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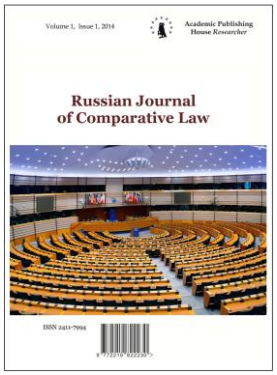

Termination of an Employment Contract on the Basis of "Just Cause" Unilaterally: The Practice of CAS in Relation to Football Clubs from the PRC

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Abstract

The practice of concluding employment contracts by professional football players and coaches, assistant coaches with clubs from China demonstrates some usual business practices encountered in football related to the conscientious and negligent performance of these contracts by the parties. To identify them, let us turn to the available appeal practice of the Court of Arbitration for Sport (hereinafter – CAS, arbitration) regarding the decisions of the FIFA Committee on the status of players (hereinafter – the Committee). In this article, we turn to all disputes involving clubs from the PRC, considered by arbitration, and united by the question of applying "just cause" for termination of an employment contract by one of the parties.

Keywords: employment contracts with football players, employment contracts with coaches and assistant of coaches, termination of an employment contract with a football player, "just cause", practice of FIFA Committee on the status of players, Court of Arbitration for Sport (CAS), practice of CAS, football clubs from the PRC.

1. Introduction

Applying subsidiarily the law of Switzerland in labor disputes, CAS drew attention to the "just cause" wording: "In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice" (Code of Obligations). However, as follows from this article of the Code, the immediate termination of an employment contract for the just cause should be announced only in circumstances where the party has committed a serious breach of contract. This regulation corresponds to the CAS position previously expressed by arbitration in CAS 2009/A/1956 dispute: the immediate termination of labor relations should be used as an "ultima" measure. Therefore, a football player who does not receive payment for more than three months has, as a rule, the "just cause" to terminate an employment contract (CAS 2014/A/3584).

2. Materials and methods

This study is based on the results of previously published works of the authors, as well as a few researchers of the problems of unilateral termination of an employment contract with a football player (Czarnota, 2013; Gardiner, Welch 2007; Ongaro, 2011). At the same time,

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consideration of the disputes involving clubs from the PRC and united by the question of applying "just cause" for termination of an employment contract by one of the parties through the prism of key decisions of the Court of Arbitration for Sport for UEFA regulation was not previously studied for the listed authors.

In the process of conducting the study, the formally dogmatic method, the problem method, the legal modeling method, and the system method were used, which are not the first time the authors are involved in studying the sports law.

3. Discussion

In the process of considering the dispute CAS 2015/A/4158, according to the club, the coach could not prove the grounds for termination of the contract.

First, the payment was made in advance, but the club was not obliged to make payments for two months when the coach actually refused to perform his duties. Evaluating the club's argument, CAS reasonably disagreed with it, because the evidence submitted by the parties did not testify consistently about it. One of the sums was transferred to the coach after he officially started to fulfill his duties and it can be recognized as an advance payment because the coach signed a document confirming receipt of sums, and also that the sums received will be deducted from his future salary. Of course, even if one imagines that the document signed by the coach would not contain such unambiguous wording, it is difficult to present a large sum of "one-time financial support", as the coach stated in his objections. On the other hand, another sum transferred to the coach before the start of the labor relations, not accompanied by his duty to sign the document of receipt, should be assessed as help from the club, compensating minor expenses at the initial stage of cooperation between the club and the coach who moved to China.

Therefore, CAS did not consider this sum a part of the coach's salary. The club's failure to pay subsequent wages, according to CAS, did not create a "just cause" for the coach to terminate the employment contract: the debt was approximately 20 % of the salary and lasted 17 days. Although a "just cause" is evaluated on a case-by-case basis, it is necessary to take into account the CAS practice mentioned earlier about the need for long-term wage arrears as "ultima". Therefore, the duration of the club's violation of its obligation to the coach did not create a "just cause", as there were no aggravating circumstances: constant, unexplained or unjustified delays in payment. It means that the coach did not have a "just cause" to terminate the employment contract due to the club's wage arrears.

Secondly, as the club argued in CAS 2015/A/4158, the reserve team of the club is part of a professional team, so the coach was obliged to perform his duties in relation to it. The coach claimed that he was replaced by another professional, but from the evidence presented by the parties it followed that five days before leaving China, he held his first training session with the team. At the same time, the coach was unable to provide CAS with evidence as to why he was allowed to coach the team on that date if he had previously been replaced by another person.

