Arbitration CAS 2018/A/6029 Akhisar Belediye Gençlik ve Spor Kulübü Derneği v. Marvin Renato Emnes, award of 17 September 2019

Panel: Mr Fabio Iudica (Italy), President; Mr Markus Bösiger (Switzerland); Mr João Nogueira da Rocha (Portugal)

Football
Termination of the employment contract with just cause by the player
Definition of "just cause"
Notice of termination
Administrational or financial difficulties within a club
Poor performance of a player
Right to play and train with the first team
Duty to mitigate the damage

1. **A "valid reason" or "just cause" for termination of an employment contract exists when the relevant breach by the other party (or other impeding circumstances) is of such nature, or has reached such a level of seriousness, that the essential conditions under which the contract was concluded are no longer present and the injured party cannot in good faith be expected to continue the employment relationship, to be established on a case-by-case basis.**

2. **For a party to be allowed to validly terminate an employment contract with immediate effect, it must have warned the other party, in order for the latter to have the chance, if it deemed the complaint legitimate, to comply with its obligations.**

3. **As a general rule, the payment of the players' remuneration consists in the clubs' main obligation within the employment relationship. Administrational and financial difficulties within a club cannot be invoked as an excuse for non-payment of a player. It is for the club to find a way around these difficulties or to bring this forward to the player in an attempt to arrive at a compromise.**

4. **It happens quite frequently that clubs sign players who subsequently disappoint with their sporting performance. In the absence of strict contractual language, inadequate sporting performance can hardly constitute a legitimate breach of contract. This is not to say that the club cannot terminate the contract in such cases, provided of course, that it has reached an agreement with the player in this regard.**

5. **Preventing a player from training with the first team is potentially a much harsher measure than solely assigning a player to play matches with the second team while being allowed to train with the first team squad. The former seriously prejudices the player's future perspectives with the first team, since such measure is of a more definite**

nature than the latter. Unilateral change in the status of a player which is not related to company requirements or to organization of the work or the failings of the employees, is a valid reason for the player to unilaterally terminate the employment contract, as there is a serious infringement of the players' personality rights. For athletes, personality rights encompass in particular the development and fulfilment of personality through sporting activity, professional freedom and economic freedom. An athlete who is not actively participating in competitions depreciates on the market and reduces his future career opportunities. Athletes have therefore a right to actively practice their profession. A club arbitrarily relegating a player hired play with the first team to the U-21 team in fact violates his right to train and play with the first team, i.e. the right to be employed and perform his activity under the terms agreed, which can seriously prejudice his career as a professional.

6. **The duty to mitigate damages shall be regarded in accordance with the general principle of fairness, which implies that, after a breach by the club, the player must act in good faith and seek for other employment, showing diligence and seriousness, with the overall aim of limiting the damages deriving from the breach and avoiding that a possible breach committed by the club could turn into an unjust enrichment for him. The duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign a contract with worse financial conditions, in the absence of any valid reason to do so. However, the circumstance that a player received a higher remuneration under his former contract than he will receive under his new contract is not in itself sufficient to mean automatically that the compensation payable from his former club has to be reduced in the event that the new contract does not pay the player just as well as the original contract did.**

INTRODUCTION

1. This appeal is brought by Akhisar Belediye Gençlik ve Spor Kulübü Derneği against the decision rendered by the Dispute Resolution Chamber (the "DRC" or the "Chamber") of the Fédération Internationale de Football Association on 14 September 2018 (the "Appealed Decision"), with regard to an employment-related dispute arisen between Akhisar Belediye Gençlik ve Spor Kulübü Derneği and Mr Marvin Renato Emnes.

I. PARTIES

2. Akhisar Belediye Gençlik ve Spor Kulübü Derneği (the "Appellant" or the "Club") is a football club with headquarters in Akhisar-Manisa, Turkey. It is a member of the Turkish Football Federation, which in turn is affiliated with FIFA.

3. Mr Marvin Renato Emnes (The "Respondent" or the "Player") is a Dutch professional football player, born in Rotterdam, the Netherlands, on 27 May 1988.

(The Appellant and the Respondent are hereinafter jointly referred to as the "Parties").

II. FACTUAL BACKGROUND AND FIFA PROCEEDINGS

A. Background Facts

4. Below is a summary of the main relevant facts and allegations based on the Parties' oral and written submissions on the file and relevant documentation produced in this appeal. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On 24 August 2017, the Player signed an employment contract with the Club as a professional, valid for three sporting seasons, starting from the date of signature until 31 May 2020 (the "Employment Contract").

6. Pursuant to Article 3 of the Employment Contract, the Player was entitled to receive a total amount of Euro 650,000 as net salary for the sporting season 2017/2018 and a total amount of Euro 550,000 as net salary for each of the sporting seasons 2018/2019 and 2019/2020, as well as an annual bonus of Euro 50,000 net for each sporting season, upon reaching 13 goals scored or assists in Super League matches.

7. With regard to the sporting season 2017/2018, the Parties agreed that the Player's remuneration shall be payable as follows:

At the date of registry	Euro 40,000
31/08/2017	Euro 55,000
25/09/2017	Euro 55,000
30/09/2017	Euro 30,000
25/10/2017	Euro 55,000
30/10/2017	Euro 30,000
25/11/2017	Euro 55,000
25/12/2017	Euro 55,000
25/01/2018	Euro 55,000

25/02/2018	Euro 55,000
25/03/2018	Euro 55,000
25/04/2018	Euro 55,000
25/05/2018	Euro 55,000

8. As additional benefits to the Player for the entire duration of the Employment Contract, the Club undertook to provide a fully furnished apartment (*"Rent of the apartment shall be paid by the Club. Water, gas, electric, phone and other bills shall be paid by the Player"*), 6 return economy class flight tickets between Turkey and the Netherlands for each sporting season, and car availability.

