FIFA FOOTBALL TRIBUNAL

Decision of the Dispute Resolution Chamber

passed on 12 April 2023

regarding an employment-related dispute concerning the player Illia Markovskyi

BY:

Clifford J. Hendel (USA & France), Deputy Chairperson
Sihon Gauci (Malta), member
André dos Santos Megale (Brazil), member

CLAIMANT:

Player Illia Markovskyi, Ukraine
Represented by Shkrebets & Partners

RESPONDENT:

Hapoel Haifa, Israel
Represented by Nir Inbar

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I. Facts of the case

1. On 31 May 2022, the Ukrainian/Israeli player Illia Markovskyi (hereinafter *the Claimant* or *the player*) was sent a Pre-Contract from the Israeli club Hapoel Haifa (hereinafter *the Respondent* or *the club*) for the season 2022/2023 with an option to extend for one additional season.

2. On 28 June 2022, the Claimant and the Respondent (jointly referred to as *the parties*) signed a document called "Appendix to the budget control agreement" (hereinafter *the Appendix*), establishing the following:

> *"In addition to all the provisions set in the budget control agreement, the Player Iiliya Markovsky passport no FB005467- citizen of Ukraine (hereinafter: the Player) and the Club Hapoel Haifa (hereinafter: the Club) have agreed as follow.*
> *The player will play for the Hapoel Haifa football club in the 2022/23 and The team have Contract option for one more season (2023124).*
>
> ***For Season 2022/23***
> ***Salary and benefits***
> *1) The Club undertakes to pay to the Player* ***10 monthly salaries from August 2022 until May 2023****, each in the amount of* ***37,837 NIS*** *gross.*
> *3) The club will provide the Player with accommodation as usual at the club, free of charge.*
> *4) The club will put at the Players disposal a car as usual at the club, free of charge+* ***1,000 NIS*** *for gas.*
> *5) The club will provide the Player with round trip flight ticket.*
> *6) bonus point- Bonus of 1,361 NIS for each point in the league games in which the player will participate (maximum 50 point).*
> *In case the player was on the team roster and did not participate in the game or the player was not on the team roster at all - the player will not receive a bonus for the points of that game.*
>
> ***Bonuses***
> *1) qualifies to the championship playoff: then the Club shall pay to-the Player bonus of 40,835 NIS gross.*
> *The bonus will be paid in installments from the 2023-2024 season budget."* (emphasis added)

3. On 30 June 2022, the Parties signed a "PLAYER AGREEMENT FORM FOR THE SEASON OF 2022/23" (hereinafter *the Employment Agreement*).

4. The nationality of the player was not mentioned in the said Employment Agreement, yet the document referred to the following I.D./passport of the player: 345400394. Based on further evidence on file, this is the player's Israeli I.D. card.

5. In Clauses 5 and 6 of the Employment Agreement concerning the duration of the agreement as well as the financial stipulations, the Parties remarked "*See attached Appendix*".

6. In Clause 7 of the Employment Agreement stipulated the following:

   "7. Arbitration
   a. The parties hereby agree that differences of opinion between the Club and player or between the Player and the Club, in everything relating to the provisions of this Agreement, shall be decided by an arbitrator, who will be appointed by virtue of the of the Association's Arbitration Institute Codex.
   b. The arbitration will be held in accordance with the directives of the Association's Arbitration Institute Codex."

7. It shall be noted that there is no corresponding transfer instruction in the Transfer Matching System (TMS), i.e. it appears that the player was never duly registered with the club.

8. It is undisputed that the player got injured during the Summer, around 6 or 7 July 2022.

9. The Claimant asserted that in August 2022, he continued a recovery process and that since mid-August 2022 he trained individually with the physiotherapist as well as participated in a training with the B-team.

10. On 2 September 2022, the Respondent sent the following letter to the Claimant:

    "We regret to inform you that we are considering the termination of your employment as a result of your misleading conduct, and the fact that you did not give us accurate information about your medical condition including stress fractures wich costs us enormous damage, and about the fact that you did not play for half a year.
    You are invited to a hearing meeting which will take place at:
    Bar Kochba 23, Bnei Brak (VTOWER building)
    Dated – 6/09/22- 10:00 a.m
    And you shall have the opportunity to argue against the termination.
    The hearing will be held in the English language and will be recorded.
    You can be accompanied by a lawyer and if you choose to do so, please let us know in advance."

