Silva, counsel;
    - iii. Mr José Oliveira, counsel;
    - iv. Mr Jaime Filipe Peres Pacheco, party witness;
  - B. For the Respondent:
    - i. Mr Nasr Azzam, counsel;
30. The Parties were given the opportunity to present their case, to make pleadings and arguments, to examine the witness and to answer questions posed by the Panel. Upon closing of the hearing, the Parties expressly stated that they had no objections in relation to their right to be heard. The Panel had carefully taken into account all the evidence and the arguments presented by the Parties, in their written submissions and at the hearing, even if they have not been summarized in the present Award.

**V. SUBMISSIONS OF THE PARTIES**

**A. The Appellant**

31. As to the facts, the Appellant's submissions may, in essence, be summarized as follows:
- On 23 September 2020, the Coach signed an Employment Contract with the Club, according to which the Appellant would render his professional services for season 2020/2021 in exchange for a basic monthly wage in the net amount of EUR 102,000, plus some perks and performance bonuses. The Employment Contract was valid until 31 July 2021 or until the end of season 2021.
  - The Appellant never, while working with the Club, had any problems with any of the players, staff, the board or the Club.
  - On 11 March 2021, the Respondent announced that the Coach was being dismissed, which the Appellant learned through the Club's social media.
  - On 12 March 2021, the Appellant received a communication from the Club via e-mail informing the Coach that his Employment Contract was terminated due to "special circumstances for the team" and "the matches' unfortunate circumstances" and that the termination was effective immediately. The Club assured the Coach that all the latter's financial dues should be settled according to the terms of the Employment Contract within 30 days from the receipt of such termination notice.
  - The Clubs' decision for termination was taken a day after another victory, halfway through the season, when the Club was leading the Egyptian league.
  - After being reassured about receiving his compensation, on 24 March 2021, the Coach sent his bank account details to the Respondent. The Club never responded to the communication and did not make any payment to the Coach. At the time of the termination, the Club was in default with respect of the Coaches' salaries for the months of January and February, as well as for several match bonuses, in the total amount of EUR 224,800 and EGP 40,000.
  - On 24 August 2021, the Club was crowned the national league champion of Egypt.
  - The season 2020/2021 in Egypt ended on 28 August 2021, on the date of the last league match, due to a COVID-related postponement.
32. With regard to the merits, the Appellant identifies the following main issues:
- The Appealed Decision confirmed that the Club unilaterally terminated the contract without just cause and partially accepted the Coach's claim in the contractually agreed amount of EUR 204,000, rejecting the Appellant's claim for compensation in the amount of the Employment Contracts' residual value.

- The Appealed Decision was made on the basis of Article 5 from the Employment Contract. The latter is to be considered void, as it clashes with a semi-imperative provision of Swiss employment law.
- In any event, the common intention of the Parties was for Article 5 to be a simple buy-out clause at the election of the Coach.
- Under Swiss law, the Coach is entitled to receive termination compensation in the amount he would have earned had the employment relationship ended upon expiration of its term. The Employment Contract was terminated significantly ahead of the agreed end date and its residual value was much higher than the amount provided under Article 5.
- When calculating the residual value, it should be taken into consideration that the Employment Contract was due to expire in August 2021.
- Apart from the residual value of his salaries under the Employment Contract, the Appellant was also entitled to performance bonuses which are to be treated as conditional contracts under Swiss law. The condition precedent in this case is to be considered fulfilled as, by unilaterally, prematurely and without just cause terminating the Employment Contract, the Respondent has effectively prevented its fulfillment by acting in bad faith.
- As a result of the specificities of the case, the Appellant is entitled to additional compensation under Swiss law, to be added to the residual value of the Employment Contract and the unpaid performance bonuses.

