

Decision of the Single Judge of the Players' Status Committee

passed via videoconference, on 16 June 2020,

regarding an employment-related dispute concerning the coach Fernando Néstor
OCHOAIZPUR ITURAIN

BY:

José Luis Andrade (Portugal), Single Judge of the PSC

CLAIMANT:

FERNANDO NÉSTOR OCHOAIZPUR ITURAIN,
Argentina

Represented by Mr. Ricardo Alípaz Loetz

RESPONDENT:

REAL POTOSÍ, Bolivia

Represented by Mr. Ariel Reck

I. FACTS OF THE CASE

1. On 28 May 2018, the Argentinian coach, Fernando Néstor Ochoaizpur Iturain (hereinafter: *the coach or the Claimant*), and the Bolivian club, Real Potosí (hereinafter: *the club or the Respondent*), signed an employment contract valid from 15 June 2018 until 15 July 2019, according to which he was entitled to a sign-on bonus of USD 8,000 and a monthly salary of USD 8,000 (hereinafter: *the first contract*). In the occasion of the execution of the first contract, the club was represented by its president, Mr Wilson Gutierrez (hereinafter: *Mr Gutierrez*).
2. According to clause 11 of the first contract, in case of unilateral termination of the first contract by the club, the coach was entitled to his remuneration until the contract's original term, plus an amount of USD 70,000 as damages.
3. In June 2018, problems allegedly arose in the directing board of the club, and the latter decided to remove Mr Gutierrez from office, later nominating Mr Calixto Santos as the Respondent's new president. The Bolivian Football Federation (hereinafter: *FBF*), however, supposedly did not recognise such act.
4. On 27 July 2018, the coach sent two letters to the club, each one addressed to one of the presidents, asking for a clarification of the employment situation of his team and himself in the following ten days.
5. On 31 July 2018, the coach sent another letter to the club, once again requesting it to clarify his contractual situation within 24 hours, to which he received no reply.
6. The coach filed a claim against the club before FIFA for breach of contract. Such claim, which received reference number 18-01880, was however closed because the coach failed to pay the mandatory advance of costs as per art. 17 of the Rules Governing the Procedure of the Players' Status Committee and the Dispute Resolution Chamber.
7. On 4 January 2019, the coach and the club signed a second employment contract (hereinafter: *the second contract*), valid as from the date of signature until 31 December 2019, according to which he was *inter alia* entitled to a total remuneration of USD 103,000.
8. The preamble of the second contract reads as follows: "*Considering that the coaching staff had signed a services agreement dated 28 May 2018 with Club Real Potosí, which at that time was chaired by Mr. Wilzon Miguel Gutierrez Carrasco with identity card 3695699, and which was unilaterally and unjustifiably terminated by the club, generating a debt of one hundred and seventy-five thousand 00/100 US dollars (USD 175,000). The club's new board of directors and coaching staff consisting of Messrs. Fernando Nestor Ochoaizpur Iturain and Roberto Luis Settecase, have reach an agreement which will be embodied in this new contract.*"
9. According to clause 11 of the second contract, the club guaranteed to the coach a one-year contract "*without the possibility to end his duties*". Such clause further did not establish a fixed amount in case on unilateral termination by the club.

10. On 19 March 2019, the coach and the club signed a termination agreement (hereinafter: *the termination agreement*), according to which the second contract was terminated and the club undertook to pay to the coaching staff the total amount of USD 48,000 in two instalments.
11. The termination agreement was signed by the club, the coach and Mr Roberto Luis Settecase, the latter two indicated as "*the coaching staff*".

II. PROCEEDINGS BEFORE FIFA

12. On 15 November 2019, the coach filed a claim against the club before FIFA. A brief summary of the parties' positions is detailed in continuation.

