



Arbitration CAS 2004/A/565 & 566 Clube Atlético Mineiro & E. v. Club Sinergia Deportiva (Tigres) & Fédération Internationale de Football Association (FIFA), award of 2 May 2005

Panel: Mr Hernán Jorge Ferrari (Argentina), President; Ms Margarita Echeverría Bermúdez (Costa Rica); Mr Paulo Roberto Murray (Brazil)

Football

Breach of an employment contract by the Player

Determination of damages pursuant to FIFA Regulations and Swiss Law

Interests

Joint responsibility of the new club

1. The Player who never came back to play with his club but filed a claim before the labour courts and finally entered into a contract with another club whereas he was asked by his former club to play in the pre-season and to go on to play, infringed his primary duties as an employee and unilaterally breached the employment contract.
2. The consequences of a breach of an employment contract between a player and a club are regulated in the FIFA Regulations under the title “maintenance of contractual stability”. Under Art. 22 (2) of the FIFA Regulations the length of time remaining in the existing contract (up to a maximum of 5 years) is one of the criteria to be taken into account when determining the compensation. As a general principle of contract law, the party in breach of the contract owes compensation for the damage caused to the other party as a consequence of such breach. Such compensation is calculated on the basis of the difference between the claimant's actual assets and its hypothetical assets had the breach of contract not occurred. Therefore, if the player terminates without just cause a fixed-term employment contract, the damage owed to the Club consists essentially of the remaining unperformed length of the Contract. Moreover, Art. 337 d of the Swiss Code of Obligations (CO) provides that in case of unjustified termination by the employee of the employment contract, the employer is entitled to compensation amounting to no more than the equivalent of four monthly salaries, plus the actual proven additional damage. Any amount of money relevant to the time the Player effectively played should be deducted.
3. Pursuant to art. 104 CO the party owing the compensation has to pay an interest of 5% per annum from the due date of the payment of the compensation.
4. In accordance with Art. 14 para. 3 of the Regulations governing the Application of the Regulations for the Status and Transfer of Players, if a player responsible for a breach of a contract does not pay the compensation awarded by the FIFA DRC within one month, the new club shall be deemed jointly responsible for the payment of the compensation awarded.

The Appellants are: 1) E., born in 1977, professional football player (the “Player”); 2) Clube Atlético Mineiro, Brazilian Football Club (the “Atlético Mineiro”).

The Respondents are Club Sinergia Deportiva (Tigres), Mexican Football Club (the “Tigres”) and Fédération Internationale de Football Association (FIFA).

On December 31, 2001, Tigres acquired the Player’s federative rights from Coritiba Football Club and Planet Sports in the amount of USD 1,000,000, pursuant to the following clauses of the above-mentioned contract (“the Transfer Contract”):

“FIRST: OBJECT OF THE CONTRACT.

By this contract, CORITIBA sells without any reservation nor limitation the whole of the Federative rights of THE PLAYER (E.) to SINERGLA. The transfer of such federative rights shall include all rights, duties and secondary rights and duties.

SECOND: CONSIDERATION.

For the purchase-sale of THE PLAYER’s federative rights, SINERGLA shall pay to CORITIBA and PLANET the following amount:

The total amount of US\$ 1,000,000.00 (one million U.S. dollars) broken down as provided for in the THIRD CLAUSE, here below.

If appropriate, should SINERGLA transfer to another Club the federative rights, THE PLAYER agrees to be discounted from the value of the signing-on fee the amount he had received for such item, during his stay in SINERGLA:

The PLAYER expressly states he is familiar with and agrees upon the scope, content and application of the Regulations for the Status and Transfer of Players, issued and authorized by the Mexican Football Federation.

[...]

FOURTH: EVENTS OF NON-COMPLIANCE.

Contracting parties agree upon setting forth the events of non-compliance.

[...]

[In broad terms, the realization of any act or omission infringing the covenants of this CONTRACT or the provisions of the effective Laws.]

If any of the Events of Non-compliance agreed upon in this Clause takes place both parties are bound to submit such non-compliance to the competent instances of the FIFA so that the FIFA’s instances are the authorities having jurisdiction over this dispute; [...].”

(Spanish text translation by the Panel)

This contract was also signed by the Player.

On 2 January 2002 Tigres and the Player signed a contract for the employment of the Player by Tigres (“the Employment Contract”). The Employment Contract contained the following relevant provisions:

“[...]

THIRD. EFFECTIVE TERM.

