

Decision of the Dispute Resolution Chamber

passed on 25 October 2023

regarding an employment-related dispute concerning
the player Emilio Jose Zelaya

BY:

Roy Vermeer (The Netherlands), Single Judge

CLAIMANT:

Emilio Jose Zelaya, Argentina

Represented by Loizos Hadjidemetriou

RESPONDENT:

Ohod, Saudi Arabia

Represented by Global Sport Consulting

I. Facts of the case

1. On 9 January 2023, the Argentinian player Emilio Jose Zelaya (hereinafter: the *Claimant*) and the Saudi club Ohod (hereinafter: the *Respondent*) concluded an employment contract to valid as from said date until 8 July 2023.
2. On 17 May 2023, the Claimant unilaterally terminated the employment contract.
3. On 1 June 2023, the Parties stipulated a settlement agreement (hereinafter: the *Agreement*), by means of which the Respondent undertook to pay the Claimant a total of USD 153,333 broken down as follows:
 - (a) USD 35,000 until 30/07/2023
 - (b) USD 35,000 until 30/09/2023
 - (c) USD 17,500 until 30/10/2023
 - (d) USD 66,333 until 30/12/2023
4. In accordance with clause 4 of the Agreement:

“Should the [Respondent] fail to timely and fully comply with any one of the instalments:

 - (a) *The [Agreement] would be immediately terminated, and all remaining amounts would become immediately due and payable and*
 - (b) *The [Respondent] would have to pay legal interest of 5% p.a. on all remaining amounts from 25/05/2023 until full settlement and*
 - (c) *The [Respondent] would pay a one-off penalty equal to the 35% of all remaining amounts and*
 - (d) *The [Respondent] would pay the [Claimant] an additional amount of EUR 5,000 as contribution to his legal expenses.”*
5. Finally, under clause 8 of the Agreement, the Parties stipulated that *“Should a dispute arise, all amounts would be considered as due from 25/05/2023 and the [Claimant] would have the right to initiate a 12bis proceeding without first having to put the Respondent in default for 10 days (...)”*.
6. On 10 August 2023, the Respondent paid to the Claimant a total of USD 59,335.

II. Proceedings before FIFA

7. On 16 August 2023 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

8. According to the Claimant, the Respondent failed to comply in a timely manner with its financial obligations as set under clause 4 of the Agreement, hence this shall be deemed as terminated on 1 August 2023 and the Respondent should pay the relevant penalty fee corresponding to 35% of the amounts stipulated thereto in addition to the respective interest running as from 25 May 2023 as well as a contribution to the legal expenses incurred by the Claimant.

9. Notwithstanding the above, the Claimant confirmed having received a payment of USD 59,335 on 10 August 2023, hence he requested to deduct such amount from the outstanding debt carried by the Respondent.

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

- *USD 93,998 as outstanding amount plus 5% interest p.a. as from 25 May 2023;*
- *USD 53,666.55 as penalty fee;*
- *USD 5,000 as outstanding legal fees under the settlement agreement.*

b. Position of the Respondent

11. In its reply, the Respondent alleged having suffered financial difficulties and acknowledged outstanding sums in favor of the Claimant for a total of USD 93,998.

12. Conversely, regarding the claimed penalty fee, the Respondent objected to its proportionality in respect to the residual outstanding amount, thus arguing that said fee shall be reduced by FIFA because it currently corresponds to more than 50% of the sum due to the Claimant.

13. Finally, the Respondent did not contest the Claimant's demand for contribution to his legal expenses in the amount of USD 5,000 based on clause 4 of the Agreement.

III. Considerations of the Dispute Resolution Chamber

a. Competence and applicable legal framework

14. First of all, the Single Judge of the Dispute Resolution Chamber (hereinafter also referred to as *the Single Judge*) analysed whether he was competent to deal with the case at hand. In this respect, it took note that the present matter was presented to FIFA on 16 August 2023 and submitted for decision on 25 October 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.
15. Subsequently, the Single Judge 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 (May 2023 edition), the Single judge of the Dispute Resolution Chamber is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a player from Argentina and a club from Saudi Arabia.
16. Subsequently, the Single Judge 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 (May 2023 edition), and considering that the present claim was lodged on 16 August 2023, the aforementioned edition of said regulations (hereinafter: *the Regulations*) is applicable to the matter at hand as to the substance.

b. Burden of proof

17. The Single Judge 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 Single Judge stressed the wording of art. 13 par. 4 of the Procedural Rules, pursuant to which he may consider evidence not filed by the parties, including without limitation the evidence generated by or within the Transfer Matching System (TMS).

c. Merits of the dispute

18. The competence and the applicable regulations having been established, the Single Judge entered into the merits of the dispute. In this respect, the Single Judge started by acknowledging all the above-mentioned facts as well as the arguments and the documentation on file. However, the Single Judge emphasised that in the following

considerations he will refer only to the facts, arguments, and documentary evidence, which he considered pertinent for the assessment of the matter at hand.