A. Claim of the coach

13. The coach claimed that on 5 June 2018 he had started in advance the preparation for the pre-season with the club, as agreed with the club president at the time, Mr Gutierrez. The coach submitted that that, around this time, problems arose in the directing board of the club and the latter decided to demote Mr Gutierrez and nominate Mr Calixto Santos the new president, which however was not recognised by the FBF.
14. The coach further claimed to have continued to perform his duties, despite the fact that the club had two parallel presidents, and allegedly two coaching teams.
15. In continuation, the coach explained that on 22 July 2018, he was in the club's dressing room, awaiting the start of the club's first match, when Mr Calixto Santos' coaching staff locked him and his team, as well as forbade them to perform their tasks, in a violent manner. The situation was only allegedly solved when until security arrived.
16. The coach also claimed that (a) the club hired a new manager; (b) he did not receive any payments from the club; (c) he and his coaching staff were expelled from their hotel, as per the orders of the club, in spite of never having been informed directly about his dismissal. The coach is of the position this amounts to a unilateral breach of the first contract by the club, therefore entitling him to claim the entire value of the first contract. As such, he explained that he lodged the claim under the ref. no 18-01880, which was closed due to the lack of payment of advance of costs.
17. According to the coach, months after such claim was lodged, Mr Calixto Santos was confirmed by the FBF as the president of the club, and the latter supposedly acknowledged the severe mistakes he had made towards the coach and his team, offering him a second contract, which he accepted.
18. Lastly, the coach explained that on 14 March 2019, the club communicated to the coach its intention to terminate the contract and, subsequently on 19 March 2019, forced him to sign the termination agreement.

19. In his claim, the Claimant requested FIFA to declare that both the first and the second contract had been breached without just cause by the club, as follows:
 - a. The first contract: unpaid salaries as well as lack of response regarding the coach's employment situation;
 - b. The second contract: not complying with the "one year stability" agreed under clause 11, therefore trying to circumvent its obligations regarding the first contract.
20. The coach requested that the compensation clause included in the first contract be enforced. Thus, the coach claims from the club the payment of the amount of USD 144,119.54, plus interest of 5% p.a. on said amount, broken down as follows:
 - a. USD 8,000 as sign-on bonus for the first contract;
 - b. USD 64,000 as outstanding salaries from the first contract;
 - c. USD 70,000 as per the compensation clause in the first contract;
 - d. USD 2,119.54 as reimbursement of alleged hotel and flight costs.
21. The coach further requests that the club bears all the costs of the procedure and pays the attorney fees for 20% of the amount eventually granted.

B. Reply of the club

22. The Respondent, for its part, claimed it paid all the amounts under the termination agreement and requested that the claim be dismissed.
23. In particular, the Respondent outlined that all the agreements executed with the coach, i.e. the first contract, the second contract, and the termination agreement, were done so on a free-will basis, and that the coach has filed no evidence that he was forced to sign any of these contracts. What is more, the club argues to have filed evidence that the amounts agreed under the termination agreement have been duly paid.

C. Replica of the coach

24. Upon request by FIFA, the Claimant confirmed that the amounts agreed under the termination agreement were duly paid. Nevertheless, he explained that his requests for relief were directed to the first contract and not the second one.
25. Furthermore, the Claimant later changed its position regarding his original requests for relief and claimed that the requested compensation regarded only the first contract and never the second contract.
26. Nevertheless, the coach insisted in on the amounts sought as relief, as outlined in his statement of claim.