9. According to a letter dated 2 January 2018, signed by the President of the Club, the Appellant informed the Respondent that, due to his poor sporting performance, the Club's Head Coach had decided to exclude him from the mid-season camp of the Club's first team in Antalya, between 4 January and 14 January 2018, during which the Player was invited to train with the U21 team.

10. By a letter dated 27 March 2018, the Player sent a formal notice and put the Club in default of payment of his outstanding salaries for the months of January, February and March 2018, amounting to a total of Euro 165,000, granting a deadline of 10 days to settle the debt, failing which the Player would unilaterally terminate the Employment Contract for just cause according to Article 12 bis of the FIFA Regulations on the Status and Transfer of Players (hereinafter the "FIFA RSTP"). By the same letter, the Player also requested to be formally notified of the formal decision by the Club, with grounds, with regard to the Player's exclusion from the trainings of the Club's first team.

11. On 9 April 2018, in the absence of any payment or response by the Club, the Player sent a second formal notice by which he unilaterally terminated the Employment Contract with immediate effect, claiming just cause.

B. Proceedings before the Dispute Resolution Chamber of FIFA (FIFA DRC)

12. On 30 April 2018, the Player filed a claim before the FIFA DRC against the Club for breach of contract, requesting the payment of the following amounts:

- EUR 165,000 as outstanding remuneration, plus 5% interest p.a. as from each due date, corresponding to the Player's salaries payable on 25 January 2018, 25 February 2018 and 25 March 2018;

- EUR 1,210,000 as compensation for the early termination of the Employment Contract, corresponding to its residual value, plus 5% interest p.a. as from 9 April 2018;

- EUR 330,000 as additional compensation in consideration of the specificity of sport, calculated on the basis of six months of salary;

- As well as the reimbursement of the legal costs incurred by the Player in relation with the FIFA proceedings.

13. The Player argued that due to the Club's persistent failure to pay his outstanding remuneration - despite the warning letter dated 27 March 2018 -, he was compelled to terminate the Employment Contract on 9 April 2018.

14. The Club rejected the Player's argument and stressed that the latter was requested by the Head Coach to train with the U-21 team *"for a temporary period"* due to his poor and insufficient performance and that, despite all this, the Player did not make any effort to improve his performance and only relied on receiving his salary.

15. With respect to the Player's default notice dated 27 March 2018, the Club objected that, since it was willing to find an amicable settlement, it initiated *"verbal negotiations"* in this regard; that, however, the Player terminated the Employment Contract all of a sudden and in unexpected manner on 9 April 2018. Consequently, the Club argued that the termination of the Employment Contract *"was made with bad faith and therefore unjust"* and that, therefore, the Player was not entitled to receive any compensation.

16. The Player objected that the Club had serious intentions to solve the matter in an amicable way and pointed out that, in fact, he did not receive any communication from the Club between the date of the default notice (27 March 2018) and the date of termination of the Employment Contract. Moreover, the Player considered that the Club was not authorized to breach the Employment Contract on the basis of the Player's alleged bad performance and that the decision to exclude him from the first team as from 2 January 2018 until the date of termination was made in bad faith and with the only purpose to downgrade his position within the Club.

17. In view of the above, the Player concluded that three monthly outstanding salaries, as well as his exclusion from the first team and the Club's lack of response to his letter of warning, were sufficient elements to justify the termination of the Employment Contract.

18. Finally, the Club informed that all the unpaid monies, amounting to EUR 181,497 (corresponding to the salary of January, February and March 2018, as well as a pro rata of April 2018 in the amount of EUR 16,497) were settled in full on 26 June 2018 and provided documentary evidence in support. In this regard, the Club emphasized that the delay in the payment was caused by the alleged rapid devaluation of the Turkish Lira during the year 2018.

19. Although the Player affirmed having been unemployed since the termination of the Employment Contract, according to the information contained in the Transfer Matching System, the DRC established that the Player concluded a contract with a Canadian club valid as from 16 August 2018 until 31 December 2018, for a monthly salary of USD 8,833, plus housing allowance in the amount of USD 40,500.

20. On 14 September 2018, the FIFA DRC rendered the Appealed Decision by which the Player's claim was partially upheld, as follows:

"• The claim of the Claimant, Marvin Renato Emnes, is partially accepted.

- *The Respondent, Akhisar Belediyespor, has to pay to the Claimant, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 1,134,903, plus 5% interest p.a. as from 30 April 2018 until the date of effective payment.*
- *In the event that the aforementioned sum plus interest is not paid by the Respondent within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
- *Any further claim lodged by the Claimant is rejected.*
- *The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittance under point 2 is to be made and to notify the Dispute Resolution Chamber of every payment received".*

21. On 8 November 2018, the grounds of the Appealed Decision were notified to the Parties.

III. GROUNDS OF THE APPEALED DECISION

22. Firstly, the DRC established that it was competent to deal with the present dispute based on the provision of Article 3 para. 1 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "Procedural Rules"), in conjunction with Article 24 para. 1, in combination with Article 22 lit. b) of the FIFA RSTP, since it concerns an employment-related dispute with an international dimension between a Dutch player and a Turkish club.

23. Furthermore, the DRC decided that the 2018 edition of the FIFA RSTP were applicable to the substance of the matter, considering that the Player's claim was lodged in front of FIFA on 30 April 2018.

24. With regard to the merits, the Chamber acknowledged that the Employment Contract had been unilaterally terminated by the Player on 9 April 2018 with alleged just cause, based on the failure by the Club to pay the Player's salaries of January 2018, February 2018 and March 2018, for a total amount of EUR 165,000.

25. The DRC observed that the main legal issue at stake was to determine whether the Employment Contract had been terminated by the Player with or without just cause.