As a result, the arbitration was not fully convinced (that means the "comfortable satisfaction" standard of proof) that the coach was replaced by another professional. The witnesses attracted by the coach showed inconsistency in their testimony and, in fact, neither they nor the coach were able to name the officials of the club who announced to the latter the decision to replace him in the coaching position. On the other hand, even if the coach was asked to work with the reserve team, CAS reasonably did not regard this fact as contrary to the duties of the coach. As you can see from the materials of the case, the coach was hired as the "head coach of the professional team "Qingdao Zhongneng Football Club" and when considering the dispute, there was no evidence that the reserve team of this club consists of amateur players. In addition, according to the provisions of the employment contract, the coach was obliged to attend all training, matches, briefings and other events.

Therefore, CAS was not fully convinced by the arguments of the coach and considered that the latter did not have a "just cause" to terminate the employment contract unilaterally due to the suspension from the training of the club's professional team.

Thirdly, in CAS 2015/A/4158, the club appealed to the fact that the employment contract did not contain provisions requiring the club to obtain a work permit and a visa for the coach. Despite this, the club voluntarily unsuccessfully asked the coach to provide his passport to assist in these matters. Considering the club's arguments, CAS did not agree that the employment contract does

not indicate the club's obligations regarding the receipt of a work permit and visa by the coach. The general presumption in labor relations is that if the club intends to transfer these obligations to the coach, then it must include an unambiguous wording in the employment contract. In its absence, the club as an employer is presumed to be obliged to facilitate the obtaining of work permits and visas. In the dispute under review, evidence was presented showing that the coach arrived in China on a tourist visa and that he started working, waiting for the club to provide him with a work permit and a work visa.

Therefore, the club apparently gave reason to the coach to believe that would help in these matters, as evidenced by the club's attempts to contact the coach to obtain his passport in order to obtain a visa. In this case, the arbitration used the well-known doctrine of venire contra factum proprium (prohibition of contradictory behavior of participants in legal relations), which prevents the club from changing its previous position.

Thus, in labor relations under consideration, it was the club that accepted the obligation to facilitate the obtaining of a work permit as well as a visa. The physical absence of a coach in China should be seen as detrimental to the interests of the club, but not to the interests of the coach, as it affected the sports and financial performance of the club due to the preservation of labor relations. In fact, the coach terminated his employment relationship on the same day he left China, without waiting or making any personal effort to obtain the necessary documents upon his return to his home country.

For example, the coach could require the club to apply for a work permit and visa by sending the necessary documents. As it was established in the process of dispute consideration in arbitration, the club has not received any messages from the coach and therefore there is no evidence of the club's refusal to cooperate on this issue. Perhaps CAS would have considered the grounds for termination of the employment contract differently if the coach, while staying in his home state, had not received any messages from the club for a long period of time or had sent to the club his application for a work permit and visa together with a set of documents and had not received a response. In this situation, it would be possible to consider the behavior of the club as evidence of disinterest in the work of the coach and, consequently, violation of obligations under the employment contract. Therefore, the situation in the CAS 2015/A/4158 dispute cannot be considered "just cause" for termination of the employment contract.

The assessment of the presence or absence of "just cause" for the termination of the employment contract by the club with the assistant coach was carried out in CAS 2015/A/4161. As follows from the correspondence presented in CAS, labor relations with the assistant coach was terminated by the club unilaterally on the basis that the assistant coach did not fulfill his duty to lead the training of one professional team's group three times.

In reviewing the testimony of the witness, CAS drew attention to its inconsistency. In the first statement, which was given by the assistant coach, the witness affirmed the existence of an employment contract, a copy of which was not provided to the assistant coach. However, in the second statement of the witness which was submitted by the club, absence of data on signing by the assistant of the employment contract was noted. Therefore, CAS did not accept the testimony as evidence and did not consider the videos and photographs of the applicant's meetings with the club's management to be sufficient to reach an unambiguous conclusion about the existence of the employment contract (CAS 2015/A/4161: para. 89).

