



Andrew Smith Barrister
andrewsmith@matrixlaw.co.uk
Matrix Chambers, London

Recent jurisprudence on ‘just cause’ contract termination

The maintenance of contractual stability between professional football players and their employer clubs is the objective that underpins Section IV of the FIFA Regulations on the Status and Transfer of Players (‘RSTP’). Andrew Smith, Barrister at Matrix Chambers, considers in this article the recent decisions of the Court of Arbitration for Sport (‘CAS’) concerning unilateral terminations of contracts, with a particular focus on the following issues: What is regarded as a ‘termination’ of the employment contract?; What constitutes ‘just cause’ for a unilateral termination?; What are the principles governing the assessment of compensation for a unilateral termination without just cause?; How does joint liability operate in this context?; and What are the principles governing the imposition of sporting sanctions?

What is regarded as a ‘termination’ of the employment contract?

In *Al Shaab FC v. Aymard Guirie*¹, one of the issues arising for determination was whether the club’s de-registration of a player from the FIFA Transfer Matching System constituted a formal termination of his employment contract, for the purpose of *inter alia* Article 17 of the RSTP. The CAS held that it did, stating that by its actions, the club had “barred [the player’s] access to any official match with its team,” thereby violating the player’s “fundamental right as its employed player to compete on the highest level possible.” The club’s unilateral de-registration of the player amounted to a breach of contract and a “factual termination of the Employment Contract.”

What constitutes ‘just cause’ for a unilateral termination?

A contract cannot be unilaterally terminated during the course of a season, unless there is ‘just cause’ for such termination. This article does not address the concept of sporting just cause, which in summary provides a 15 day ‘window of opportunity’ for an ‘established’ player, following his club’s

last official match of the season, to terminate his contract prematurely in circumstances where he has appeared in fewer than 10% of his club’s official matches during the course of a season². What does and does not constitute ‘just cause’ for the premature and unilateral termination of a contract under Article 14 of the RSTP is an issue that frequently arises for determination in proceedings before the CAS. Often these disputes centre on a club’s failure to ensure prompt payment of salary and/or bonus payments to a player, or the imposition of a disciplinary sanction on a player, which causes the aggrieved player to resign and a legal battle as to whether he was legally entitled to do so. In terms of the general principles to be applied in this context:

i. Article 14.2 of the FIFA Commentary on the RSTP suggests that “[...] behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over time, then it is most probable that the breach of contract has reached such a level that

the party suffering the breach is entitled to terminate the contract unilaterally.’

ii. According to jurisprudence from the CAS, just cause will exist where the breach of obligation has reached an extent that the injured party can no longer, and in good faith, be expected to continue the contractual relationship³.

iii. Furthermore, as a general rule, “A party will only be able to establish a just cause to terminate the employment contract if it had previously warned the other party of its unacceptable conduct or attitude⁴.”

The practical application of these principles has been considered in a number of recent cases before the CAS. In *Hønefoss Ballklubb v. Heiner Mora Mora & Belén FC*⁵, the player relied on two alleged breaches of contract in support of his contention that he had been entitled to terminate his contract for just cause. The first was a delay in paying his salary: at the time of his unilateral termination, the player’s May 2013 salary was approximately one month overdue and his June 2013 salary was two days overdue. The second

continued

matter relied upon by the player was his exclusion from the first team for a period of approximately two weeks. The CAS rejected the player's arguments, holding that he had not been entitled to terminate his contract unilaterally and summarily. With regard to the late payment of salary, the CAS noted that under the express terms of his contract, the player did have a right to "terminate the contract with one month's notification," in the event that "The Club does not fulfil their salary obligations according to this contract and the delay in payment for one term exceeds one calendar month." However, the CAS concluded that this provision did "not define a right of the Player to terminate the contract with just cause within the meaning of the RSTP (i.e. immediately) and resulting in a right to compensation" in such circumstances.

With regard to the player's alleged exclusion from the first team, the CAS held that this was attributable to genuine disciplinary reasons; the exclusion was of short duration; the player had failed to notify the club that he considered his exclusion to be a breach of contract; and the player had in fact handed in a letter of apology and resumed training upon the expiry of his two week exclusion. In the circumstances, the CAS held that this fell considerably short of constituting just cause for the player's termination of the contract.