26. In this regard, the DRC also took note of the Club's position, according to which the Player was excluded from the training with the first team, on a temporary basis, because of his poor performance; and considered the fact that the payment of the outstanding salaries of the Player were settled by the Club on 26 June 2018, i.e. after the termination of the Employment Contract, for a total amount of EUR 181,497.

27. According to the DRC, the Player was contractually entitled to receive his remuneration in a timely manner and, consistent with its longstanding jurisprudence, unless otherwise agreed between the parties, a player cannot be liable for external economic factors such as a possible currency devaluation; moreover, as a general principle and in line with the DRC longstanding jurisprudence, a club cannot withhold a player's remuneration on the basis of an alleged poor or unsatisfactory performance *"which remains, under any circumstance, a purely subjective evaluation"*.

28. Considering that, as of 8 April 2018, the Club had repeatedly and, for a significant period of time, been in breach of its financial obligations towards the Player, the DRC concluded that the latter had a just cause to terminate the Employment Contract.

29. Notwithstanding the above, having acknowledged the payment of the relevant outstanding salaries made by the Club on 26 June 2018, which was supported by documentary evidence and was not contested by the Player, the DRC established that the Player was only entitled to receive compensation for breach of contract pursuant to Article 17, para 1 of the FIFA RSTP, excluding any request related to remuneration.

30. In order to determine the amount of compensation payable by the Club, in the absence of any compensation clause in the Employment Contract, the Chamber considered the indicative criteria set forth under Article 17 of the FIFA RSTP, including in particular, the monies payable to the Player under the terms of the Employment Contract until 31 May 2020 (i.e. the original date of expiration), which amounted to EUR 1,193,503, detailed as follows:

- EUR 55,000 corresponding to the Player's salary of April 2018, excluding the pro rata amount of EUR 16,497 paid by the Respondent on 26 June 2018;
- EUR 55,000 corresponding to the Player's salary of May 2018;
- EUR 550,000 corresponding to the Player's total remuneration for the sporting season 2018/2019;
- EUR 550,000 corresponding to the Player's total remuneration for the sporting season 2019/2020.

31. Therefore, the amount of 1,193,503, was taken into account as the basis for determining the final amount of compensation for breach of contract.

32. In accordance with its constant practice in relation to the general obligation of the creditor to mitigate his damages, the DRC reduced the abovementioned amount of the alternative income received by the Player under the employment contract with the Canadian club, amounting to USD 66,748,50, equivalent to EUR 58,600, thus obtaining the final amount of EUR 1,134,903 which the Chamber considered to be a reasonable and justified amount as compensation for breach of contract, plus 5% interest p.a. on the amount of compensation, as of the date on which the claim was lodged, i.e. 30 April 2018, until the date of effective payment.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

33. On 26 November 2018, the Club filed an appeal with the Court of Arbitration for Sport (the "CAS") against the Respondent with respect to the Appealed Decision, pursuant to Article R48 of the Code of Sports-related Arbitration (the "CAS Code"), and nominated Mr Markus Bösiger as an arbitrator.

34. On 7 December, the Appellant filed its appeal brief in accordance with Article R51 of the CAS Code.

35. On 10 December 2018, the Respondent informed the CAS Court Office that he nominated Mr João Nogueira da Rocha as an arbitrator in the present proceedings.

36. On 7 January 2019, the Respondent filed his answer in the present proceedings, pursuant to Article R55 of the CAS Code.

37. On the same day, the CAS Court Office invited the Parties to state whether they preferred a hearing to be held in the present matter or for the Panel to issue an award based solely on the Parties' written submissions.

38. On 9 January 2019, the Respondent informed the CAS Court Office that he did not consider a hearing to be necessary in the present proceedings; while, on 11 January 2019, the Appellant expressed its preference for a hearing to be held.

39. On 24 January 2019, on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter had been constituted as follows:

- President: Mr Fabio Iudica, attorney-at-law in Milan, Italy
- Arbitrators: Mr Markus Bösiger, attorney-at-law in Zürich, Switzerland

  Mr João Nogueira da Rocha, attorney-at-law in Lisbon, Portugal

40. On 19 February 2019, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in the present arbitration proceedings.

41. On 5 March 2019, the Parties were informed that a hearing would take place on 22 May 2019 at the CAS Court Office in Lausanne and they were invited to provide the CAS Court Office, on or before 19 March 2019, with the names of all persons that would be attending the hearing.

42. On 8 March 2019, the CAS Court Office forwarded copy of the Order of Procedure to the Parties, which was returned to the CAS Court Office in duly signed copy by the Respondent on the same day and by the Appellant on 15 March 2019. By signature of the Order of Procedure, the Parties confirmed the jurisdiction of the CAS in the present matter.

43. On 22 May 2019, a hearing took place at the Lausanne Palace, Switzerland.

44. In addition to the Panel and Mr Antonio De Quesada, Head of Arbitration, the following persons attended the hearing:

- For the Appellant: Mr Levent Polat, legal counsel.
- For the Respondent: Mr Marvin Renato Emnes, via conference call, Mr Sami Dinç and Mr Alfonso León Lleó, legal counsels.

45. At the outset of the hearing, the Parties confirmed that they had no objections in respect to the formation of the Panel and that the Panel has jurisdiction over the present dispute. In their opening statements, the Parties reiterated the arguments already put forward in their respective written submissions.

46. The Player informed the Panel that, after the termination of the Employment Contract, he only signed a new contract with the Canadian club, after which he has not received any other proposal and is now unemployed. With regard to the oral negotiations which were allegedly ongoing between the Parties according to the Appellant, the Player's legal counsel objected he has never been contacted by the Club with this purpose and that no phone call has ever occurred. The Player also confirmed he was excluded from the First Team's roster in January 2018, although he was still registered with the Club.