III. CONSIDERATIONS OF THE PLAYERS' STATUS COMMITTEE

A. Competence and applicable legal framework

27. First of all, the Single Judge of the Players' Status Committee (hereinafter: *the Single Judge*) analysed whether he was competent to deal with the present matter. In this respect, he took note that the present matter was submitted to FIFA on 15 November 2019. Taking into account the wording of art. 21 of the June 2020 edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: *the Procedural Rules*), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.
28. Subsequently, the Single Judge referred to art. 3 of the Procedural Rules and confirmed that in accordance with art. 23 par. 1 and 3 in combination with art. 22 lit. c) of the June 2020 edition of the Regulations on the Status and Transfer of Players, he is competent to deal with the matter at stake which concerns an employment-related dispute of an international dimension between an Argentinian coach and a Bolivian club.
29. Furthermore, the Single Judge analysed which edition of the Regulations on the Status and Transfer of Players should be applicable as to the substance of the matter. In this respect, he confirmed that in accordance to art. 26 par. 1 and 2 of the June 2020 edition of the Regulations on the Status and Transfer of Players and considering that the present claim was lodged with FIFA on 15 November 2019, the October 2019 edition of the Regulations on the Status and Transfer of Players (hereinafter: *the Regulations*) is applicable to the present matter as to the substance.

B. Burden of proof

30. The Single Judge recalled the basic principle of burden of proof, as stipulated in art. 12 par. 3 of the Procedural Rules, according to which a party claiming a right on the basis of an alleged fact shall carry the respective burden of proof. Likewise, he stressed the wording of art. 12 par. 4 of the Procedural Rules, pursuant to which he may consider evidence not filed by the parties.
31. In this respect, the Single Judge also recalled that in accordance with art. 6 par. 3 of Annexe 3 of the Regulations, FIFA's judicial bodies may use, within the scope of proceedings pertaining to the application of the Regulations, any documentation or evidence generated or contained in TMS.

C. Merits of the dispute

I. Main legal discussion and considerations

32. His competence and the applicable regulations having been established, and entering into the substance of the matter, the Single Judge started by acknowledging the above-mentioned facts as well as the arguments and the documentation submitted by the parties. However, the Chamber

- emphasised that in the following considerations it will refer only to the facts, arguments and documentary evidence, which it considered pertinent for the assessment of the matter at hand.
33. By doing so, the Single Judge recalled the parties' respective positions, and observed that while the Claimant deems that the first contract was breached by the Respondent, the latter claimed that all contracts executed with the coach were freely entered into by and between the parties, and that the club paid the coach all his dues under the termination agreement.
 34. The Single Judge also recalled that the Claimant confirmed that the club correctly paid the amounts due under the termination agreement.
 35. Accordingly, the Single Judge determined that the main issue in the case at hand, as disputed by the parties, was to determine whether the club had breached the first contract, and the consequences thereof.
 36. In this regard, the Single Judge observed that following the filing of a claim regarding the events that took place regarding the first contract, the coach and the club executed the second contract. In particular, the Single Judge noted the explicit wording of the Claimant's statement of claim, namely that the Respondent had contacted the coach "to try to reach an agreement" (cf. item D.2 of the coach's statement of claim).
 37. Subsequently, the Single Judge turned his attention to the contents of the second contract, the preamble of which expressly reads that "*Considering that the coaching staff had signed a services agreement dated 28 May 2018 with Club Real Potosí, which at that time was chaired by Mr. Wilzon Miguel Gutierrez Carrasco with identity card 3695699, and which was unilaterally and unjustifiably terminated by the club, generating a debt of one hundred and seventy-five thousand 00/100 US dollars (USD 175,000). The club's new board of directors and coaching staff consisting of Messrs. Fernando Nestor Ochoaizpur Iturain and Roberto Luis Settecase, have reach an agreement which will be embodied in this new contract*" (emphasis added by the Single Judge).
 38. The Single Judge then took note of the fact that no clause under the second contract establishes an exception in the sense that its preamble does not have legal content, or that it should not be considered as part of that contract.
 39. In light of the above, the Single Judge concluded that, irrespective of the any breach of contract that the club may have committed *vis-à-vis* the first contract – a breach that was seemingly recognized as per the second's contract preamble – the coach settled his financial dues with the club by signing the second contract. The Single Judge was of the firm position that the second contract represents a *novatio* of the parties' relationship: its contents are not only thoroughly clear in this regard, but also this has expressly confirmed by the coach in his submissions, as detailed above.
 40. Furthermore, the Single Judge found that despite all the alleged conditions concerning the employment situation of the Claimant while at the Respondent, he ultimately agreed to sign the second contract and the termination agreement. In this regard, the Single Judge stressed that the

coach produced no evidence to demonstrate that either was not entered by mutual consent, or that the Claimant was forced to sign the termination agreement.