Note that the Regulations oblige professional football players and clubs to conclude contracts in writing (Regulations: art. 2). This rule has been verified by CAS practice (CAS 2014/A/3739&3749). However, the requirement cannot be extended to coaches and assistant coaches, as their agreements are not subject to Regulations, except for the extension of the jurisdiction of the Committee to disputes related to their professional activities. Therefore, CAS required subsidiary recourse to Swiss law to resolve the issue of the existence of an employment relationship: "The expression of intent may be express or implied" (Code of Obligations: art. 1 (2)). The possibility of the implied relationship in the dispute CAS 2015/A/4161 required proof by answering questions (1) about the presence of an assistant coach under the leadership of the club; (2) the participation of an assistant in the sports activities of the club; (3) the presence of mutual responsibility between the parties; (4) the receipt by the assistant of some payment from the club (CAS 2015/A/4161: para. 92).

As follows from the letters submitted by the assistant in resolving the dispute, the club appointed him to train one of the professional team's groups, but he refused to fulfill his obligations to conduct training three times, which forced the club to release from the post of assistant coach of the football club "Qingdao Zhongneng Football Club" and to dismiss from the club. After analyzing the data letters, CAS made the following conclusions. First, the club really appointed a famous person to work as an assistant coach. Secondly, the assistant was subordinated to the local acts of the club, on the basis of which it was necessary to perform his obligations in preparing the team, which confirms his involvement in the club's sports activities.

Thirdly, the club required the assistant to carry out training in relation to a certain group of a professional team. Fourth, the club relieved the assistant from his duties and terminated legal relations due to the refusal to fulfill the previously directed requirements for the implementation of professional duties. Fifth, the letter states that the club has the right to refuse the services of an assistant if it is not satisfied with the level of performance of their duties by the latter. Sixth, in the last of the letters, the club informed the assistant about the need to take back the amount due to him as a "debt of the club" and thus complete the termination procedure. Since the club did not specify the details of the "debt", it can be assumed that they meant remuneration for the professional activities of the person (CAS 2015/A/4161: para. 100-101). This is one more characteristic feature of the employment relationship between the employer and the employee.

Taken together, these facts indicated that the assistant coach was under the direction and control of the club, which is typical of entities acting as employers. If we assume the opposite and assume that the person was not an assistant, but was an intern under the supervision of the head coach (as the club insisted), then you should expect the coach to engage in a discussion of the claims regarding the trainee's activities. It is the trainer who better understands the trainee's responsibilities, and therefore appears to be the appropriate person to resolve the misunderstandings that have arisen. In particular, it can be considered that the club, by its actions and behavior, has created reasonable grounds for believing the existence of an employment relationship. It means that there were mutual obligations between the parties, which are characteristic of the relations between the employer and the employees. In addition, article 344 (a) of the Swiss Code of obligations imposes on the club the burden of proving the status of an intern in the absence of a written training contract. For example, the club could submit documents about the applicant's attendance of courses or programs for professional coaches in the relevant organization.

However, in CAS 2015/A/4161, the club did not fulfill the burden of proof and could not confirm the status of the claimant as an unpaid trainee of the head coach (CAS 2015/A/4161: para. 104). Even if we assume that the person was at first really an unpaid intern, then the following facts confirm the true intention of the parties and their understanding of the transformation of relationships into labor relations by nature – between the employer and the employee.

The legal consequences of terminating an employment relationship in the absence of "just cause" should be considered subject to the provisions of chapter IV of Regulations. However, the club appealed to the impossibility of applying this chapter as directed, in his opinion, to maintain contractual stability only between clubs and professional football players, but not between clubs and head coaches, assistant coaches. Indeed, the Regulations does not contain an algorithm for determining compensation in labor disputes between clubs and coaches, assistant coaches (Regulations limits the scope of the provisions of this act to the rules governing the status of professional football players, their right to participate in sports activities and their transitions (transfers) between clubs belonging to different associations) (Regulations: art. 1), which means that it will be necessary to refer to the applicable Swiss subsidiary legislation. As referred to CAS, in accordance with the provisions of the Switzerland Code of Obligations: "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" (Code of Obligations: art. 337c (1). In addition, part 3 of this article requires that the amount of compensation due be calculated on the basis of what the person received upon termination of the employment relationship, or as compensation for another job, or that which she intentionally did not want to earn, having the opportunity.