47. The Club contested that the Employment Contract has been terminated by the Player with a very short prior notice. In addition, with respect to the decision to relegate the Player to the U21 team, the Appellant affirmed that, throughout the 4-month-period of duration of the Employment Contract, it resulted that the Player did not show having the sporting features they were expecting.

48. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their rights to be heard and to be treated equally had been duly respected.

49. On 23 May 2019, as instructed by the Panel during the hearing of 22 May 2019, the CAS Court Office invited the Parties to provide copy of the following documents within the next 15 days:

- As to the Appellant: the Player's training schedule;
- As to the Respondent: the warning letter dated 27 March 2018; the termination letter dated 9 April 2018; the employment contract with Vancouver; the document stating the lack of the Player's eligibility to play in the Turkish team.

50. On 6 and 7 June 2019 respectively, the Respondent and the Appellant filed the relevant documents requested by the Panel. The copy of the employment contract with the Canadian Club filed by the Respondent presented the signature of the Player only.

51. On 12 June 2019, by acknowledging receipt of the Parties' documents, the CAS Court Office informed the Parties that unsolicited comments raised by the Respondent were not admitted into the file.

52. On 10 July 2019, the Respondent submitted to the CAS Court Office a second copy of the employment contract which bears the signature of the Player and of the Major League Soccer.

V. SUBMISSIONS OF THE PARTIES

53. The following outline is a summary of the Parties' arguments and submissions which the Panel considers relevant to decide the present dispute and does not necessarily comprise each and every contention put forward by the Parties. The Panel has nonetheless carefully considered all the submissions made by the Parties, even if no explicit reference has been made in the following summary. The Parties' written and oral submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. The Appellant's Submissions and Requests for Relief

54. The Appellant's submissions in its statement of appeal and in its appeal brief may be summarized as follows.

55. With regard to the facts of the present case, the Appellant alleged that, after receiving the Player's letter dated 27 March 2018, the Club immediately contacted the legal counsel to the Respondent, via oral communication, in order to explain that the delay in payment was due to some temporary financial difficulties and the Club was willing to resolve the matter in an amicable way.

56. The Club's proposal in that regard was to pay the outstanding monies in some instalments by signing a reconstruction agreement and moreover, in relation to the Player's poor performance, the Club suggested it was ready to agree on a mutual termination of the Employment Contract.

57. According to the Appellant, the Player's legal counsel replied that he would consult the Player about the conversation with the Club and would revert with a response. However, while the Club was waiting for an answer with regard to a possible solution of the dispute, the Player unexpectedly terminated the Employment Contract by letter dated 9 April 2018 and subsequently filed his claim with FIFA.

58. Although the Player acted in bad faith, FIFA did not consider that the Employment Contract was terminated when the negotiations between the Parties were still in progress and in any event, the compensation established by the DRC is excessive and unfair.

59. Moreover, the DRC wrongly assumed that the Player's poor performance and the devaluation of the Turkish Lira were the justification for the Club to delay the payment of the Player's salaries; on the contrary, the Club never claimed having the right to delay the relevant payment. What is true, is that the abovementioned circumstances were in fact the reasons why the Club was induced to find an amicable solution with the Player.

60. In this regard, although the Club had great expectations for the Player's performance, which justified the high value of the Employment Contract, the Respondent's sporting performance

in trainings and matches were very poor and this fact caused a deep disappointment on the part of the Club; this was the reason why the Club finally decided that the Player would train with the U-21 team, but such a decision was originally meant for a temporary period of time. The Player, however, did not make any effort during his preparation with the U-21 team and, moreover, the Club faced financial difficulties in meeting the payment deadlines; which is the reason why the Player's salaries were not paid in due time.

61. Briefly, when the Player terminated the Employment Contract at the end of the given 10-day-time limit, the Club had not proceeded with the payment yet, because it was still waiting for an answer by the Player's legal counsel with regard to the conclusion of a possible amicable settlement.

62. Not only the Player acted in bad faith, but it is also true that the Club paid the outstanding salaries in full on 26 June 2018; which fact shows that the Club was in good faith and that it did not try to escape from its financial obligations.

63. In addition, the 10-day-time limit given to the Club to settle its debt was too short and inadequate according to article 14bis of the FIFA RSTP and article 28 of the Regulations of the Turkish Football Federation which require that in order for a player to terminate the employment contract with the club because of unpaid salaries, the player shall grant a time limit of, respectively, 15 and 30 days to the Club to make the relevant payment.

64. With regard to the amount of compensation granted by the DRC, the Club first maintained that EUR 1,193,503 which was taken as the basis for calculation, is too high since it is the maximum amount that the Player would receive until the end of the contract, only on condition that he continued providing his services to the Club, otherwise the Player would be granted unjust enrichment.

65. Moreover, the new employment contract signed by the Player with the Canadian club stipulated a very low remuneration and was only 4,5 months long (from 16 August 2018 until 31 December 2018); therefore, the deduction made by the DRC from the amount of compensation is excessively unfair to the Club, also considering that the new salary of the Player is 1/10 of the salary he received under the Employment Contract. As a consequence, the Club argued that the Player did not satisfy his obligation to mitigate his damages and tried to obtain unfair benefits. The Club also objected that it is not reasonable that the amount granted to the Player as *"house allowance"* was higher than the amount payable as remuneration for the same period, which the Club considered to be a misleading element. In this respect, according to article 337c of the Swiss Code of Obligation (hereinafter the "Swiss CO"), the income which the Player intentionally escaped, shall be deducted from the amount of compensation.

66. In addition, any potential contract that the Player could sign in the future, after the end of the employment relationship with the Canadian club, until the original termination of the Employment Contract (i.e. 31 May 2020) shall also be taken into account, otherwise it would turn the compensation to be an unjust enrichment for the Player. In fact, the Player is a 30-year-old professional with good value and reputation within the market of international football.