This contract is valid as from the summer tournament in 2002, as well as for the 2002-2003, 2003-2004, 2004-2005 y 2005-2006 seasons. It is understood that, at the end of each seasons, the club shall have the option right to extend the contract term for twelve months, in which case the parties shall be subject to the salary increases stipulated in Annex 1, subparagraph 1.1 of this contract. If the club decides not to exercise the foregoing option, it shall be bound to comply only with the contractual obligations of the last season in which the player was under contract.

[...]

FIFTH. PAYMENTS

5.1 SALARY

The Club shall pay to the Player as valuable consideration during the season(s) set forth in the Third Clause, the monthly salary stipulated in the Addendum conditions.

5.2 ADVANCED SIGNING-ON FEE

Bearing in mind that the Player in case his federative rights be transferred to another club member of the F.M.F [Mexican Football Association] or association registered with FIFA shall be entitled -as set forth in article 296, fraction III of the Mexican Labour Law- to a share on the value of the signing-on fee, defined in the Transfer Regulations, both parties accept, the Club to grant and the Player to receive, as signing-on fee advance the annual and season amount set forth in Addendum One and according to the special conditions provided for in Clauses 2, 3 and 4 of the above-mentioned Addendum.

The Player accepts and acknowledges in this act that the signing-on fee advance and the signing-on fee itself set forth in the preceding paragraph is deemed neither salary nor part of it and therefore, the Player hereby agrees, if the Club transfer his federative rights to another Club, to have discounted from the signing-on fee the amount or amounts he may have already received in advance, during his stay with the Club.

The Player expressly acknowledges and agrees upon the scope, content and application of the Regulations for the Status and Transfer of Players issued and authorized by the F.M.F.

[...]

SEVENTEENTH. THE PARTIES SUBJECT TO ARBITRATION

As members of the F.M.F. and according to the by-laws and regulatory provisions of the Federation itself, both parties are subject to the jurisdiction and competence of the Dispute Resolution Commission and all other authorities of the F.M.F. as to the interpretation of the present contract, its execution and performance”.

Addendum Number 1 – headed as follows – is an integral part of this Employment Contract:

“This is an integral part of the individual employment contract executed by and between the Player E. and the Club Sinergia Deportiva S.A. de C.V.: dated January 2, 2002, and regulates the FIFTH clause of said instrument as provided in the following CLAUSES:

1. SALARY PAYMENTS.

A total salary in the amount of US\$ 66,000.00 net (sixty-six thousand US dollars) which shall be paid in 12 monthly, equal and consecutive, instalments beginning on January 1, 2002 and ending on December 2002, in the amount of US\$ 5,500.00 (five thousand five hundred US dollars) on the fifteenth day of each month in the understanding that the salary for the other seasons of the effective term of this contract shall be established according to his sport performance and at the Club’s criteria, the increase for the second year not being higher than 20%, for the third year not higher than 15% and for the fourth year not higher than 10%.

Said amount includes the proportional part of vacations and year-end bonus, vacation bonus, days of rest, holidays and seventh day relevant to said period, according to sections 77, 79 and 80 of the Labour Federal Law, as well as payment of the overtime that may take place, as provided in sections 65, 66, 67 and 68 of the laws governing this matter.

Special conditions for the payment of the activity to be performed by the Player base on the stipulations of sections 83 and 294 of the Federal Labour Law, including, as already stated, anything related to time unit and event.

2. ADVANCED SIGNING-ON FEE

2.1 An advanced signing-on fee – that corresponds to a proportional part of the percentage the Player is entitled to receive of the relevant fee – in the amount of US\$ 198,000.00 (one hundred ninety-eight thousand US dollars) which shall be paid as follows: a down payment of US\$ 24,000.00 (twenty-four thousand US dollars) that shall be paid before January 15, 2002 and the remaining US\$ 174,000 (one hundred seventy-four thousand US dollars) in 12 monthly instalments of US\$ 14,500.00 (fourteen thousand five hundred US dollars), as from the date in which this contract is executed, that is to say during the period between January 1, 2002 and December 31, 2002, said amounts shall be paid after law and social security deduction have been made.

The stipulated amount in clause 2 par. number 2.1 of this addendum represents and includes, in case of the Player transfer, an advance of the participation of the Player in the signing-on fee.

[...]”.

(Spanish text translation by the Panel)

Under these conditions the Player played regularly for Tigres during the year 2002 and the latter paid the amounts agreed upon.

The Player is not claiming any outstanding amounts under his Employment Contract from Tigres.

Tigres called the Player to the club’s pre-season on 26 December 2002, the Player did not come, having been absent from of the Tigres’s Club since then.