33. In the Appeal Brief, the Appellant requested the following relief:

*“The Appellant hereby respectfully requests the Court to:*

*(a) declare that the appeal of the Coach is admissible;*

*(b) order the Respondent to pay to the Appellant compensation for the unilateral termination of the employment contract without just cause in the total amount of EUR 1.353.065,50, corresponding to the Employment Contract’s residual value pursuant to Article 337c para. 1 CO, plus 5% interest as from 12 March 2021;*

*(c) order the Respondent to pay additional compensation in the amount of EUR 612.000,00, corresponding to six months of salary pursuant to Article 337c para. 3 CO, plus 5% interest as from 12 March 2021;*

*(d) set aside the part of the Decision that imposed costs on the Appellant in the amount of CHF 5.000,00;*

*(e) order the Respondent to bear all costs pertaining to the arbitration and to make a contribution the Appellant’s legal costs and other expenses in the amount of CHF 30.000,00.”*

**B. The Respondent**

34. The Respondent's statements of fact and law, made during the hearing may be summarized as follows:
- In 2014, there was a previous work relationship between the Parties which had been terminated without just cause by the Appellant, without paying any compensation to the Club.
  - The Respondent called the Appellant immediately after the end of the match on 11 March 2021 and set a meeting with him and his staff to discuss the termination of their contracts precisely because the Club did not want to put the Coach on notice or terminate his Employment Contract by e-mail. The meeting took place around two hours after the end of the match. The Respondent was represented by the son of the Club's president. During this meeting, the Parties discussed the reasons for the termination, one of which was that the Coach asked for his son to be a part of the technical staff and, even though the Club had rejected his request, later on, his son started attending the Club's trainings with his father.
  - Article 5 in the Employment Contract has been freely subscribed to by the Parties and clearly stipulates the precise amount of liquidated damages in case of early termination of the Employment Contract by either the Coach or the Club.
  - The Coach has been the one requesting to add such clause to the Employment Contract and, not in bad faith, interprets it as a buy-out clause that should only favor him.
  - Article 5 of the Employment Contract is not a buy-out clause, and it is not only in favor of the Coach.
  - Article 5 is to be applied in accordance with Article 17 of the RSTP.
  - Before this appeal was filed, the Respondent intended to comply with its payment obligations as per the Appealed Decision. This is the only reason the Club has not yet paid.
35. At the hearing, the Respondent requested that the Panel dismissed the Coach's Appeal in full and upheld FIFA's decision. In addition to that, the Respondent requested the Appellant to bear the legal costs of the Club in the amount of CHF 10,000.
36. As an alternative request, in case the Panel decided that the Appellant is entitled to additional compensation, the Respondent claims this amount should not be more than what has been agreed in the Employment Contract and no more than what he would have earned in the final matches of the league in total.

## VI. JURISDICTION

37. 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 if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.”*

38. The Appealed Decision, at page 13, informs the Parties that an appeal can be filed with CAS according to Article 58.1 of FIFA Statutes.

39. With regard to jurisdiction, the Appellant relies on Article Nine of the Employment Contract and on Articles 57 and 58 of the FIFA Statutes, respectively, providing the following:

*“Article Nine of the Employment Contract*

*This agreement is based, construed and interpreted based upon to the various regulations of FIFA, the Club and the second party herein indicate the decision making bodies of FIFA and/or TAS/CAS directly or in appeal has the exclusive competence to resolve any controversy or dispute whatsoever regarding the terms and conditions set out in the present contract.”*

*“Article 57 (Court of Arbitration for Sport (CAS))*

*FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents. (...)*

*“Article 58 (Jurisdiction of CAS)*

*1. 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 receipt of the decision in question. (...)*

*Furthermore, pursuant to Article 23.4 of the FIFA Regulations on the Status and Transfer of Players, (...) Decisions reached by the single judge or the Players’ Status Committee may be appealed before the Court of Arbitration for Sport (CAS).”*

40. The Respondent has not objected to CAS’ jurisdiction over the underlying matter during the hearing.

41. In addition, all of the Parties accepted CAS’ jurisdiction by signing the Order of Procedure.

42. In view of the above, CAS has jurisdiction to decide the present appeal.

## **VII. ADMISSIBILITY**

43. 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.”*

44. Article 58 par. 1 of the FIFA Statutes further confirms that decisions issued by FIFA may be appealed against before CAS within 21 days of their notification to the Parties.

45. The Appealed Decision was passed on 30 June 2021 and the grounds of the Appealed Decision were communicated to the Appellant on 6 August 2021.