For example, in the case of CAS 2014/A/3525, the club did not provide evidence that the assistant coach received a new job during the period during which labor relations with the former club would remain, or that they intentionally did not look for a new job. For example, in CAS 2014/A/3525 the compensation was deducted from the salary of the player received in the new club after the termination of "just cause" unilaterally employment contract with the previous club. Therefore, the assistant coach in the dispute in question had the right to compensation for the unilateral termination of the employment contract by the club. In the absence of any evidence to the contrary, the existence of an employment relationship between the club and the assistant should be recognized during the period for which an employment contract has been concluded between the coach and the club. On the other hand, in the absence of a written contract between the parties, in which the financial conditions would be fixed, one should not a priori base on the assistant's statements about the amount of his remuneration, but should seek agreement with the club's head coach and other evidence (CAS 2014/A/3525: para. 62). As a result, it was precisely this wage of an assistant coach that was considered to determine the compensation due to him from the club.

More complex situations of employment contracts arise in the presence of two agreements: the employment contract and the agreement on the rights to the image of the player. In CAS 2015/A/4039, the football player terminated the employment contract, as he considered on the grounds of "just cause", notifying the club of the failed, but due under two contracts of payments.

Considering the payments in favor of a football player, CAS drew attention to the following points. The first of the payments received by the football player from the club should be considered as part of the salary since the player himself did not indicate in his statement that he regarded the payment as part of the sum for signing it. The second of the payments was made not by the club, but by the company of the same name. Given that the company was a party to the contract on the rights to the image of a football player, CAS reasonably regarded this amount as part of the remuneration for the transfer of these rights (CAS 2015/A/4039: para. 74, 76). Thus, the arbitration considered that the player had been paid all the amounts due until he had unilaterally terminated the employment contract with the club.

The employment contract between the club and the professional football player in CAS 2015/A/4039 contained a clause on the right of the player to cancel unilaterally if the club had wage arrears for more than three months. The player did not dispute such clause of the agreement and signed it, thereby agreeing with the unequivocal wording of the condition. It followed from the case file that the wage arrears did not exceed 36 days, which meant, in accordance with the doctrine of pacta sunt servanda, the absence of a breach by the club, which would be serious for the "just cause" to occur. At the same time, the mentioned condition of the employment contract could not be recognized as invalid as pursuing the interests of only one party – the club. First, a professional football player previously played for several clubs in Asia, he was assisted by an agent, which means he was well acquainted with such a condition of the contract in clubs from China and could, if necessary, get preliminary legal advice on the consequences of the application of the said condition. Secondly, the player agreed with the division of payment of labor relations into two contracts and accepted the principle of payment. Of course, he knew or should have known about the rather controversial scheme of payment for his work, but never raised the issue during the term of both agreements (CAS 2015/A/4039: para. 106). Assessing the behavior and actions of the player in the complex, we can assume that he wanted to terminate his employment relationship with the club, despite several requests from the club. Thus, it can be stated that the club tried to continue labor relations, but did not meet with understanding from the player, who apparently decided not to cooperate with the club anymore. Indeed, the club's debt violated contractual obligations, but such a violation was not serious ("ultime") to be a "just cause" for the player to terminate the employment contract.

4. Results

Termination of labor relations in professional sports should take place when the "injured" party cannot honestly expect the other party to continue the relationship since the latter has committed a serious violation of the contract (CAS 2008/A/1447, CAS 2009/A/1956). Before resorting to such an "ultima" measure, as indicated by arbitration in CAS 2014/A/3460, the party is advised to notify the violating party of the need to stop the violations: despite the fact that it is not obligatory to notify about this in labor relations in professional sports, arbitration considers as

an important step that may affect the cessation of the violation, especially if such a violation has not reached a "totally unacceptable level". Thus, in CAS 2015/A/4161, the employment relationship with the assistant coach (1) was terminated three days after missing the last of the three training, (2) the club did not provide any evidence of his previous unacceptable behavior, (3) the club did not provide any explanation to the assistant about the reasons. Following the requirement of conscientious behavior of participants in labor relations, the club was required, at a minimum, to begin disciplinary proceedings against the assistant — he could be sent a warning to stop violations, and then, if the unacceptable situation persisted, other disciplinary sanctions would be applied to the assistant, such as a reprimand or a fine. Dismissal should have been the last measure of disciplinary liability if the violation reached a serious level and "... not all employee errors unequivocally give the club the right to unilaterally terminate the employment contract". Acting within the framework of the above reasoning and relying on the facts proved in the process, CAS reasonably considered in 2015/A/4161 that the absence of an assistant in three workouts cannot be considered as serious violations justifying "just cause" the termination of labor relations unilaterally by the club.