In *Club Samsunspor v. Aminu Umar & FIFA*⁶, the player terminated his contract on the basis that the club had failed to pay three consecutive monthly salaries, and a lump sum payment to which he was entitled, leaving an unpaid debt of €75,000. The player had sent a reminder to the club about the overdue payables and had formally warned the club that he would terminate the contract in the event that the outstanding sums were not paid within seven days. The CAS held that in these circumstances the player did have just cause to terminate the contract. The non-payment was a substantial breach of the club's fundamental obligation to pay its player, and it had been on notice of the consequence of failing to remedy its breaches of contract - i.e. the player's intention to terminate the contract.

A different conclusion was reached by the CAS in *Nashat Akram v. Dalian Aerbin FC*⁷. In this case, as at the date of the player's termination, the club owed him a signing on fee worth \$400,000, plus two months' salary and image rights payments. Notwithstanding these substantial outstanding sums, the CAS held that the player did not have just cause to terminate the contract when he did. The conclusion was reached having regard to the express terms of the player's contract, which stipulated that he may cancel the contract if the club 'is behind in payment of salary to [the Player] for over three months.' The majority of the Panel held that this provision was valid, having regard to (amongst other matters) the player's experience as a "seasoned professional," who had been assisted by an Intermediary when entering into the contract; and the assumption that "foreigner players desirous of signing relatively big professional football contracts with Chinese clubs sought (or should have) prior legal advice on the consequences of such clauses."

Accordingly, the majority of the panel concluded that the club "had not breached its contractual obligations to an extent whereby the Player was entitled to regard the same as a serious breach giving rise to a right of termination." A serious breach would, in the eyes of the Parties, "only have arisen had [the club] delayed any of the Player's dues by 90 or more days." It followed that the player had terminated the contract prematurely and without just cause.

In *Qingdao Zhongneng FC v. Blaz Sliskovic*⁸, the club was responsible for a 17 day delay in paying one fifth of its head coach's monthly salary. Unsurprisingly, having regard to the principles outlined above, the CAS held that this was insufficient to constitute just cause for the coach's termination of the contract. There were no aggravating features, such as persistent, unexplained or unjustifiable delays in the administration of the coach's pay.

Another matter relied upon by the coach in support of his contention that he had just cause to terminate the contract was

the club's failure to facilitate the renewal of his visa and work permit. The CAS accepted that there was an implied duty on the club to facilitate this; the club's omission in this regard did not, however, provide the coach with just cause to terminate his contract. The Panel noted that the delay was "more to the detriment of the Club as opposed to the Coach himself," on the basis that the coach was still entitled to be paid during the period of the visa/work permit hiatus; the coach acted prematurely and "hardly waited nor made personal efforts to renew the documents;" and the coach had not sent any specific notice to the club requesting particular documents. The CAS went on to observe that its decision "may have been different had the Coach stayed in Bosnia for a relatively long period without hearing from the Club, or given the Club a specific notice to facilitate the renewal of these documents while he was in Bosnia, as this could perhaps have given rise to a legitimate argument or presumption that the Club was no longer interested in his services and/or had breached its duties to grave and unacceptable levels."

The final matter relied upon by the coach in support of his contention was an allegation that he had been mistreated by the club in various respects, including by being asked to train the reserves rather than the first team. The CAS also rejected these arguments, concluding that even if the coach had been asked to train the reserves, this fell within the scope of his duties and job description.

Blaz Sliskovic's brother and coaching colleague, Vladimir Sliskovic, fared rather better in his claim before the CAS⁹. He was dismissed by Qingdao three days after he had failed to attend and oversee three training sessions without explanation. The CAS concluded that this termination was "harsh or rather undertaken in a rush and irrational manner [sic]" and without just cause. It held that a warning notice should have been sent to the coach, with a view to bringing an end to the breaches; and that sanctions short of dismissal should have been utilised if the situation persisted, such as fines or formal reprimands. The Sole Arbitrator emphasised that

In this Award the Sole Arbitrator also referred to the well-established principle that if a player is unable to provide his services to the club due to illness or injury, this does not constitute a breach of contract and will not provide just cause for a termination of the contract¹³.