11. On 5 September 2022, the Claimant replied that he duly fulfilled his treatment since his injury and that any termination of the contract would be in violations of the FIFA Regulations. Finally, the player added the following allegations:

    "(...) Unfortunately, on 1 August 2022, the Club's coach has informed the Player that he does not need him due to his medical conditions and asked to find a solution with the Club in terms of termination of the Contract. Since that time, the Player have been informed that the Club engaged in an intimidating campaign and induced the Player to terminate the Contract.

Namely, the Club refused to register the Player with the Israel Football Association for the Season 2022/2023, which effectively prevents the Player from performance from September to December 2022 inclusively, at minimum. Further, the Club refused to include the Player into the joint photo session as well as treated unequally to other players. ***Notably, the Player has not been paid his salary for one month, which is a separate serious breach of the Contract****. This culminated on 2 September 2022, when the Club notified the Player about an intention to unilaterally terminate the Contract and invited to the hearing scheduled for 6 September 2022 under a pretense that the Player allegedly concealed information about his medical condition. 2 This is a. nonsensical and apparently is an attempt to avoid fulfillment of the obligations under the Contract.* (...)"

12. On 6 September 2022, the Respondent terminated the Employment Agreement as the player "did not show up" in the respective meeting, provided "no explanation" regarding his medical condition nor to the alleged "misleading conduct" of the club.

13. On 27 December 2022, the Claimant signed a new employment agreement (hereinafter *the New Employment Agreement*) with the Estonian club, FC Levadia, valid as from 15 December 2022 until 15 December 2023.

14. In accordance with Clause 5 of the New Employment Agreement, the player is entitled to a monthly remuneration of EUR 3,000.

II. Proceedings before FIFA

15. On 1 December 2022, the Claimant filed the claim at hand before FIFA. A brief summary of the position of the parties is detailed in continuation.

a. Position of the Claimant

16. The requests for relief of the Claimant were the following:

"(1). Adjudge and declare that the Respondent has seriously breached the Contract during the Protected period;
(2). Adjudge and declare that the Respondent has unilaterally terminated the Contract without just cause;
(3). Oblige the Respondent to pay compensation of NIS 380,370 (three hundred eighty thousand three hundred seventy NIS);
(4). Oblige the Respondent to pay the default interest at the rate of 5% p.a. over the amount of awarded compensation starting from 06 September 2022 as of the time of actual payment;
(5). Impose a sporting sanction on the Respondent of a ban from registering any new players, either nationally or internationally, for two entire and consecutive registration periods;
(6). To order the Respondent jointly and severally to pay the full costs of the Claimant.

17. The Claimant argued that following his injury, he duly followed the instructions of the club. Nonetheless, that as of 1 August 2023, the approach of the club has changed and that it wished to terminate the contract as *"it appears that the Club's actions* [were] *an attempt to get rid of the roster of a foreign player, which did not have an opportunity to undergo mid-season preparation."*

18. The Claimant asserted that the termination on 6 September 2022 was without just cause as *"the injury and illness of the Player sustained by the Player after signing the Contract cannot per se serve as a ground for termination"* and shall bear the financial consequences thereof.

19. The player provided for the following calculation of the compensation: *"In light of para. 1 of the Annex to the Contract, the Player would have earned 8 monthly salaries, totalling to* ***NIS 302,696*** *(three hundred two thousand six hundred ninety-six NIS), as well as outstanding payment for two months, August and September 2022, owned by the Club, in the amount* ***NIS 75,674*** *(seventy-five thousand six hundred seventy four NIS), as well as* ***NIS 2,000*** *(two thousand NIS) as payment for gas, which comprises the amount of fair compensation."*

b. Position of the Respondent

20. The Respondent argued that *"FIFA does not have jurisdiction to hear this case due to the lack of international dimension in the dispute but a national dimension dispute and the fact the parties agreed that all disputes in relation with the Agreement will be decided by the IFACA. This claim must therefore be declared inadmissible.*

21. *In the alternative, the claim must be dismissed in full because the Respondent acted in good faith and terminated the agreement with just cause and according to RSTP."*

22. The Respondent argued that this is a national dispute since it involves a *"an Israeli football club and a professional football player who signed an employment contract as an Israeli citizen, using an Israeli ID.*

23. Furthermore, the Respondent asserted that, *"the parties agreed to bring any legal dispute related to their employment relationship to the Israeli Football Association's court of arbitration."*

24. In case the DRC would enter into the merits of the dispute, the Respondent argued that based on the medical evidence on file, the Claimant *"****suffered from and was aware of a chronic injury and incapability to perform sporting services***", which *"stood in the core and fundamental basics of the Agreement – Under such circumstances were a player is aware of his incapability to provide football services upon signing a contract and hides such fact , clearly justifies the termination of a contract by the injured club."*

25. Finally, the Respondent requested *"the honorable DRC must deduct a sum of 3,000 NIS, due to the speeding ticket the respondent had to pay on behalf of the claimant."*

c. Comments of the Claimant

26. The Claimant did not dispute his double-nationality, i.e. Ukrainian and Israeli, nonetheless, he argued that his "sportive nationality" should be relevant in the matter at hand, i.e. his registration in the national association.