The Mexican football club season's calendar is as follows:

Opening Tournament August 3 until 21 December 2002;

Closing Tournament 11 January 2003 until June 2003.

On 3 February 2003 the FIFA Administration provisionally suspended the Player from any football activities worldwide.

In May 2003, due to a decision taken by a Brazilian Labour Court, authorizing the Player to proceed with his career, the Brazilian Football Confederation was bound to authorize his registration with Atlético Mineiro.

The Player executed an employment contract with Atlético Mineiro, valid from 9 May 2003 until 8 May 2004.

Following the Tigres' initiation of dispute resolution proceedings under the FIFA Regulations for the Status and Transfer of Players ("the FIFA Regulations"), the Dispute Resolution Chamber of the FIFA Player's Status Committee (the "Chamber") reached a formal decision on this matter on 15 January 2004 (the "Decision"). Such Decision was served to the parties per fax of 19 February 2004.

In its Decision the Chamber found that the Player had not just cause to terminate his employment contract with Tigres and that he had committed an unjustified breach of contract.

As a consequence, the Chamber decided that the Player had to pay Tigres the amount of USD 1,000,000. This amount corresponds to the transfer fee for the Clubs that transferred the federative rights according to the Transfer Contract. Additionally, the Player had to pay back the amount of USD 154,008, considering that the Player "*should return part of the signing-on fee corresponding to the remainder of the timeframe of the employment contract for which he did not stay with the Mexican Club*".

And if the Player failed to pay the aforementioned financial compensation to Tigres, Atlético Mineiro was to be considered jointly responsible for such payment.

Furthermore, the Player was suspended from any football activities worldwide for the period of four months.

On 10 March 2004, the Player filed a statement of appeal against the Decision.

On 11 March 2004, Atlético Mineiro also filed a statement of appeal against the Decision.

On 22 March 2004, the Player filed his appeal brief.

On 22 March 2004, Atlético Mineiro filed its appeal brief.

On 15 April 2004, Tigres filed its answer to the statement of appeal lodged by Atlético Mineiro.

On 6 April 2004 FIFA waived its filing an answer.

On 6 August 2004, the Player's representative requested from the Panel that they ordered the production of the original employment contract signed by the Player and from CAS that it appointed an expert in order to analyse the employment contract and to determine whether or not it was a forgery.

On 30 August 2004, Atlético Mineiro requested that any additional costs related to the appointment and hearing of experts should be supported by the Player.

On 9 September 2004 the Panel ordered Tigres to file, within a 7-days deadline, the original of the contract signed with the Player, in order to submit it to an expert. Additionally, the Player was invited to file a document showing his original usual signature in order to compare it with the signature borne by the contract.

On 10 September 2004 Tigres filed by courier the original employment contract together with a copy of the ID of the Player.

On 21 September 2004, so as to implement the expertise of his signature, the Panel asked the Player to produce the following documents, within a 7-day deadline:

- *As many documents as possible bearing the **original** signature of E., such as lease contract, several letters and written correspondence, any kind of other contract, etc. The more specimen signatures are provided, the more accurate the expertise will be.*
- *Five sheets of lined paper, bearing each of them five times the signature of E.*

On 9 September 2004 the Player was informed by courier that as he had requested the expertise, he had to bear the costs thereof and pay its share of the advance of costs, failing which his claims would be deemed withdrawn in accordance with article R64.2 paragraph 2 *in fine* of the Code of Sports-related Arbitration (the "Code") and, unless the Panel decided otherwise, the expertise would not be implemented.

On 25 October 2004 the Panel informed that in view of the failure of the Player to provide the CAS Court Office with the necessary sample signatures which were requested from him and given the fact that he had not paid his share of cost advance, the expertise on the authenticity of the contract was not to be implemented.

On 10 November 2004, FIFA informed that it would not attend the hearing.

The parties have signed the Order of Procedure that was issued on 6 August 2004.

On 22 November 2004 a hearing was held in Buenos Aires ("the Hearing"). The representatives of Atlético Mineiro and Tigres were present while the Player did not attend the Hearing, without giving any explanation therefore.

In his appeal brief of 22 March 2004, the Player requests that the Decision be set aside and replaced by a CAS' decision.

In its statement of appeal of 11 March 2004 and appeal brief of 22 March 2004, Atlético Mineiro requests that the Decision be set aside and replaced by a CAS' decision.

In his Report dated 1 April 2004 the Tigres requests that the Decision issued by FIFA be sustained.