“Termination, as evidenced from CAS jurisprudence, ought to have been an *ultima ratio* [i.e. the last resort] if the breach had reached serious levels.” In *Hapoel Beer Sheva FC v. Razak*¹⁰, the club submitted that it had just cause to terminate the player’s contract, on the basis that there was uncertainty regarding the player’s employment status at the time of the termination. This uncertainty derived from a legal claim lodged by one of the player’s former clubs, which claimed that he had been bound by a valid employment contract when he moved to the new club, and that his transfer was therefore invalid. The CAS concluded that any uncertainty in this regard did not constitute just cause for the termination of the player’s contract with the club. The Panel noted that the player had already moved to the club when the legal claim was lodged by his former club; applying Article 18.5 of the RSTP, if the player had still been bound to his former club at the time when he entered into the new contract, the latter contract would still be valid and effective (albeit he and/or his new employer would be liable to pay compensation to his former club); and if the club was liable for inducement to breach the player’s contract with his former club, dismissing the player after the event would not allow it to avoid or escape such liability. In the circumstances, the club was not entitled to use the legal claim brought by the player’s former club as a ‘pretext’ for his dismissal. The CAS also noted that the club had not provided the player with any warning that it was contemplating terminating his contract, prior to issuing the termination notice (which itself did not provide any reason for the termination).

In *Al Shaab FC v. Aymard Guirie*¹¹, the CAS emphasised that inadequate sporting performance will not provide just cause for dismissal under the RSTP. The Sole Arbitrator concluded that “no sufficient grounds were indicated [...] to justify the early termination of the Employment Contract. Apparently, the only reason was that the [club] was not satisfied with the Player’s performance; the [club] even stated in its written submissions that the [player] was playing at a very low technical level. However,

according to CAS jurisprudence, inadequate sporting performance cannot constitute a legitimate reason to terminate the Employment Contract.” In *FC Dinamo Minsk v. Christian Udubuesi Obodo*¹², the club sought to justify its termination of the player’s contract on the basis that he had been undergoing medical treatment and rehabilitation in Italy, without the club’s consent. The CAS held that the club had never formally requested that the player return to Belarus for treatment; it had not warned him that his absence was regarded as being in breach of contract, or sought to discipline him; and had created a legitimate expectation on the part of the player that the club had tacitly authorised his treatment and rehabilitation regime. In the circumstances, the club did not have just cause to terminate the contract.

In this Award the Sole Arbitrator also referred to the well-established principle that if a player is unable to provide his services to the club due to illness or injury, this does not constitute a breach of contract and will not provide just cause for a termination of the contract¹³. Furthermore, the Sole Arbitrator made the interesting observation that “even though the [player] followed all the medical instructions of the [club], after more than three months he had not resolved his physical problems in spite of the treatment followed by the Club’s indication. In these circumstances the Sole Arbitrator considers that it was lawful for him to seek an alternative and independent medical opinion from a specialized medical center in order to protect and guarantee his fundamental right to health, given that the Club was being unable to do so.”

What are the principles governing the assessment of compensation for a unilateral termination without just cause?

The amount of compensation may be provided for in the contract - e.g. by way of a specific liquidated damages provision. Otherwise, compensation for the breach shall be calculated ‘with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria.’

These ‘objective criteria’ shall include, in particular, ‘the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period¹⁴.’

In the cases of *Samsunspor, Razak and Gaziantepspor Kulübü Dernegi v. Darvydas Sernas*¹⁵, the CAS reiterated the principle of the “positive interest” as the starting point when assessing a player’s compensation for a dismissal without just cause. Put simply, this means ascertaining the “salaries and other material income or benefits that the player would have earned if the contract would have been performed until its natural expiration.” Once this calculation has been carried out, consideration should then be given as to whether the player has complied with his duty to mitigate his losses (arising from the termination without just cause), and what effect this should have on the final award of compensation.

With regard to a player’s duty to mitigate, in *Sernas* the Panel held that this connotes a requirement “to act in good faith after the breach by the club and seek for other employment, showing diligence and seriousness.” The employee must then “permit a set-off against the amount of compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn.” It is clear that the burden of proving a failure to comply with the duty to mitigate rests on the wrongdoer - i.e. in this scenario, the player’s former club.