On the other side, should the Player not sign any other contract with a new club between 31 December 2018 and 31 May 2020, he would violate his obligation to mitigate his damages.

67. As a consequence, the amount of compensation established by the FIFA DRC shall be further deducted in relation to the period from 31 December and 31 May 2020.

68. In its statement of appeal and in its appeal brief, the Appellant submitted the following requests for relief:

- *"to accept our appeal against the decision of FIFA DRC dated 14 November* (rectius, September n.d.r.) *and Ref. No. 18-00882/aos,*
- *to overturn and set aside the abovementioned decision with all its consequences,*
- *to decide that the Respondent terminated his Contract without just cause,*
- *if it is decided that the Appellant shall pay compensation, a deduction shall be made from the compensation,*
- *if it is decided that the Appellant shall pay compensation, after the deduction stated above, an equity deduction shall also be made from the compensation,*
- *to condemn the Respondent to pay the legal fees and other expenses of the Appellant in connection with the proceedings".*

B. The Respondent's Submissions and Requests for Relief

69. The position of the Respondent is set forth in his answer and can be summarized as follows.

70. The Club persistently failed to meet its financial obligations, which led the Respondent to send a written notice on 27 March 2018, as three-monthly salaries amounting to EUR 165,000 were outstanding.

71. In this context, the Club was granted a deadline of 10 days (which is a considerable period of time) to remedy the breach and was warned of the consequences deriving from article 12/bis of the FIFA RSTP as well as the termination of the Employment Contract with just cause in case of non-payment.

72. Moreover, in the same letter of warning, the Appellant was requested to notify the Player with the Club's formal decision, with grounds, concerning his exclusion from the first team as well as to provide medical assistance and physiotherapy to be available during the individual trainings and a fair and reasonable training schedule.

73. However, the Appellant neither made any payment nor did it even reply to the formal notice dated 27 March 2018 and therefore, a second notice was served on 9 April 2018 by which the Player terminated the Employment Contract with just cause with immediate effect.

74. The Player acknowledged that he finally received the payment of the relevant overdue salaries on 26 June 2018, which fact occurred during the course of the FIFA proceedings.

75. Besides the foregoing, confirming the same position submitted before the DRC proceedings against the club's argument, the Player denied that any negotiations between the Parties ever took place after the formal notice dated 27 March 2018. Moreover, the Appellant's allegations to the contrary have no legal value and are only aimed at distracting the Panel from the real facts of the present dispute.

76. On the contrary, the Player cannot be blamed for bad faith, as stated by the Appellant, since he merely acted in order to exercise his right to have the Employment Contract fulfilled by the Club. In this respect, the Player's performance has no relation with the present case since, as it is confirmed by the jurisprudence of FIFA and CAS, the sporting performance of a player does not authorize the club not to meet its financial obligations or to delay the due payment to the relevant player.

77. With regard to the alleged financial difficulties due to currency devaluation, this could only, if any, justify a minor delay in payment or a partial payment but, in any event, cannot provide any justification to a delay of payment of three-monthly salaries, a lack of response to the Player's requests and to the Player's exclusion from the first team's trainings.

78. Regarding article 14bis of FIFA RSTP, which was referred to by the Appellant in relation to the 15-days-notice as a requirement for the early termination of an employment contract, such provision came into force on 1 June 2018, therefore it is not applicable to the present case, since it was not in force at the time of the termination letter (i.e. 9 April 2018).

79. Finally, the DRC's determination of the compensation for breach of contract was made in line with the FIFA and CAS common practice on the subject of mitigation of damages; in addition, the Player acted in good faith and signed a new employment contract even after the closure of the transfer window and, in any case, the Club's argument that the Player did not his best in order to reduce his damages is completely undemonstrated.

80. In his answer, the Respondent submitted the following requests for relief:

- *"i) To reject the application of the Appellant,*
- *To ratify the decision of the FIFA Dispute Resolution Chamber,*
- *To state that the Appellant is responsible for the payment of the whole CAS administration costs and the Arbitrators fees,*
- *To condemn the Appellant to pay the legal fees and other expenses of the Respondent in connection with proceedings".*

VI. JURISDICTION

81. 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 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.

82. The Appellant relies on Article R58.1 of the FIFA Statutes as conferring jurisdiction to the CAS. The jurisdiction of the CAS was not contested by the Respondent. The signature of the Order of Procedure confirmed that the jurisdiction of the CAS in the present case was not disputed. Moreover, at the hearing, the Parties expressly reiterated that CAS has jurisdiction over the present dispute.

83. Accordingly, the Panel is satisfied that it has jurisdiction to hear the present case.

84. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a new decision which replaces the decision appealed or annul the challenged decision and/or refer the case back to the previous instance.

VII. ADMISSIBILITY OF THE APPEAL

85. According to Article 58 para 1 of the FIFA Statutes: *"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".*

86. The Panel notes that the FIFA DRC rendered the Appealed Decision on 14 September 2018 and that the grounds of the Appealed Decision were notified to the Parties on 8 November 2018. Considering that the Appellant filed its statement of appeal on 26 November 2018, i.e. within the deadline of 21 days set in the FIFA Statutes, the Panel is satisfied that the present appeal was filed timely and is therefore admissible.

VIII. APPLICABLE LAW

87. Article R58 of the Code provides the following:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

88. Article 57 para. 2 of the FIFA Statutes so provides:

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.

89. In consideration of the reference made by the Parties in their submissions, and in view of the abovementioned provisions, the Panel holds that the present dispute shall be decided principally according to FIFA RSTP, Edition 2018, with Swiss law applying subsidiarily.

IX. MERITS

90. By addressing the merits of the present case, the Panel reminds that it is undisputed between the Parties that the Employment Contract was unilaterally terminated by the Player, in writing, on 9 April 2018, following a prior warning to the Club dated 27 March 2018, without any written response by the Club.