46. The Appellant filed its Statement of Appeal on 27 August 2021. Therefore, the 21-day deadline to file the appeal was respected.

47. Furthermore, the appeal complied with all of the admissibility criteria set forth in Articles R48 *et seq.* of the Code

48. Accordingly, the appeal is admissible.

## **VIII. APPLICABLE LAW**

49. Article R58 of the CAS Code provides as follows:

*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”*

50. According to Article 9 of the Employment Contract:

*“The agreement is based, construed and interpreted based upon to the various regulations of FIFA, the Club and the second party herein indicate the decision making bodies of FIFA and/or TAS/CAS directly or in appeal has the exclusive competence to resolve any controversy or dispute whatsoever regarding the terms and conditions set out in the present Contract.”*

51. Pursuant to Article 57 of the FIFA Statutes:

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

52. In his Appeal Brief, the Appellant has stated the following:

*“In the case at hand, on the basis of R58 of the CAS Code, Article 57 para. 2 of the FIFA Statutes, and Article Nine of the Employment Contract, Swiss law is to be applied in addition to the rules and regulations of FIFA.”*

53. During the hearing, the Respondent stated that, as the Employment Contract was signed and performed in Egypt, the law applicable to this matter should be FIFA regulations and Egyptian law.

54. None of the applicable law rules provided above – neither the applicable law provision in the Employment Contract, nor the applicable FIFA or CAS regulations – leads to the application of Egyptian law to the merits of the dispute.

55. Considering the above, and taking into consideration the choice of law provision contained in the Employment Contract, in conjunction with the applicable provision of the FIFA regulations, the Panel is of the view that the law applicable to the present appeal shall be primarily the FIFA regulations and, subsidiarily, Swiss law.

## **IX. MERITS**

56. The core principle that CAS applies when rendering an award on appeal is the *de novo* principle resulting from Article R57 of the CAS Code. According to Article R57, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision that replaces the challenged decision or may, alternatively, annul the decision and refer the case back to the previous instance.

57. Based on the Parties’ submissions and oral arguments, the issues for determination are the following:

- A. Did the Respondent terminate the Employment Contract unilaterally and without just cause?
- B. If so, is the Appellant entitled to compensation as per Article 5 of the Employment Contract or in accordance with Article 337c para 1 of the Swiss Code of Obligations (CO)?
- C. Is the Appellant entitled to compensation for bonuses under the Employment Agreement?
- D. Is the Appellant entitled to additional compensation pursuant to Article 337c para 3 of the Swiss CO?

**A. Did the Respondent terminate the Employment Contract unilaterally and without just cause?**

58. On 23 September 2020, the Parties entered into the Employment Contract valid until 31 July 2021 or “*till the end of the season 2020/2021*”. On 12 March 2021, the Club terminated the Employment Contract with the Coach, who later filed a claim for compensation before FIFA. FIFA decided that the Club terminated the Employment Contract unilaterally and without just cause.

59. According to constant CAS jurisprudence:

*“CAS, in referral to Swiss law, subsidiarily applicable to the present dispute, constantly held that “just cause” to terminate a contract is generally said to exist where the breach has reached such serious levels that the injured party cannot in good faith be expected to continue the contractual relationship. The question whether just cause in fact existed, shall be established in accordance with the merits of each particular case (ATF 127 III 153 consid. 1 a). As it is an exceptional measure, the immediate termination of a contract for just cause must be accepted only under a narrow set of circumstances. Thus, only a particularly severe breach of the labour contract will result in the immediate dismissal of the employee, or, conversely, in the immediate abandonment of the employment position by the latter. In the presence of a less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after being warned (ATF 129 III 380 consid. 2.2). The judging body determines at its discretion whether there is just cause (Article 337 (3) CO).” (CAS 2009/A/1956).” (CAS 2020/A/7175).*

60. In light of the above, a finding that the Club had just cause to dismiss the Coach would require a case-by-case determination that the Coach has seriously breached his contractual obligations and the Club could not, in good faith, continue to perform.

61. According to the basic principle of burden of proof, a party claiming a right on the basis of an alleged fact shall carry the respective burden of proof. Therefore, the Respondent alleging special circumstances justifying the termination shall actively substantiate its allegations with convincing evidence.