27. In this respect, he pointed out that he *"has always been registered as a Ukrainian football Player. He played in various national associations, where the latest before the transfer to the Respondent, was the Greece association as a Ukrainian player."*

28. What is more, the Claimant argued that the Appendix explicitly mentions his Ukrainian passport and that the relevant transfer instruction in TMS confirms it.

29. In view of the above, the Claimant argued that the Claim is "admissible".

30. Concerning the Respondent's arguments concerning the jurisdiction clause, the Claimant argued that (i) Clause 7 is not exclusive; (ii) what is more, that *"the Respondent did not provide evidence that IF ACA arbitration comprises an independent arbitration tribunal that guarantees fair proceedings and respect the principle of equal representation of players and clubs as required by Article 22 of the FIFA RSTP."*

31. The Claimant consequently reiterated his initial request for relief.

d. Comments of the Israel Football Federation

32. The Israel Football Federation was requested to inform the FIFA general secretariat under which nationality was the Claimant registered with the Respondent.

33. In this respect, the Israel Football Federation provided with the following information:

    *"According to our registration records, our affiliated club, Hapoel Haifa FC (the "**Club**"), contacted the IFA to receive information regarding the registration of the Player. However, the Player did not register in the Club."*

e. Information in the Transfer Matching System

34. It shall be recalled that based on the information in the TMS, the player was never duly registered with the Respondent.

35. What is more, based on the player's ID in the TMS, the latter has a Ukrainian nationality.

III. Considerations of the Dispute Resolution Chamber

a. Competence and applicable legal framework

36. First of all, the Dispute Resolution Chamber (hereinafter also referred to as *Chamber* or *DRC*) analysed whether it was competent to deal with the case at hand. In this respect, it took note that the present matter was presented to FIFA on 1 December 2022 and submitted for decision on 12 April 2023. Taking into account the wording of art. 34 of the March 2023 edition of the Procedural Rules Governing the Football Tribunal (hereinafter *the Procedural Rules*), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.

37. Subsequently, the members of the Chamber referred to art. 2 par. 1 of the Procedural Rules and observed that in accordance with art. 23 par. 1 in combination with art. 22 lit. b) of the Regulations on the Status and Transfer of Players (October 2022 edition), the Dispute Resolution Chamber is – in principle – competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a player from Ukraine and a club from Israel.

38. Nonetheless, the Chamber recalled that the Respondent argued that the FIFA does not have competence due to the lack of international dimension, i.e. the player being from Israel, as well as due to a jurisdiction clause in the Employment Agreement.

39. Concerning the nationality of the player, the members of the DRC pointed out to the FIFA Commentary, which reads as follows: *"If the player holds dual nationality, and if one of their nationalities is that of the country in which the club is based, then the dispute will only be deemed to have an international dimension (and, by extension be within FIFA competence) if the player is registered by their club to participate in the relevant championship under their other nationality (i.e a Brazilian/Italian player participating for a Brazilian club is registered to participate as an Italian)."*

40. In this respect, the Chamber than recalled that the Claimant was never properly registered with the Respondent, which was confirmed by the Israel Football Federation as well as in the instructions in TMS. Furthermore, the DRC highlighted that the Employment Agreement and the Appendix are not unified as to the nationality of the player. Finally, the Chamber added that the TMS I.D. of the player also never mentions player's Israeli nationality.

41. In view of the above and based on the evidence on file, the DRC concluded that this is a matter of international dimension.

42. Furthermore, the Chamber turned its attention to the jurisdiction clause provided in Clause 7 of the Employment Agreement and the alleged to the competence of a different

deciding body. In this respect, the Chamber highlighted the Respondent failed to provide the Regulatory framework to establish the compliance of the said body with Circular 1010.

43. In view of the above, the DRC concluded that FIFA has jurisdiction to decide on the matter (art. 22 par. 1 lit. b) of the Regulations).