91. It is also undisputed that, at the time when the letter of formal notice was sent, the Club was in default of payment of the outstanding amount of EUR 165,000, corresponding to the Player's monthly salaries respectively due on 25 January 2018; 25 February 2018 and 25 March 2018, as well as the fact that the Player was excluded from the first team's training as from the end of the first period of the sporting season 2017/2018.

92. What is disputed in the present case is whether the Player had a just cause or not to unilaterally terminate the Employment Contract on 9 April 2018, which fact is contested by the Club. If a just cause should be affirmed, it is furthermore controversial whether the FIFA DRC established an appropriate compensation for the Player as a result of the early termination of the Employment.

A. Was there a just cause for termination of the Employment Contract?

93. The Appellant admits having been in default of payment of the relevant sum at the time the formal notice was sent by the Player on 27 March 2018, ascribing its failure to meet the relevant deadlines to some financial difficulties allegedly faced in connection with the devaluation of the Turkish Lira. Moreover, the Club maintains that it was disappointed with the Player's poor performance in trainings and matches, which was the reason why the Club imposed the Player to train with the U-21 team, although this decision was meant for an alleged temporary period. Due to those combined circumstances, the Club maintains that it was willing to find an amicable settlement of the dispute with the Player. In fact, as soon as the Club received the letter of formal notice by the Player, the Appellant maintains that its legal representative immediately contacted the Player's legal counsel by phone and proposed to repay the debt by some instalments; afterwards, on 9 April 2018, when negotiations were still pending according to the Club's position, the Player terminated the Employment Contract in bad faith. In any event, the Club argues that the 10-day-deadline contained in the warning letter dated 27 March 2018 was a too short period for the Club to remedy its default. Finally, the Club, contests that, in any case, the compensation for breach of contract established by the FIFA DRC is excessive.

94. On the other side, the Player denies that negotiations between him and the Club ever took place after notification of the warning letter; he acknowledges that the payment of the outstanding remuneration was executed by the Club on 26 June 2018; i.e. after the Employment Contract was terminated and claims that both the Club's failure to fulfil its financial obligations together with the Club's illegitimate decision to exclude him from the first team, were sufficient elements to establish his right to unilaterally terminate the Employment Contract based on just cause; moreover, the Player maintains that the deadline granted to the Club in order to make the relevant payment was adequate and also underlines that the Club even failed to reply to his warning letter. In addition, according to the Player's position, nor his alleged poor performance, neither the Club's financial difficulties, if any, may ever justify the Club's failure to fulfil its obligations.

95. In view of the opposing arguments above, the Panel is invited to assess: a) whether the failure by the Club to pay the Player's salaries together with the Player's exclusion from the first team and relegation to the U-21 team were suitable grounds to give rise to the Player's entitlement to terminate the Employment Contract with just cause and, in the positive case, b) whether the compensation for breach established by the FIFA DRC in the Appealed Decision is excessive and need to be reduced, as requested by the Appellant, or shall be confirmed.

B. The meaning of "just cause" according to CAS case law and relevant requirements

96. The Panel first reminds that according to Article 13 of the FIFA RSTP, *"A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement"*, while Article 14 of the same regulations provides that *"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause"*.

97. In the absence of a specific definition in the FIFA RSTP, and in accordance with the well-established CAS jurisprudence which has constantly referred to the principles of Swiss law, a "valid reason" or "just cause" for termination of an employment contract exists when the relevant breach by the other party (or other impeding circumstances) is of such nature, or has reached such a level of seriousness, that the essential conditions under which the contract was concluded are no longer present and the injured party cannot in good faith be expected to continue the employment relationship, to be established on a case-by-case basis (see CAS 2006/A/1180).

98. The Panel also observes that in principle, according to CAS jurisprudence, and in accordance with Swiss law (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446), for a party to be allowed to validly terminate an employment contract with immediate effect, it must have warned the other party, in order for the latter to have the chance, if it deemed the complaint legitimate, to comply with its obligations (CAS 2016/A/4884; CAS 2015/A/4327; CAS 2013/A/3091, 3092 & 3093; CAS 2013/A/3398; ATF 121 III 467, consid. 4d).

99. Therefore, the Panel has to establish whether in the present case the two conditions mentioned above are satisfied.

100. As to the existence of a "valid reason" or just cause in the present case, the Panel observes that the Club was in default of payment with regard to three monthly salaries, amounting to a total of EUR 165,000 when the Player sent his warning letter on 27 March 2018. In this respect, the Panel considers that, as a general rule, the payment of the players' remuneration consists in the clubs' main obligation within the employment relationship and, moreover, in the case at hand, the relevant amount is quite substantial.

101. That being said, the financial issue alleged by the Club with regard to the devaluation of the Turkish Lira, if any, is irrelevant and cannot be invoked as a justification for the late payment, as, consistent with CAS jurisprudence *"Administrational and financial difficulties within the Club cannot be invoked as an excuse for non-payment of a player. It is for the Club to find a way around these <difficulties> or to bring this forward to the player in an attempt to arrive at a compromise"* (CAS 2016/A/4482).

102. Besides the fact that the alleged difficulty was not sufficiently substantiated by the Appellant, the Panel considers that it is the responsibility of the Club to bear any financial risk connected to its own activity and, moreover, the Appellant also failed to prove that it actually contacted the Player in order to explain the situation allegedly preventing the non-payment and try to find an amicable solution. On the contrary, the assertions made by the Club regarding ongoing negotiations between the Parties were objected by the Player and remained undemonstrated since the Club failed to meet its burden of proof in this regard. In addition, the Panel notes that there is no clear and convincing evidence in the file that the Club even somehow reacted to the warning letter sent by the Player on 27 March 2018. Finally, the Panel considers that the fact that the Club ultimately paid the outstanding salaries to the Player, is irrelevant for the purpose of establishing whether the Player had or not just cause for termination, since the payment was fulfilled long after the Employment Contract was terminated.