62. The Panel notes that the Respondent, in its email dated 12 March 2021, based its decision to terminate the Employment Contract on the following reasons: “*due to special circumstances for the team*” and “*due to the matches unfortunate circumstances*”.

63. At the hearing, the Respondent invoked the Club’s internal struggles and organizational reforms, allegedly leading to the replacement of the whole staff. The Club further stated that the termination had been discussed with the Coach during the meeting that took place after the 11 March 2021 match, when the Appellant was allegedly told that taking his son to work in the face of the Club’s express refusal constituted another reason for the termination.

64. After a careful examination of the evidence in the file, the Panel agrees with the FIFA PSC that the Respondent has not satisfied its burden of proving that it had just cause to terminate the Employment Contract. Consequently, the Panel considers that the Employment Contract was terminated without just cause, and, according to basic legal principles, the Appellant is entitled to compensation for such termination.
- B. Is the Appellant entitled to compensation as per Article 5 of the Employment Contract or in accordance with Article 337c para 1 of the Swiss Code of Obligations (CO)?**
65. The Appellant claims compensation for the termination in the amount of the residual value of the Employment Agreement as per Article 337c para 1 of the Swiss CO. In response, the Respondent argues that Article 5 of the Employment Contract expressly deals with the consequences of contract termination, which, pursuant to the FIFA RSTP, falls within the exception to the application of the residual value principle.
66. FIFA rules and regulations are primarily applicable to the present dispute while Swiss law shall only be applied subsidiarily.
67. Article 6.2.a of Annexe 8 to the FIFA RSTP provides that “[i]n case the coach did not sign any new contract following the termination of their previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated.”
68. Pursuant to Article 6.2 of Annexe 8 to the FIFA RSTP, however, the above rule would only apply “[u]nless otherwise provided for in the contract”. Article 5 of the Employment Contract expressly deals with the consequences of contract termination and shall therefore be examined beforehand.
69. Upon finding that the Respondent had terminated the Appellant’s Employment Contract without just cause, the FIFA PSC proceeded to award the latter compensation in accordance with Article 5 of the Employment Contract.
70. Article 5 reads as follows: “If any party for whatsoever reason terminate the contract before the end of the contract, the terminating party will pay other party an amount of 204.000 € (two hundred and four thousand Euros) NET of any taxes.”
71. In its Appeal Brief, the Appellant asserts that Article 5 is invalid, as it disregards the basic and imperative principle of labor law that, in the event of termination without just cause, the employee is entitled to the amounts it would have earned had the agreement not been terminated, as per Article 337c of the Swiss CO. The Appellant further underlines that Article 5 should instead be seen as a buy-out clause for the sole benefit of the Coach, at his request. Allegedly, the idea, when drafting the agreement, was that if the Coach wanted to leave the Club to pursue a different path in his career, he should pay the latter the compensation agreed in Article 5. In support of such reasoning, the Appellant further invoked that the Employment Contract had been drafted exclusively by the Respondent.

