Arbitration CAS 2021/A/8352 Al-Raed Club v. Nemanja Nikolic, award of 7 November 2022

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football
Termination of the employment contract without just cause by the club
Compensation for damages – lack of need of proof of damage
Damage mitigation – de novo power of review of CAS
Flight tickets allowance

1. **In case of breach of contract by a club, the damage suffered by a player is, in fact, "proven" by the mere fact that he suffered the premature termination of the Employment Contract. Pursuant to regulations set by FIFA in the FIFA Regulations on the Status and Transfer of Players, and in long standing CAS jurisprudence, this is sufficient to "prove" that damage occurred and give rise to a right to compensation.**

2. **Pursuant to CAS *de novo* power, a CAS panel can review subsequent employment contracts entered into by a player following the FIFA decision when calculating damages.**

3. **The purpose of clubs including a provision granting round trip flight tickets per season to players, is to facilitate a player's arrival and departure from the club's country of residence. If the player is no longer employed by the club, it follows that he no longer has to fly to the country where the club is based.**

I. PARTIES

1. Al-Raed Club (the "Appellant" or the "Club") is a football club with its registered office in Buraidah, Saudi Arabia. The Club is currently competing in the Saudi Pro League, which is the highest division in Saudi Arabia. It is a member of the Saudi Arabian Football Federation (the "SAFF"), which in turn is affiliated to Fédération Internationale de Football Association ("FIFA").

2. Mr Nemanja Nikolic (the "Respondent" or the "Player") is a Serbian national and professional football player, born on 19 October 1992 in Kraljevo, Serbia. The Player is currently registered with FK Spartak Subotica, in Serbia. Together referred to as the "Parties".

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and evidence submitted with those submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

A. The Player signs with the Club

4. On 15 October 2020, the Player entered into an employment contract with the Club, valid from 15 October 2020 until 14 October 2022 (the "Employment Contract").

5. Pursuant to clause 4 of the Employment Contract, the material terms were as follows:

- Advance payment (first year) – USD 150,000 (net)
- Monthly salary (first year) – USD 45,833 (net)
- Advance payment (second year) – USD 100,000 (net)
- Monthly salary (second year) – USD 58,333 (net)

Additionally, clause 4 stated that the Club was to pay for *"two tickets round trip for the player entire the season from home to Gassim to home and. [sic]"*.

B. The termination of the Employment Contract

6. On 7 February 2021, the Club informed the Player that he was deregistered from *"its official squad list of the national football league"*.

7. On 8 February 2021, the Club provided the Player with a termination notice (dated 7 February 2021) according to which the Club had unilaterally terminated the Employment Contract (the "Notice of Termination"). No reasons were provided for the unilateral termination. Up until the date of termination, the Club had made payments of salaries totalling USD 162,294 to the Player, out of the USD 344,790 which was due under the Employment Contract.

8. On 10 February 2021, the Player sent a default notice to the Club requesting the Club to pay him outstanding salaries, flight tickets and compensation in the amount of USD 1,342,298 (net), along with all relevant taxes, as follows:

- USD 182,496 (net), in unpaid salaries;

- USD 1,155,510 (net), as compensation for breach of the Employment Contract without just cause, amounting to the residual value of the contract;
- USD 4,292 (net), equating to the value of four round trip flight tickets between Belgrade-Gassim-Belgrade; and
- All relevant taxes and contributions in addition to the above amounts.

9. On 17 February 2021, the Club sent the Player two emails, which stated *inter alia*:

"[…] I would like to reach with you an amicable termination agreement of the contract between [the Club] and the [Player].

As you know, the Covid-19 pandemic had terrible consequences on the financial situation of the [Club] and we would really appreciate if you accept to reduce the compensation to be paid for the Player.

We propose that we make an amicable termination agreement according to which the [Player] will receive from the [Club] a total amount of USD 600,000 […] that will be paid to the Player in five instalments as follows: […]

We hope that you will understand our circumstances and we hope to have with you a long-standing relationship.

We also would like to wish the [Player] the best of luck in his career. […]".

10. On 18 February 2021, the Player wrote to the Club rejecting its offer, and reiterated his requests in his default letter.