44. Subsequently, the Chamber analysed which regulations should be applicable as to the substance of the matter. In this respect, it confirmed that, in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (March 2023 edition), and considering that the present claim was lodged on 1 December 2022, the October 2022 edition of said regulations (hereinafter: *the Regulations*) is applicable to the matter at hand as to the substance.

b. Burden of proof

45. The Chamber recalled the basic principle of burden of proof, as stipulated in art. 13 par. 5 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, the Chamber stressed the wording of art. 13 par. 4 of the Procedural Rules, pursuant to which it may consider evidence not filed by the parties, including without limitation the evidence generated by or within the TMS.

c. Merits of the dispute

46. Its competence and the applicable regulations having been established, the Chamber entered into the merits of the dispute. In this respect, the Chamber started by acknowledging all the above-mentioned facts as well as the arguments and the documentation on file. 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.

i. Main legal discussion and considerations

47. The foregoing having been established, the Chamber moved to the substance of the matter, and took note that this is a claim of a player against a club concerning a termination of a contract.

48. The DRC took note of the arguments of the parties, in particular that the player asserted that the club terminated the contract without just cause on 6 September 2022 due to the medical condition of the player. On the other hand, the club argued that it was misled by the player about his medical condition from the beginning and that this justified the termination by the club.

49. As to any alleged error in the Employment Agreement as asserted by the Respondent, the Chamber was of the opinion that by invoking a contractual right to terminate the said Agreement on 6 September 2022, based on the alleged breaches, the Respondent actually ratified the Agreement and is therefore precluded from avoiding the Agreement based on fundamental error and/or fraudulent misrepresentation.

50. On the basis of the evidence before it, it is also clear that the medical reports were available to the Respondent already on 10 July 2022, i.e. the Respondent was aware of the relevant facts based on which it alleges the purported error and deceit at the time it terminated the contract.

51. In this context, the Chamber recalled its long-standing jurisprudence, according to which only a breach or misconduct which is of a certain severity justifies the termination of a contract without prior warning. In other words, only when there are objective criteria which do not reasonably permit to expect the continuation of the employment relationship between the parties, a contract may be terminated prematurely. Hence, if there are more lenient measures which can be taken in order for an employer to assure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can only be an *ultima ratio*.

52. In view of the above, the DRC concluded that the Respondent terminated the Employment Agreement without just cause as the medical condition of the player does not give the Respondent just cause to terminate the contract, which goes in hand with art. 18 par. 4 of the Regulations.

ii. Consequences

53. Having stated the above, the members of the Chamber turned their attention to the question of the consequences of such unjustified breach of contract committed by the Respondent.

54. The Chamber observed that the outstanding remuneration at the time of termination, coupled with the specific requests for relief of the player, are equivalent to the salary of August 2022 under the contract, amounting to NIS 38,837.

55. In this respect, and for completion only, the Chamber wished to clarify that as the Respondent failed to provide any evidence that it made the payment of NIS 3,000 for the speeding ticket on behalf of the player, no reduction shall apply on the awarded amounts.

56. As a consequence, and in accordance with the general legal principle of *pacta sunt servanda*, the Chamber decided that the Respondent is liable to pay to the Claimant the amounts which were outstanding under the contract at the moment of the termination, i.e. NIS 38,837 (i.e. NIS 37,837 and NIS 1,000 for the "gas expenses").

57. In addition, taking into consideration the Claimant's request as well as the constant practice of the Chamber in this regard, the latter decided to award the Claimant interest at the rate of 5% p.a. on the outstanding amounts as from 6 December 2022 until the date of effective payment.

58. Having stated the above, the Chamber turned to the calculation of the amount of compensation payable to the player by the club in the case at stake. In doing so, the Chamber firstly recapitulated that, in accordance with art. 17 par. 1 of the Regulations, the amount of compensation shall be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including 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, and depending on whether the contractual breach falls within the protected period.

59. In application of the relevant provision, the Chamber held that it first of all had to clarify as to whether the pertinent employment contract contained a provision by means of which the parties had beforehand agreed upon an amount of compensation payable by the contractual parties in the event of breach of contract. In this regard, the Chamber established that no such compensation clause was included in the employment contract at the basis of the matter at stake.

60. As a consequence, the members of the Chamber determined that the amount of compensation payable by the club to the player had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations. The Chamber recalled that said provision provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of compensation payable.

61. Bearing in mind the foregoing as well as the claim of the player, the Chamber proceeded with the calculation of the monies payable to the player under the terms of the contract from the date of its unilateral termination until its end date. Consequently, the Chamber concluded that the amount of NIS 341,533 (i.e. NIS 37,837 (NIS 37,837 x 9) plus NIS 1,000, corresponding to the rest of the gas expenses that were requested) serves as the basis for the determination of the amount of compensation for breach of contract.