LAW

CAS Jurisdiction

1. CAS jurisdiction, which is not disputed, stems from article 59 ff. of the FIFA Statutes and art. R47 of the Code. It is further confirmed by the order of procedure duly signed by both parties.
2. It follows that the CAS has jurisdiction over the present dispute.

Applicable Rules

3. Art. Art. R58 of the Code provides the following:
"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".
4. Art. 59 para. 2 of the FIFA Statutes further provides for the application of the various regulations of FIFA or, if applicable, of the Confederations, Members, Leagues and clubs, and, additionally, Swiss law.
5. In their written submissions, both parties considered FIFA Regulations to be applicable to the present dispute. They have not agreed on the application of any other particular law. Therefore, the rules and regulations of FIFA shall apply primarily and Swiss law shall apply subsidiarily.
6. As to the nullity claimed by Atlético Mineiro in their filing of 11 March 2004 and 22 March 2004, the Panel deems any restriction to their rights to intervene in litigation before the Chamber has already been remedied by the opportunity to exercise them given to the Player

during the arbitration proceedings before the CAS. On the other hand, this claim was not held during the Hearing, therefore this Panel dismissed it.

Main Issues

7. The Panel's decision on the merits depended on the answers to the following questions:
 - Did the Player infringe the Employment Contract?
 - Should the Panel conclude that the Player breached the Employment Contract, what amount would constitute a fair and appropriate compensation?
 - Did Tigres pay USD 1,000,000 for the Player's federative rights?
 - Is this amount part of the salary?
 - Is Atlético Mineiro jointly responsible?
- A. *Interpretation of the Employment Contract*
8. The existence and contents of the Employment Contract has not been challenged by any of the parties.
9. According to the Employment Contract, the Player was employed by Tigres from January 2002 until the 2005-2006 season. The Player was bound to train and play football according to the directions of Tigres.
10. The Employment Contract obliges Tigres to pay for each year within the contract term an amount of USD 66,000. The fact that Tigres timely honoured the payments during the period the Player played for Tigres is not at issue.
11. According to the exhibits Tigres paid USD 1,000,000 for the Player's federative rights: USD 550,000 to Coritiba Football Club and USD 450,000 to Planet Shorts.
12. The Player's interpretation of the third Clause of the Employment Contract is that its effective term was a "one-tournament" and that Tigres has not exercised its option rights at the end of the championship are not sufficient grounds in the Panel's opinion.
13. A literal interpretation of clause 3 of this contract leads the Panel to the conclusion that the option right to extend the contract term was granted exclusively to Tigres, and any eventual salary increase was also at the sole discretion of Tigres. The clause is clear and unambiguous.
14. Tigres also stated his intention to continue with the contract when calling the Player to be present at the pre-season in December 2002.

15. On the contrary, the Player's interpretation of the Employment Contract would imply that Tigres has paid an amount of USD 1,000,000 for only a one-year contract term!

B. *Breach of the Employment Contract*

16. It is undisputed that Tigres was entitled to ask the Player to play in the pre-season in December 2002 and to go on playing.
17. The Player, however, did neither play at the pre-season nor returned to play after December 2002 but filed a claim before the labour courts and, finally, a contract was executed by and between Atlético Mineiro and the Player.
18. The Player since December 2002 has committed a unilateral and continuing breach of the Employment Contract.
19. The evidence shows that the Player had no interest in reintegrating into the 'Tigres' team since he never came back to play, therefore he infringed his primary duties as an employee and breached the Employment Contract.
20. The Panel concurs with the finding of the Chamber of the FIFA Player's Status Committee.
21. It has been established that the Player did not play again as from December 2002, and that he was not willing to play for Tigres again. When not playing again for Tigres, the Player infringed his duties under the Employment Contract and therefore breached a valid contract.
 - a) Determination of damages pursuant to FIFA Regulations and Swiss Law
22. In its decision of 15 January 2004, the Chamber awarded Tigres the amount of USD 1,000,000, which corresponds to the whole sum paid for the federative rights.
23. The consequences of a breach of an employment contract between a player and a club are regulated in the FIFA Regulations under the title "maintenance of contractual stability":

"Art. 21

1 (a) In the case of all contracts signed up to the players' 28th birthday: if there is unilateral breach without just cause or sporting just cause during the first 3 years, sports sanctions shall be applied and compensation payable.

[...]"
24. Article 22 of the FIFA Regulations lists a number of factors that should be taken into account when determining the amount of compensation due to a player (or a club) in the event of breach of contract.