103. In addition to the foregoing, the Panel observes that the default of payment was not the only reason put forward by the Player for the unilateral termination of the Employment Contract, as he also claimed that the Club has illegitimately excluded him from the first team and imposed him to train with the U-21 team. In this context, the Club maintains that the relevant decision, which allegedly was meant to be temporary, was justified by the Player's poor performance. From the documents submitted by the Respondent after the hearing, as per the Panel's instructions, it was also demonstrated that the Player did not appear in the list of the Club's first team with regard to the following dates: 10 August 2017; 18 August 2017; 25 August 2017; 19 January 2018; 2 February 2018. The Panel notes that, in any case, the relevant circumstance was not objected by the Appellant at the hearing.

104. In this regard, the Panel notes that, according to CAS jurisprudence, inadequate sporting performance by a player can hardly constitute a breach of contract (CAS 2010/A/2049, para 12, see also ZIMMERMANN M., Vertragsstabilität im Internationalen Fussball, Zürich 2015, p. 237):

> *"The Club may have been legitimately disappointed with the performance of the Player, especially since they made an investment of a reasonable size. However, nothing in the Contract justifies termination of contract based on sporting performance. Moreover, it happens quite frequently that clubs sign players who subsequently disappoint with their sporting performance. In the absence of strict contractual language, inadequate sporting performance*

can hardly constitute a legitimate breach of contract. This is not to say that the Club cannot terminate the contract in such cases, provided of course, that it has reached an agreement with the Player in this regard. This has not been the case here. For these reasons, this plea must be rejected as well" (CAS 2010/A/2049).

105. Moreover, it has been established by CAS jurisprudence that preventing a player from training with the first team *"is potentially a much harsher measure than solely assigning a player to play matches with the second team while being allowed to train with the first team squad. The former seriously prejudices the player's future perspectives with the first team, since such measure is of a more definite nature than the latter"* (CAS 2014/A/3642).

106. Another CAS panel has strengthened this principle by establishing that unilateral change in the status of a player which is not related to company requirements or to organization of the work or the failings of the employees, as is the present case, a valid reason exist for the player to unilaterally terminate the employment contract, as there is a serious infringement of the players' personality rights: *"According to Articles 28 et seq. of the Swiss Civil Code, any infringement of personality rights caused by another is presumed to be illegal and subject to penalties unless there is a justified reason that overturns this presumption. It is generally accepted in jurisprudence (ATF 120 II 369; ATF 102 II 211; ATF 137 III 303; Judgment of the Swiss Federal Tribunal 4A_558/2011, dated March 27,2012) that personality rights apply to the world of sport. For athletes, personality rights encompass in particular the development and fulfilment of personality through sporting activity, professional freedom and economic freedom. An athlete who is not actively participating in competitions depreciates on the market and reduces his future career opportunities. Athletes have therefore a right to actively practice their profession"* (CAS 2016/A/4560 referring to CAS 2013/A/3091; 3092 & 3093). Finally, although the Club alleged that the decision to relegate the Player to the U-21 team was a provisional measure, it failed to provide any evidence thereto.

107. Therefore, the Panel believes that, in the absence of any objective reasons, the Club arbitrarily relegated the Player to the U-21 team, in fact violating his right to train and play with the first team, i.e. the right to be employed and perform his activity under the terms agreed, which could seriously prejudice his career as a professional.

108. Within the legal framework above, the specific circumstances of the present case led the Panel to believe that at the moment when the notice of termination was notified to the Club, considering the repeated violations resulting in a default of payment of the Player's salaries in the amount of EUR 165,000, and also considering the exclusion of the Player's from the first team for alleged poor performance of the latter, the essential conditions under which the Employment Contract was concluded between the Parties were no longer present. As a consequence, in the Panel's opinion, due to the Club's behaviour, the Player could not in good faith be expected to rely on the performance by the Club of its contractual obligations and therefore, to continue the employment relationship.

109. Moreover, the Panel observes that, before the termination of the Employment Contract was notified, the Player complied with the duty to give a warning to the Club, that in the absence of any remedy by the Club, he would terminate the contract, in accordance with CAS jurisprudence and Swiss law (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF

108 II 444, 446; CAS 2013/A/3091, 3092 & 3093; CAS 2015/A/4327; CAS 2013/A/3398; ATF 121 III 467, consid. 4d).

110. In fact, it appears from the file that the Player had previously warned the Club by letter dated 27 March 2018, which the Club apparently disregarded, in the absence of any evidence to the contrary. The Player has therefore drawn the Appellant's attention to the fact that the Club's conduct was not in accordance with the Employment Contract and that the persistence of the breach would result in the unilateral termination for just cause. With this regard, the Panel finds that, consistent with CAS jurisprudence, the 10-day-deadline given to the Club in order to make the relevant payment was a sufficient period of time, i.e. a *"realistic chance"* to remedy the breach (CAS 2016/A/4403), or, at least, the Club could have searched for a compromise with the Player, but failed to do so. In addition, the 15-day-deadline set forth under 14bis of the FIFA RSTP referred to by the Appellant is not applicable to the present case since it came into force on 1 June 2018; and therefore, the Appellant's argument shall be rejected.

111. In view of all the above, the Panel is satisfied that firstly, the outstanding payments claimed by the Player were substantial and that the relegation of the Player to the U-21 team was unwarranted; and that, secondly, the Player had given prior warning to the Club, granting the latter a *"realistic chance"* to fulfil its obligations. Therefore, the Panel abide by the Appealed Decision that the Player had just cause to terminate the Employment Contract on 9 April 2018, in accordance with Article 14 of the FIFA RSTP.