72. During the hearing, the Respondent firmly disagreed with the Appellant’s position, stating that the wording of Article 5 was clear and applied to both Parties without any distinction.
73. According to the universally applicable *pacta sunt servanda* principle, both Parties shall fulfill the obligations they voluntarily entered into – such as the Employment Contract and, more specifically, its Article 5.
74. During the hearing, the Respondent brought up the question of the interpretation of Article 5 and whether it should be considered a “buy-out clause” or a “penalty clause” regarding the termination of the contract.
75. For the sake of clarity, a “penalty clause” provides for payment of a specified amount to one party in case the other breaches its contractual obligations.
76. A “buy-out clause” suggests that the parties, while entering into a contract, may agree that at a certain (or at any) moment one of the parties (normally, the player/coach) may terminate the contract by simple notice and by paying a stipulated amount. In other words, one of the parties (ordinarily, the club) accepts in advance that the contract may be terminated: as a result, when the contract is effectively terminated, such termination can be deemed to be based on the parties’ (prior) consent and no contractual breach occurs (CAS 2016/A/4550 Darwin Zamir Andrade Marmolejo v. Club Deportivo La Equidad Seguros S.A. & Fédération Internationale de Football Association (FIFA) and CAS 2016/A/4576 Újpest 1885 FC v. FIFA).
77. According to well-established CAS case law:
- “Whether such clauses are called “buy-out clauses”, “indemnity” or “penalty clauses” or otherwise, is irrelevant. To meet the requirements of [Article 6.2 of Annexe 2 to the FIFA RSTP] the parties shall have “provided otherwise”, i.e. the parties shall have provided in the contract how compensation for breach or unjustified termination shall be calculated. Legally, such clauses correspond therefore to liquidated damages provisions, at least so far as the real will of the parties to foresee in such clause the amount to be paid by the breaching party in the event of a breach and/or of a unilateral, premature termination of the employment contract is established. Indeed, when FIFA and the relevant stakeholders were drafting the provision, it was recognized that such kind of penalties/liquidated damages may be validly agreed between the parties and, in such a case, it should not be up to the FIFA Regulations to deprive such a clause of its legal effect.” (CAS 2008/A/1519).*
78. While the actual qualification of Article 5 does not matter in similar cases, CAS Panels agree that *“the parties are called to make sure that any clause to be included in an employment contract shall indicate that the sum specified is the one due as compensation in the event of a unilateral breach, respectively termination of the contract by either of the parties” (CAS 2008/A/1519).*

79. CAS Panels have most often invalidated contractual penalty clauses when “*the reciprocal obligations it sets forth actually disproportionately favour one of the parties and gives it an undue control over the other party, [as] such clause is incompatible with the general principles of contractual stability and therefore null and void*” (CAS 2016/A/4605 Al-Arabi Sports Club Co. For Football v. Matthew Spiranovic).
80. In the present case, Article 5 in a clear and conspicuous way specifies the amount to be paid in case of unilateral termination by any of the Parties – EUR 204,000. In other words, Article 5 provides for payment of the same amount in case of unilateral termination of the Employment Contract by either the Club or the Coach.
81. The Parties have satisfied the CAS case law requirements for validity of a buy-out/penalty clause and the latter is also balanced, proportionate and non-discriminatory, potentially making for a perfectly valid contractual provision. In that context, whether or not the Club drafted the Employment Contract is irrelevant, as Article 5 has been freely accepted by the Coach. Any potentially negotiated nuances in the application of Article 5 should have been included in the wording of the clause.
82. According to well-established CAS case law, however, “*according to Article 341 para. 1 of CO an employee may not waive claims arising from mandatory provisions of law or mandatory provisions of a collective employment contract during the period of the employment relationship and for one month after its end. The provision of Article 337(c) of CO regarding the employee’s claims for financial compensation in case of unilateral termination of an employment contract without just cause by the employer is such a mandatory provision, as explicitly stipulated in Article 362 of CO*” (CAS 2017/A/5125, para 71).
83. Under Article 362 of the Swiss CO, “[i]t is not permissible to derogate from the following provisions to the detriment of the employee by individual agreement...”. The same has been explicitly recognized by CAS Panels (CAS 2017/A/5402 among others) and by the Swiss Federal Tribunal (4A\_608/2010).
84. Pursuant to Article 5, in case of unilateral termination (including without just cause), the terminating party is to compensate the other in the amount of EUR 204,000 net of taxes representing around two months of the Coach’s salary.
85. That being said, in application of Article 337(c) of the Swiss CO: “*where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration.*”
86. Under Article 334 of the Swiss CO, a fixed-term employment relationship, as the one between the Parties in this case, ends without notice. Accordingly, the underlying principle is that when the employer dismisses the employee with immediate effect without just cause, the latter is entitled to damages in the amount he/she would have earned had the employment relationship ended on expiry of its agreed duration. In other words, the employee would, in this case, be entitled to compensation in the amount of the residual value of the employment contract.