“Art. 22

Unless specifically provided for in the contract, and without prejudice to the provisions on training compensation laid down in Art. 13 ff, compensation for breach of contract (whether by the player or the club), shall be calculated with due respect to the national law applicable, the specificity of sport, and all objective criteria which may be relevant to the case, such as:

- (1) *Remuneration and other benefits under the existing contract and/or the new contract,*
- (2) *Length of time remaining on the existing contract (up to a maximum of 5 years),*
- (3) *Amount of any fee or expense paid or incurred by the former club, amortised over the length of the contract,*
- (4) *Whether the breach occurs during the periods defined in Art. 21.1”.*

25. Under Art. 22(2) of the FIFA Regulations the length of time remaining in the existing contract (up to a maximum of 5 years) is one of the criteria to be taken into account when determining the compensation. The Employment Contract has been executed for a fixed four-year term (from 1 January 2002 until 2006).
 26. As a general principle of contract law, the party in breach of the contract owes compensation for the damage caused to the other party as a consequence of such breach. Such compensation is calculated on the basis of the difference between the claimant's actual assets and its hypothetical assets had the breach of contract not occurred. Therefore, if the player terminates without just cause a fixed-term employment contract, the damage owed to the Club consists essentially of the remaining unperformed length of the Contract.
 27. Art. 337d of the Swiss Code of Obligations (CO) provides that in case of unjustified termination by the employee of the employment contract, the employer is entitled to compensation amounting to no more than the equivalent of four monthly salaries, plus the actual proven additional damage.
- b) Application of FIFA Regulations and Swiss Laws by the Panel
28. In consideration of the aforementioned, Tigres is entitled to claim for compensation amounting to the equivalent of four months of salaries of the Player, as well as compensation for the actual proven additional damage incurred. However, by virtue of Art. 22(2) FIFA Regulations, this compensation shall not exceed the corresponding period of five years of contract.
 29. In the present case, if Tigres acquired and paid for the federative rights, for a four-year Contract, USD 1,000,000, and said amount should have been amortised over the length of the contract. Since the Player played only during a year, the Panel must deduce the amount of money relevant to the year he effectively played.

30. Accordingly, the Panel finds that Tigres is entitled to claim the amount of USD 750,000 as compensation for the damage caused by the breach of contract by the Player.

31. At the hearing, the representatives of Tigres acknowledged that the amount of USD 198,000 paid to the Player was the proportional part of the total signing-on fee he was entitled to since he had played during one year. When the Panel asked them if they claimed the return of the preceding amount, they stated they did not claim such amount.

C. Due date

32. Tigres has applied to the confirmation of the decision, which provides that the financial compensation shall be paid within a deadline of 30 days from the date of the notification of the Decision. The Panel considers that the financial compensation granted to Tigres is thus to be paid within the same deadline of 30 days from the notification of the present award.

D. Interests

33. The Decision awards Tigres an interest of 5% in case of failure by the Player to pay the compensation within the prescribed deadline. As stated above, Tigres has applied to the confirmation of the Decision. The Panel sees no reason not to award such interest of 5%, which corresponds to the legal interest provided under Swiss law (Art. 104 CO).

34. It follows that Tigres shall be entitled to an interest of 5% per annum from the due date of the payment of the above-mentioned compensation.

E. The joint responsibility of Atlético Mineiro

35. In accordance with Art. 14 para. 3 of the Regulations governing the Application of the Regulations for the Status and Transfer of Players as well as pursuant point 3(a)(II) of the Circular letter, if a player responsible for a breach of a contract does not pay the compensation awarded by the Chamber within one month, the new club shall be deemed jointly responsible for the payment of the compensation awarded.

36. In this regard, the Panel determined that the Player's new club, Atlético Mineiro, shall be liable to pay the aforementioned financial compensation to Tigres, in case the Player fails to make such payment within one month of notification of the present award. It shall also be liable to pay an interest of 5% per annum as from the due date determined above.

The Court of Arbitration for Sport rules:

1. The appeal filed by Clube Atlético Mineiro against the decision issued on 15 January 2004 by the FIFA Dispute Resolution Chamber is partially upheld and such decision is partially amended as follows:
2. E. is ordered to pay Club Sinergia Deportiva (Tigres) and USD 750,000 (seven hundred fifty thousand US Dollars) within 30 days from the notification of the present award.
3. If E. fails to pay the aforementioned financial compensation to Club Sinergia Deportiva (Tigres) within 30 days from the notification of the present award, Clube Atlético Mineiro shall be deemed jointly responsible for such payment.
4. If E. or Clube Atlético Mineiro fails to comply with the obligations described in item 2 and 3 above, an interest of 5% per annum shall apply.
5. All other and further claims of the parties are dismissed.