In *Al Shaab*, the CAS drew attention, in interesting *obiter* remarks, to the issue of whether a player can validly waive his entitlement to receive compensation for the termination of his contract without just cause. It cited Articles 337c, 341, 361 and 362 of the Swiss Code of Obligations,

If a player terminates his contract without just cause and is signed by a new club, there is a rebuttable presumption that the new club induced the player to breach his contract with his former club.

continued

the combined effect of which, in the Sole Arbitrator's judgment, is that an employee cannot validly waive any right to payment for unilateral termination of an employment contract without just cause, during the period of employment or within 30 days of its termination. Accordingly, any renunciation of a right to compensation made by the employee within that timeframe would be deemed null and void under Swiss law. In *Ascoli Calcio 1898 S.p.A v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club*¹⁶, the CAS noted that the 'objective criteria' identified in Article 17 of the RSTP are not necessarily the only criteria to be taken into consideration when determining the appropriate award of compensation. This was a case in which the player had terminated his contract without just cause, and the CAS had to determine what award of compensation should be made to his former club. On the facts, the Panel considered that two additional factors/criteria were pertinent, namely: (i) the fact that the club had engaged a players' agent to search for opportunities to transfer the player to the Middle East, "thus showing that it did not intend to keep the player;" and (ii) the fact that the club had stipulated a transfer fee of €500,000 for the player, which was the monetary value the club apparently placed on his services. The CAS rejected the club's claim for compensation to the sum of €1,500,000, ultimately concluding that the sum of €500,000 reflected fair compensation for the player's termination without just cause.

How does joint liability operate in this context?

Article 17.2 of the RSTP stipulates that "[...] If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.' Unlike the rules governing the imposition of sporting sanctions on clubs (see further below), the new club will be jointly and severally liable to pay the compensation, even if it is innocent of any wrongdoing. In *Ascoli*,

the CAS confirmed that "liability under article 17.2 RSTP is of an objective nature and does not require that the new club be considered as the instigator of the player's breach. As long as a club can be identified as the 'new club' of the player, joint liability can be established."

What are the principles governing the imposition of sporting sanctions?

If a player terminates his contract without just cause during the protected period, then sporting sanctions will be imposed on him, in addition to an order to pay compensation. The starting point is a four-month restriction on playing in official matches, although in the case of aggravating circumstances, the restriction shall last for six months¹⁷. If a player terminates his contract with just cause during the protected period, the club (which has acted in breach of contract) shall be banned from registering any new players for two entire and consecutive registration periods. Similarly, if a club terminates a contract without just cause during the protected period, it shall be subject to these sporting sanctions¹⁸.

If a player terminates his contract without just cause and is signed by a new club, there is a rebuttable presumption that the new club induced the player to breach his contract with his former club. Any club found guilty of a breach of contract, or inducing a breach of contract, shall be subject to the sporting sanctions identified above¹⁹.

In *Samsunspor*, the club was banned by the FIFA Dispute Resolution Chamber ("DRC") from registering any new player, either nationally or internationally, for two registration periods. On appeal to the CAS, one of the arguments advanced by the club was that the DRC had not been entitled to issue these sporting sanctions, on the basis that the player had not requested that sporting sanctions be imposed. This argument was flatly rejected by the CAS, which noted the mandatory wording of Article 17.4 of the RSTP - namely that sporting sanctions shall be imposed on any club

found to be in breach of contract during the protected period - and held that "a strict approach is necessary" in order to "guarantee a better enforcement of the contractual obligation assumed by [the club] towards its players." The Sole Arbitrator further concluded that "The prerogative to impose the sporting sanctions provided for in Article 17 para. 4 RSTP entirely lies with FIFA, respectively the DRC, which implicates that it is of no relevance whether a player or club has requested the imposition of sporting sanctions." Accordingly, the transfer ban was upheld by the CAS.

Concluding remarks

The concept of 'just cause' and the calculation of compensation for unjust terminations continues to be a fertile ground for disputes before the CAS. The increasing volume of published awards on this topic is helpful in terms of clarifying the applicable principles and increasing awareness of the same. That being said, there remains considerable scope for argument and disagreement on the application of these principles to particular factual scenarios, and no doubt the CAS will remain busy on this front.

1. CAS 2015/A/4122.
2. Article 15 of the RSTP.
3. See for example CAS 2008/A/1447 and CAS 2008/A/1517.
4. CAS 2013/A/3237; and CAS 2013/A/3091, 3092 & 3093.
5. CAS 2015/A/4083.
6. CAS 2015/A/4220.
7. CAS 2015/A/4039.
8. CAS 2015/A/4158.
9. CAS 2015/A/4161.
10. CAS 2015/A/4209.
11. CAS 2015/A/4122.
12. CAS 2015/A/4327.
13. CAS 2009/A/1956.
14. Article 17.1 of the RSTP.
15. CAS 2015/A/4346.
16. CAS 2014/A/3852.
17. Article 17.3 of the RSTP.
18. Article 17.4 of the RSTP.
19. Article 17.4 of the RSTP.