41. Consequently, the Single Judge concluded both that the arguments raised by the Claimant could not be upheld, and the club owed no amounts to the coach in light of the first contract.
42. Lastly, the Single Judge turned to the amounts payable to the coach under the termination agreement, and confirmed that the parties do not dispute that such moneys were accurately paid.
43. In light of the foregoing considerations, the Single Judge decided that the Claimant is not entitled collect any amounts regarding the first contract and/or the termination agreement, and that the claim of the coach should be rejected in its entirety.

D. Costs

44. Lastly, the Single Judge referred to art. 25 par. 2 of the Regulations in combination with art. 18 par. 1 of the Procedural Rules, according to which in the proceedings before the Players' Status Committee and the Single Judge, costs in the maximum amount of CHF 25,000 are levied. The costs are to be borne in consideration of the parties' degree of success in the proceedings and are normally to be paid by the unsuccessful party.
45. In this respect, the Single Judge reiterated that the Claimant's claim is fully rejected. Therefore, the Single Judge decided that the Claimant shall bear the entirety of costs of the current proceedings in front of FIFA.
46. The Single Judge further observed the temporary amendments outlined in art. 18 par. 2 lit. ii) of the Procedural Rules, which entered in force in 10 June 2020, according to which the maximum amount of procedural costs levied for any claim lodged prior to 10 June 2020, which was yet to be decided at the time of such temporary amendment, shall be equivalent to any advance of costs paid.
47. Accordingly, the Single Judge observed that the Claimant paid the amount of CHF 2,000 as advance of costs, and therefore decided that the maximum amount of costs of the proceedings corresponds to CHF 2,000.
48. Consequently, the Single Judge determined that the Claimant shall pay the amount of CHF 2,000 in order to cover the costs of the present proceedings.
49. Subsequently, the Single Judge reverted to art. 17 par. 5 in combination with art. 18 of the Procedural Rules, and observed that the advance of costs paid by a party shall be duly considered in the decision regarding costs. Therefore, the Single Judge decided that the amount of the procedural costs, as decided herein, shall be offset against the amount paid by the Claimant as advance of costs.

IV. DECISION OF THE PLAYERS' STATUS COMMITTEE

1. The claim of the Claimant, FERNANDO NÉSTOR OCHOAIZPUR ITURAIN, is rejected.
2. The final costs of the proceedings in the amount of CHF 2,000 are to be paid by the Claimant to FIFA (cf. note relating to the payment of the procedural costs below). Such amount is offset against the payment of advance of costs made by the Claimant.

For the Players' Status Committee:



Emilio García Silvero

Chief Legal & Compliance Officer

NOTE RELATED TO THE APPEAL PROCEDURE:

According to article 58 par. 1 of the [FIFA Statutes](#), this decision may be appealed against before the [Court of Arbitration for Sport \(CAS\)](#) within 21 days of receipt of the notification of this decision.

NOTE RELATED TO THE PUBLICATION:

FIFA may [publish](#) this decision. For reasons of confidentiality, FIFA may decide, at the request of a party within five days of the notification of the motivated decision, to publish an anonymised or a redacted version (cf. article 20 of the Procedural Rules).

NOTE RELATING TO THE PAYMENT OF THE PROCEDURAL COSTS:

If applicable, payments to FIFA should be made by wire transfer in Swiss francs (CHF) to the following bank account:

366.677.01U (FIFA Players' Status) UBS Zurich,
SWIFT: UBSWCHZH80A, Clearing number 230, IBAN: CH 27 0023 0230 3666,
Please mention the applicable reference number

CONTACT INFORMATION:

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