i. Main legal discussion and considerations

19. The foregoing having been established, the Single Judge moved to the substance of the matter, and took note of the Agreement signed by the parties on 1 June 2023, by means of which the Respondent undertook to pay the Claimant a total of USD 153,333.
20. In this context, the Single Judge noted that the Claimant alleged having only received the amount of USD 59,335 by the Respondent, whereas a total of USD 93,998 would remain unpaid. The Single Judge emphasised that this fact was confirmed by the Respondent, who alleged having suffered financial difficulties to justify the lack of compliance with its contractual obligations.
21. Moreover, the Single Judge observed that the Respondent did not contest the Claimant's request for contribution to his legal expenses in the amount of USD 5,000 as stipulated by the parties under clause 4 of the Agreement.
22. At this stage, the Single Judge further acknowledged that, in addition, the Claimant had requested the payment of a penalty fee amounting to USD 53,666.55 as well as an annual interest at a rate of 5% as from 25 May 2023 until the date of effective payment on the total outstanding amount based on clause 4 of the Agreement.
23. On the other hand, the Single Judge acknowledged the Respondent's position and pointed out that the latter had requested a reduction of the relevant penalty fee as corresponding to over 50% of the outstanding amount due to the Claimant, hence in the Respondent's view said penalty should be considered excessive.
24. In this context, the Single Judge wished to recall the wording of clause 4 of the Agreement, according to which: *"Should the [Respondent] fail to timely and fully comply with any one of the instalments (...) the [Agreement] would be immediately terminated, and all remaining amounts would become immediately due and payable and (...) The [Respondent] would pay a one-off penalty equal to the 35% of all remaining amounts (...)".*
25. In this respect, the Single Judge underlined that it remained undisputed that the Respondent was in default of payment of the first instalment under the Agreement, hence the conditions set by the said document to trigger the penalty fee had been met. However, the Single Judge noticed that it remained to be established whether the percentage indicated therein as penalty should apply to the sole amount remained outstanding, as maintained by the Respondent, or to the entirety of the original Claimant's remuneration as sustained by the latter.

26. That said, the Single Judge focused his attention on the mentioned penalty clause and considered appropriate to preliminary remark, on a general level, that penalty clauses may be freely entered into by the contractual parties and may be considered acceptable, in the event that the pertinent written clause meets certain criteria such as proportionality and reasonableness. In this respect, the Single Judge highlighted that, in order to determine whether a penalty clause is to be considered acceptable, the specific circumstances of the relevant case brought before him shall also be taken into consideration.
27. In the specific case at hand, the Single Judge moved to analyse the literal tenor of clause 4 of the Agreement as principal mean of interpretation in order to assess the will of the parties when they drafted it. Therefore, the Single Judge deemed it worth to recall the text of the said clause, which reads "*The [Respondent] would pay a one-off penalty equal to the 35% of all remaining amounts (...)*".
28. Against this particular wording of the Agreement, the Single Judge pointed out that, by explicitly indicating that the penalty would correspond to "*35% of all the remaining amounts*", the parties' intention could only have been to refer it to the entirety of the amount overdue, which *in casu* was EUR 153,333 and irrespective of any potential late payment realized by the Respondent after the relevant default, as the latter had already failed to pay the first instalment within the deadline set out in the Agreement, thus triggering the acceleration clause thereto contained.
29. In other words, the Single Judge emphasized that the fact that the Respondent paid a total of USD 59,335 to the Claimant on 10 August 2023, i.e., after the relevant deadline for complying with the first instalment had been expired, would not subsequently entitle the Respondent to reduce the amount of the penalty fee stipulated under the Agreement, otherwise the said fee would be completely deprived of its rationale.
30. Consequently, the Single Judge concluded that the sum of USD 53,666.55 claimed as penalty fee by the Claimant appears congruent with the percentage agreed by the parties as effectively corresponding to 35% of the entire remuneration originally outstanding in favour of the Claimant and that such a penalty fee – which the parties contractually agreed upon in the context of the Agreement – is both proportionate and reasonable and, thus, valid and applicable.
31. In light of the above, the Single Judge decided that based on clause 4 of the Agreement and in accordance with the general legal principle of *pacta sunt servanda*, the Respondent is liable to pay to the Claimant (i) the amount of USD 93,998 as outstanding remuneration, (ii) the amount of USD 5,000 as participation to the Claimant's legal expenses, which were unequivocally contractually agreed upon, as well as (iii) a total of USD 53,666.55 as penalty

fee, in light of the Respondent's failure to comply with the terms indicated in the agreement in a timely manner.

32. In addition, taking into consideration the Claimant's request as well as the constant practice of the Football Tribunal in this regard, the Single Judge decided to award the Claimant interest at the rate of 5% p.a. on the outstanding amount of USD 93,998 as from the relevant due date until the date of effective payment. The Single Judge clarified to this end that no interest shall apply on the penalty per the principle *ne bis in idem*. By the same token, in that no interest has been claimed by the Claimant over the USD 5,000 as attorney fees, these shall not be awarded in line with the principle *ne ultra petita*.

ii. Compliance with monetary decisions

33. Finally, taking into account the applicable Regulations, the Single Judge 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.
34. In this regard, the Single Judge 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.
35. Therefore, bearing in mind the above, the Single Judge 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.
36. 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.
37. The Single Judge 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

38. The Single Judge 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 Single Judge decided that no procedural costs were to be imposed on the parties.
39. Likewise, and for the sake of completeness, the Single Judge recalled the contents of art. 25 par. 8 of the Procedural Rules, and decided that no procedural compensation shall be awarded in these proceedings.
40. Lastly, the Single Judge 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 claim of the Claimant, Emilio Jose Zelaya, is accepted.
2. The Respondent, Ohod, must pay to the Claimant the following amount(s):
 - **USD 93,998 as outstanding remuneration** plus 5% interest p.a. as from 25 May 2023 until the date of effective payment;
 - **USD 5,000 as outstanding amount;**
 - **USD 53,666.55 as contractual penalty fee.**
3. Full payment (including all applicable interest) shall be made to the bank account indicated in the **enclosed** Bank Account Registration Form.
4. 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.
5. 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.
6. 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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