87. The Employment Contract was unilaterally terminated by the Respondent on 12 March 2021. It is undisputed that it was due to expire at the end of the 2020/2021 season, which effectively ended on 28 August 2021 when the final league match was played.<sup>1</sup> The Panel therefore finds that the residual value of the Employment Contract in terms of fixed remuneration would, in this matter, amount to the remainder of March, plus the contractually provided salaries for the period between 1 April – 31 July 2021, as per Article 3.2 of the Employment Contract, in a total amount of EUR 469,200.<sup>2</sup>
88. On a side note, awarding a salary for the month of August 2021 – as requested by the Appellant in his submissions based on the actual term of the Employment Contract – would mean going above and beyond the overall contractually agreed amount of EUR 1,020,000. In other words, whether the contractual term actually expired at the end of July or August 2021 does not in any way influence the amount of the overall contractually agreed remuneration, as per Article 3.2 of the Employment Contract. Therefore, the Appellant’s request for remuneration for the month of August 2021 is dismissed as baseless.
89. It is therefore evident that the amount of compensation as per Article 5 of the Employment Contract falls short of the amount of compensation according to the criteria set out in Article 337 (c) para. 1 of the Swiss CO. Consequently, Article 5 derogates substantially from the mandatory provision of Article 337 (c) para. 1 of the Swiss CO to the detriment of the Coach.
90. In view of the above, the Panel finds that Article 5 of the Employment Contract, which effectively restricts the compensation entitlements of the Coach to roughly two monthly salaries, entails a renouncement of his claims under Article 337 (c) para. 1 of the Swiss CO, in a way incompatible with Articles 341 para. 1, 362 and Article 337 (c) para. 1 of the Swiss CO. Therefore, the Panel concludes that Article 5 is null and void and cannot be applied to determine the appropriate measure of compensation in the present case.
91. Furthermore, the Panel notes that, according to Article 337 (c) para. 2 of the Swiss CO, the employee’s entitlements in compensation may be *“reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work”*. This provision essentially encapsulates the duty of the employee to mitigate its damages in case of a breach of contract by the employer, which falls in line with the general principle of fairness and good faith and is also relevant in the sports industry (CAS 2015/A/4206 & CAS 2015/A/4209 paras. 235-236).
92. The Appellant was left without employment in the middle of the sporting season in a foreign country where he relocated for this particular employment. Therefore, his

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<sup>1</sup> See Article Two of the Employment Contract:  
“The duration of the new contract  
Starts on 28/09/2020.

Ends on: 31/07/2021 or till the end of the season 2020/2021.”

<sup>2</sup> March 2021 had 31 days, the Employment Contract was terminated on 12 March, leaving 19 remaining days of March. The Appellant only requested compensation for 18 days of March, therefore the amount requested by the Appellant is the one considered by the Panel.

prospects of finding a new job with comparable terms to substitute his loss of income for the 2020/2021 season were admittedly slim. Moreover, CAS panels have logically acknowledged that it is a more difficult task for a coach to mitigate his damages by finding alternate employment in the middle of the season than it is for a player (CAS 2017/A/5125).

93. During the hearing, it was said that, since being fired by the Respondent and leaving Cairo, the Appellant has been unemployed and left feeling humiliated by the media backlash. The Panel has no other information about the Coach's efforts to find a substitute employment after the termination of his employment relationship with the Respondent. In any case, the Appellant's Employment Contract in a foreign country was terminated in the middle of the season, just months before its natural term. Consequently, the Panel considers that the Appellant could not be considered to have acted in bad faith by intentionally foregoing any new opportunities and that the awarded termination compensation shall not be reduced in application of Article 337 (c) para. 2 of the Swiss CO.
94. Based on all of the above, the Appellant shall be compensated for the Respondent's termination without just cause of the Employment Contract, as per Article 337(c) of the Swiss CO, in the total amount of EUR 469,200, plus the applicable default interest under Swiss law of 5% *per annum* as from 12 March 2021 – date of the termination.
95. The amounts awarded by the FIFA PSC for outstanding remuneration and bonuses in the overall amount of EUR 244,800 are not in dispute and shall not be examined in this award.