62. In continuation, the Chamber verified as to whether the player had signed an employment contract with another club during the relevant period of time, by means of which he would have been enabled to reduce his loss of income. According to the constant practice of the DRC as well as art. 17 par. 1 lit. ii) of the Regulations, such remuneration under a new employment contract shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the player's general obligation to mitigate his damages.

63. Indeed, the player found employment with FC Levadia. In accordance with the pertinent employment contract, the player was entitled to approximately EUR 3,000 per month. Therefore, the Chamber concluded that – during the overlapping period, the player mitigated his damages in the total amount of EUR 16,500, that is, 5.5 times EUR 3,000). This corresponds to NIS 55,590.8.

64. Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the club must pay the amount of NIS 285,942.2 to the player (i.e. NIS 341,533 MINUS NIS 55,590.8), which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter.

65. Lastly, taking into consideration the player's request as well as the constant practice of the Chamber in this regard, the latter decided to award the player interest on said compensation at the rate of 5% p.a. as of 6 September 2022 until the date of effective payment.

iii. Compliance with monetary decisions

66. Finally, taking into account the applicable Regulations, the Chamber referred to art. 24 par. 1 and 2 of the Regulations, which stipulate that, with its decision, the pertinent FIFA deciding body shall also rule on the consequences deriving from the failure of the concerned party to pay the relevant amounts of outstanding remuneration and/or compensation in due time.

67. In this regard, the DRC highlighted that, against clubs, the consequence of the failure to pay the relevant amounts in due time shall consist of a ban from registering any new players, either nationally or internationally, up until the due amounts are paid. The overall maximum duration of the registration ban shall be of up to three entire and consecutive registration periods.

68. Therefore, bearing in mind the above, the DRC decided that the Respondent must pay the full amount due (including all applicable interest) to the Claimant within 45 days of notification of the decision, failing which, at the request of the Claimant, a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods shall become immediately effective on the Respondent in accordance with art. 24 par. 2, 4, and 7 of the Regulations.

69. The Respondent shall make full payment (including all applicable interest) to the bank account provided by the Claimant in the Bank Account Registration Form, which is attached to the present decision.

70. The DRC recalled that the above-mentioned ban will be lifted immediately and prior to its complete serving upon payment of the due amounts, in accordance with art. 24 par. 8 of the Regulations.

d. Costs

71. The Chamber referred to art. 25 par. 1 of the Procedural Rules, according to which *"Procedures are free of charge where at least one of the parties is a player, coach, football agent, or match agent".* Accordingly, the Chamber decided that no procedural costs were to be imposed on the parties.

72. Likewise, and for the sake of completeness, the Chamber recalled the contents of art. 25 par. 8 of the Procedural Rules, and decided that no procedural compensation shall be awarded in these proceedings.

73. Lastly, the DRC concluded its deliberations by rejecting any other requests for relief made by any of the parties.

IV. Decision of the Dispute Resolution Chamber

1. The Football Tribunal has jurisdiction to hear the claim of the claimant, Illia Markovskyi.

2. The claim of the Claimant is partially accepted.

3. The Respondent, Hapoel Haifa, must pay to the Claimant the following amount(s):

   - **NIS 38,837 as outstanding remuneration** plus 5% interest *p.a.* as from 6 September 2022 until the date of effective payment;

   - **NIS 285,942.2 as compensation for breach of contract without just cause** plus 5% interest *p.a.* as from 6 September 2022 until the date of effective payment.

4. Any further claims of the Claimant are rejected.

5. Full payment (including all applicable interest) shall be made to the bank account indicated in the **enclosed** Bank Account Registration Form.

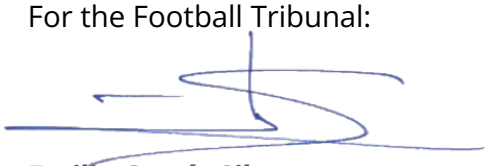
6. Pursuant to art. 24 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made **within 45 days** of notification of this decision, the following **consequences** shall apply:

   1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.
   2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.

7. The consequences **shall only be enforced at the request of the Claimant** in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.

8. This decision is rendered without costs.

For the Football Tribunal:



Emilio García Silvero
Chief Legal & Compliance Officer

NOTE RELATED TO THE APPEAL PROCEDURE:

According to article 57 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 17 of the Procedural Rules Governing the Football Tribunal).

CONTACT INFORMATION

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