C. The consequences of the breach by the Club pursuant to Article 17 FIFA RSTP. Is the amount of compensation established by the FIFA DRC appropriate to the present case?

112. With regard to the consequences of the relevant breach, the Panel also concurs with the FIFA DRC that the Player is entitled to compensation pursuant to Article 17, para. 1 of the FIFA RSTP, which provides for financial compensation in favour of the injured party. Moreover, the Panel abides by CAS case law according to which, in light of the principle of "positive interest", *"the harmed party should be restored to the position in which the same party would have been had the contract been properly fulfilled"* (CAS 2005/A/801; CAS 2006/A/1061; CAS 2006/A/1062; CAS 2008/A/1447; CAS 2012/A/2698; CAS 2014/A/3706).

113. Therefore, the FIFA DRC correctly referred to the remaining value of the Employment Contract up to the original date of termination (i.e. 31 May 2020) with respect to the monies which the Player failed to receive due to early termination, in order to determine the basis of the amount of compensation for breach of contract.

114. The Appellant argues that the remaining value of the Employment Contract is not applicable to the present case since the relevant amount is merely prospective and conditioned to the event, which is unpredictable, that the Player continued providing his services to the Club, otherwise it would result in an unjust enrichment to the Player.

115. Such an argument has no support in the provisions of Article 17 of the FIFA RSTP and of Article 337c of the Swiss CO and, in the absence of any objective circumstances put forward by the Appellant which may justify any derogation to the rule, if any, shall therefore be rejected.

In this respect, the Panel reminds that the principle of the positive interest (or "expectation interest"), aims at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly.

116. Moreover, the purpose of Article 17 of the FIFA RSTP consists in reinforcing contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches (CAS 2017/A/5180, CAS 2008/A/1519-1520, para. 80, with further references to: CAS 2005/A/876, p. 17: *"*[…] *it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability'* […]*"*; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 92: *"*[…] *the ultimate rationale of this provision of the FIFA RSTP is to support and foster contractual stability* […]*"*; confirmed in CAS 2008/A/1568, para. 6.37).

117. Therefore, the Panel shares the criteria adopted by the FIFA DRC in the Appealed Decision in order to establish the basis of the amount of the compensation for breach.

118. Furthermore, in application of the Player's duty to mitigate his damages according to Swiss law and consistent with the long-established CAS jurisprudence (CAS 2014/A/3706; CAS 2005/A/909-910-911; CAS 2005/A/801; CAS 2004/A/587 where CAS panels applied Article 337c para 2 of the Swiss Code of Obligations), the Panel observes that the FIFA DRC reduced the remaining amount of EUR 1,193,503 by deduction of the alternative monies earned by the Player under the employment contract with the Canadian Club in the period between 16 August 2018 and 31 December 2018 (USD 66,748.5 equivalent to approx. EUR 58,600), thus obtaining the final amount of EUR 1,134,903.

119. The Appellant claims that the Player violated his duty to mitigate damages. In this respect, the Club objects that the salaries stipulated by the Player with the Canadian club are extremely low, when compared with the remuneration earned by the Player under the Employment Contract, which allegedly makes the reduction extremely unfair to the Club; moreover, it argues that the compensation should be further reduced by any potential amount that the Player could earn in the future, after the end of the employment relationship with the Canadian club.

120. The Panel is not persuaded by the Appellant's argument. According to CAS case law, the duty to mitigate damages shall be regarded in accordance with the general principle of fairness, which implies that, after a breach by the club, the player must act in good faith and seek for other employment, showing diligence and seriousness, with the overall aim of limiting the damages deriving from the breach and avoiding that a possible breach committed by the club could turn into an unjust enrichment for him (CAS 2016/A/4852; CAS 2016/A/4769; CAS 2016/A/4678).

121. Furthermore, the duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign a contract with worse financial conditions, in the absence of any valid reason to do so (CAS 2016/A/4582). However, the circumstance that a player received a higher remuneration under his former contract than he will receive under his new contract is not in itself sufficient to mean

automatically that the compensation payable from his former club has to be reduced in the event that the new contract does not pay the player just as well as the original contract did (CAS 2016/A/4605).

122. In view of the foregoing, the Panel believes that the Appellant has failed to fulfil its burden of proof with regard to the alleged Player's violation of the duty to mitigate his damages, and particularly, the Club failed to demonstrate that the Player deliberately accepted less favourable financial conditions, while he had other better options, and therefore the objection concerning the alleged unjust enrichment by the Player is completely unfounded. Likewise, the allegation by the Club that the amount of compensation shall be further reduced by any potential future income that the Player could earn after his relationship with the Canadian club is also groundless in the light of article 337c of the Swiss Code of Obligations, according to which such deduction is subject to the condition that the player has intentionally foregone other profits, which fact was completely unsupported by the Appellant.

123. In view of all the arguments above, the Panel believes that the amount of compensation granted by the FIFA DRC with the Appealed Decision is fair and reasonable in accordance with the applicable criteria and with the general duty of mitigation of damages.

D. Conclusion

124. As a consequence of all the foregoing, the Panel is satisfied that the Player had just cause to terminate the Employment Contract on 9 April 2018 and that the Club shall pay to the Player compensation for breach in the amount determined by the FIFA DRC in the Appealed Decision. Finally, the Panel rejects the present appeal and confirms the Appealed Decision.

125. All other motions or requests for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Akhisar Belediye Gençlik ve Spor Kulübü Derneği against the decision rendered by the Dispute Resolution Chamber of FIFA on 14 September 2018 is rejected.

2. The decision rendered by the Dispute Resolution Chamber of FIFA on 14 September 2018 is confirmed.

3. (…).

4. (…).

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