**C. Is the Appellant entitled to compensation for bonuses under Article 6.2 of the Employment Agreement?**

96. As a preliminary remark, the Panel excludes from the present discussion the bonuses awarded by the FIFA PSC for matches that have taken place on 19 January, 28 January, 7 February, 17 February and 11 March 2021, as both Parties agree they are due and outstanding.
97. The Appellant further claims he is entitled to bonuses for achieving success at specific future sporting events, as per Article 6.2 of the Employment Contract.
98. Such bonuses are, according to the Appellant, conditional obligations regulated by Article 151 *et ff.* of the Swiss CO, and, in the best-case scenario, he could have satisfied them all by achieving all of the objectives.
99. The Appellant further argues, pursuant to Article 156 of the Swiss CO, which provides that “[a] condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting in bad faith”, that the Respondent prevented the occurrence of the conditions precedent agreed by the Parties for the bonuses to become payable by prematurely terminating the Employment Contract in bad faith.

100. For Article 156 to apply, two conditions have to be satisfied: 1) the conduct of one of the Parties must have prevented the fulfillment of the condition precedent, and 2) the party preventing the fulfillment must have acted in bad faith for the sole purpose of avoiding paying achievement bonuses.
101. The Panel observes that, while the termination of the employment relationship by the Respondent has prevented the conditions from occurring, proving that the Respondent has done so in bad faith requires solid evidence.
102. The Appellant bears the burden of proof with regard to the Respondent's bad faith in terminating the Employment Contract. The Appellant has stated that he had been dismissed 1) while holding a great relationship with the whole team and management, 2) after another successful match, when the Club was in the first place of the league and in contention for every other trophy, 3) halfway through the season and 4) upon no valid reason at all.
103. The Panel observes that the Appellant's arguments based on the Respondent's bad faith are speculative and are not supported by any clear nor convincing evidence and cannot be accepted.
104. On a different note, the Parties agreed, under Article 6.2 of the Employment Contract, to the payment of bonuses upon achievement of specific goals – for the Respondent to win a specific title. CAS panels have consistently found that, where the objective and reward are clearly defined, parties shall honor their arrangement in application of the *pacta sunt servanda* principle. More specifically, a CAS tribunal observed in a 2018 decision that:

*“For incentive schemes of this kind to provide the necessary motivation, those striving to achieve this goal must be able to expect that payment of the bonus must be certain upon obtention of the result. Presumably the higher the expected payment is, the greater the degree of motivation to achieve the identified goal. It is therefore essential that the objectives be clearly defined, and that the expected reward for reaching it also be clear.”* (CAS 2018/A/5882 FC Rubin Kazan v. Denis Gennadievich Tkachuk & RFU, para 66).
105. In that context, the Panel notes that Article 6.2.1 of the Employment Contract clearly defines the objective *“Achieving the Egyptian league title”* as well as the reward – *“204.000 €”*.
106. While not being the champion of the Egyptian Premier League for 5 consecutive seasons, from season 2015/2016 to season 2019/2020, the Respondent moved up to the first place during the course of the Appellant's Employment Contract and, eventually, won the respective title at the end of the 2020/2021 season.
107. The objective according to Article 6.2.1 was on the right way during the course of the Appellant's employment and remained so until the end of the 2020/2021 sporting season, when the Respondent won the national title. With the Appellant's results during that season and his invested effort, it is highly probable that the Egyptian league title

would have been also achieved if the Coach had stayed with the team and not been fired in the middle of the season. Nevertheless, although the Coach contributed significantly to the title 2020/2021, it is the Panel's view that the Coach was not present during the entire season, as the Appellant's Employment Contract was terminated around halfway through the season. In the absence of any clear provision in the Employment Contract, the Panel is of the view that the Appellant shall be awarded 50% of the contractually agreed bonus for achieving the Egyptian league title, amounting to EUR 102,000. This represents a proportionate compensation. It would be indeed unfair and excessive to consider that the bonus objective would be fulfilled only if the Coach would remain under contract with the Club during the entire season and until the very last day of the championship.

108. The Appellant has not satisfied its burden of proving that he has achieved the objectives provided in Articles 6.2.2-6.2.6 and shall, thus, not be awarded the respective bonuses.
109. Based on the above, the Panel finds that the Appellant is entitled to compensation for bonuses under Article 6.2.1 of the Employment Agreement in the overall amount of EUR 102,000, plus the applicable default interest under Swiss law of 5% *per annum* as from 29 August 2021 – *i.e.*, the day after the conclusion of the Egyptian Premier League 2020/21 season, when the title won by Zamalek SC became official.