We agree with the position of CAS that the wage, which is stated by the assistant coach in the absence of evidence of a copy of a written contract with him, which is three times less than the coach's salary cannot be questioned as disproportionate or inadequate in relation to the cost of services provided by the assistant. The assistant has the right to compensation, which corresponds to what he would have earned if the relations of the parties were formalized by the employment contract. This conclusion is confirmed by the doctrine of restitution used by the CAS (CAS 2008/A/1519&1520).

5. Conclusion

CAS in assessing the existence or absence of "just cause" follows its practice (CAS 2007/A/1352; CAS 2008/A/1447; CAS 2008/A/1517; CAS 2009/A/1956) and requires that one of the parties commit a serious breach of contract. The determination of the existence or absence of a "just cause" shall be made in accordance with the circumstances of each particular dispute. Behavior that violates the terms of the employment contract, by default, cannot serve as an excuse for termination of the employment contract on the initiative of one of the parties. However, if more than one breach is continuing, then the inadmissibility of the conduct of the party to the contractual obligations reaches such a level of seriousness that the other party is entitled to terminate the agreement.

References

CAS 2008/A/1447 – Arbitration CAS 2008/A/1447 E. v Diyarbakirspor, award of 29 August 2008. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/1447.pdf (accessed date 02.05.2019).

CAS 2008/A/1519&1520 – Arbitration CAS 2008/A/1519 FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA; Arbitration CAS 2008/A/1520 Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) & FIFA. [Electronic resource]. URL: https://arbitrationlaw.com/sites/default/files/free_pdfs/CAS%202008-A-1519-1520%20FCSD%20v%20MFS%20et%20al%20Award.pdf (Accessed date 02.05.2019).

CAS 2009/A/1956 – Arbitration CAS 2009/A/1956 Club Tofta Itróttarfelag, B68 v. R., award of 16 February 2010. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/1956.pdf (accessed date 02.05.2019).

CAS 2014/A/3525 – Arbitration CAS 2014/A/3525 Changchun Yatai Football Club Co. Ltd. V. Marko Ljubinkovic, award of 17 February 2015. [Electronic resource]. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/3525.pdf (accessed date 02.05.2019).

CAS 2014/A/3584 – Arbitration CAS 2014/A/3584 Elaziğspor Kulübü Derneği v. Hervé Germain Tum, award of 29 January 2015. [Electronic resource]. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/3584.pdf (accessed date 02.05.2019).

CAS 2014/A/3739 & 3749 – Arbitration CAS 2014/A/3739 & 3749 Jonathan Mensah & Evian Thonon Gaillard FC v. Fédération Internationale de Football Association (FIFA) & Udinese Calcio S.p.A, award of 16 July 2015.

CAS 2015/A/4039 – Arbitration CAS 2015/A/4039 Nashat Akram v. Dalian Aerbin Football Club, award of 3 February 2016. [Electronic resource]. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/4039.pdf (accessed date 02.05.2019).

CAS 2015/A/4161 – Arbitration CAS 2015/A/4161 Vladimir Sliskovic v. Qingdao Zhongneng Football Club, award of 28 April 2016. [Electronic resource]. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/4161.pdf (accessed date 02.05.2019).

Code of Obligations – Switzerland Code of Obligations. [Electronic resource]. URL: https://www.admin.ch/opc/en/classified-compilation/19110009/201704010000/220.pdf (accessed date 02.05.2019).

Czarnota, 2013 – *Czarnota, P.A.* (2013). FIFA Transfer Rules and Unilateral Termination Without "Just Cause". *Berkeley Journal of Entertainment and Sports Law,* Vol. 2, Is. 1, pp. 1-47.

Gardiner,Welch, 2007 – *Gardiner, S., Welch, R.* (2007). The contractual dynamics of team stability versus player mobility: who rules "The Beautiful Game"? *Entertainment Sports Law Journal*, Vol. 5, Is. 1, pp. 1-68.

Ongaro, 2011 – *Ongaro, O.* (2011). Maintenance of contractual stability between professional football players and clubs—the FIFA Regulations on the Status and Transfer of Players and the Relevant Case Law of the Dispute Resolution Chamber. *European Sports Law Policy Bulletin,* Is. 1, pp. 1-344.

Regulations – Regulations on the Status and Transfer of Players. [Electronic resource]. URL: https://www.fifa.com/about-fifa/official-documents/law-regulations/index.html (accessed date 02.05.2019).