**D. Is the Appellant entitled to additional compensation pursuant to Article 337c para 3 of the Swiss CO?**

110. The Appellant further claims that, in light of the specific circumstances of the case, he is entitled to additional compensation pursuant to Article 337c para 3 of the Swiss CO providing that:

*“The court may order the employer to pay the employee an amount of compensation determined at the court’s discretion taking due account of all circumstances; however, compensation may not exceed the equivalent of six months’ salary for the employee.”*

111. A CAS Panel have found that such additional compensation of *sui generis* character can be added to the termination compensation and may only be waived in the absence of fault from the employer. The Panel in that case also underlined that awarding such additional compensation “*is to be determined equitably by the judge*” (CAS 2017/A/5402 23 Club Al-Taawoun v. Darije Kalezic).
112. In support of its claim for additional compensation, the Appellant reminded the circumstances of the case allegedly stressing the Respondent's severe fault: “[t]he brutal interruption of the employment relationship; the disgraceful way in which the dismissal was handled, with the Coach learning through the media that a replacement had been signed; and the fact that the Club had absolutely nothing to claim against the Coach, who had diligently rendered his work during the course of the employment relationship” (Appeal Brief, p 19, para 71).
113. Unfortunately, such allegations have not been supported by clear and convincing evidence of the Respondent's alleged general bad faith in this scenario.

114. Also, the Panel observes that the overall duration of the Employment Agreement being 10 months, the Appellant has already received a signing bonus in the amount of EUR 120 000, and shall receive, as a result of this Award, monthly salaries for 5 months and 18 days, a termination compensation of EUR 469,200, as well as one half of the performance bonus stipulated under Article 6.2 of the Employment Agreement in the amount of EUR 102,000. It is therefore the Panel's view that the compensation for the Appellant's services and the termination of his Employment Contract without just cause awarded and listed above can be considered adequate and fair.
115. Consequently, the Panel finds the Appellant's claim for additional compensation pursuant to Article 337c para 3 of the Swiss CO to be speculative and unfounded and, therefore, rejects said request.

**X. COSTS**

(...).

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Jaime Moreira Pacheco on 27 August 2021 against the Decision of the Single Judge of the Player's Status Committee of FIFA from 30 June 2021 is partially upheld.
2. Paragraph 2 of the operative part of the Decision of the Single Judge of the Player's Status Committee of FIFA from 30 June 2021 is amended as follows:
  2. *The Respondent, El Zamalek, has to pay to the Claimant, the following amount:*
    - *EUR 244,800 and Egyptian Pounds ("EGP") 40,000 as outstanding remunerations plus 5% interest p.a. as follows:*
      - *On EUR 102,000 from 1 February 2021 until the date of effective payment.*
      - *On EUR 102,000 from 1 March 2021 until the date of effective payment.*
      - *On EUR 40,800 from 12 March 2021 until the date of effective payment.*
      - *On EGP 8,000 from 19 January 2021 until the date of effective payment.*
      - *On EGP 8,000 from 28 January 2021 until the date of effective payment.*
      - *On EGP 8,000 from 7 February 2021 until the date of effective payment.*
      - *On EGP 8,000 from 17 February 2021 until the date of effective payment.*
      - *On EGP 8,000 from 11 March 2021 until the date of effective payment.*
    - *Salaries from 12 March 2021 until the stipulated end of the Employment Contract (28 August 2021) as a compensation for breach of contract without just cause in the total amount of EUR 469,200, plus 5% interest from 12 March 2021.*
    - *Partial compensation for bonuses under Article 6.2.1 of the Employment Contract in the amount of EUR 102,000, plus 5% interest from 29 August 2021.*
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.

## **THE COURT OF ARBITRATION FOR SPORT**

Ivaylo Dermendjiev  
President of the Panel

Olivier Carrard  
Co-arbitrator

Jan Brodec  
Co-arbitrator