C. The Player signs with FC Tobol

11. On 1 April 2021, the Player entered into an employment contract with FC Tobol in Kazakhstan, valid from 1 April 2021 to 30 November 2021 (the "Tobol Employment Contract"). Under the Tobol Employment Contract, the Player was to be paid a monthly remuneration in the amount of KZT 2,000,000 (approximately USD 4,695.27).

D. Proceedings before the FIFA Dispute Resolution Chamber (the "FIFA DRC")

12. On 23 March 2021, the Player filed a claim against the Club before the FIFA DRC.

13. On 8 June 2021, the FIFA DRC issued a decision as follows (the "Appealed Decision"):

"1. The claim of [the Player] is partially accepted.

2. The [Club], has to pay to the [Player] the following amount:

a) USD 171,038 net as outstanding remuneration, plus 5% interest p.a. as from the respective due dates until the date of effective payment as follows:

- *on the amount of USD 79,242 as from 16 November 2020;*
- *on the amount of USD 130 as from 1 December 2020;*
- *on the amount of USD 45,833 as from 1 January 2021; and*
- *on the amount of USD 45,833 as from 1 February [sic, 2021]*

b) USD 1,129,094.40 net as compensation for breach of contract, plus 5% interest p.a. as from 23 March 2021.

c) USD 1,788 as flight tickets.

3. Any further claims of the [Player] are rejected. […]".

14. On 6 September 2021, the grounds of the Appealed Decision were provided to the Parties.

E. Subsequent events

15. On 30 July 2021, the Player and FC Tobol mutually terminated the Tobol Employment Contract.

16. On 17 September 2021, the Player signed an employment contract with FC Spartak Subotica (the "Spartak Subotica Employment Contract").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 27 September 2021, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code") the Club filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS"). In its Statement of Appeal, the Club requested the matter to be submitted to a sole arbitrator. The Club also included FIFA as a Second Respondent. As such, the CAS Court Office initiated the procedure *CAS 2021/A/8352 Al-Raed Club v. Nemanja Nikolic & FIFA*.

18. On 1 October 2021, FIFA wrote to the CAS Court Office requesting to be excluded from these proceedings on the basis that, *inter alia*, it cannot be a respondent in an appeal proceeding involving a financial dispute which does not have any disciplinary elements.

19. On the same date, the Player wrote to the CAS Court Office stating, *inter alia*, that the matter should be submitted to a panel of three arbitrators.

20. On 4 October 2021, the Club wrote to the CAS Court Office stating, *inter alia*, that it accepted FIFA's request to be excluded from these proceedings.

21. On 7 October 2021, the CAS Court Office wrote to the Parties confirming that this procedure would continue as *CAS 2021/A/8352 Al-Raed Club v. Nemanja Nikolic*, *i.e.* without the involvement of FIFA.

22. On 18 October 2021, the CAS Court Office wrote to the Parties informing them that the President of the CAS Appeals Arbitration Division had decided to submit the present case to a sole arbitrator.

23. On 22 October 2021, in accordance with Article R51 of the CAS Code, the Club filed its Appeal Brief with the CAS Court Office.

24. On 8 December 2021, in accordance with Article R55 of the CAS Code, the Player filed his Answer with the CAS Court Office.

25. On the same date, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that Mr Mark A. Hovell, Solicitor in Manchester, United Kingdom had been appointed as Sole Arbitrator.

26. On 9 December 2021, the Player wrote to the CAS Court Office stating his preference for an award to be issued solely on the written papers, without a hearing.

27. On 15 December 2021, the Club wrote to the CAS Court Office stating its preference for an award to be issued solely on the written papers, without a hearing. In the same letter, the Club requested the Sole Arbitrator to request the Player and/or the Football Association of Serbia to submit *"any other parallel contract signed between the Player and the FC Spartak Subotica, such as image rights, bonus or any other contract, as well as the special bonuses club relegations that were mentioned in articles 3.3 and 3.4 of the [Spartak Subotica Employment Contract]"*. The Club also reiterated its request for the disclosure of any termination agreement between the Player and FC Tobol.

28. On 11 January 2022, the CAS Court Office wrote to the Parties on behalf of the Sole Arbitrator stating, *inter alia*, as follows:

> *"With respect to the disclosure of any parallel agreement related to the Respondent's contract with FC Spartak Subotica (such as such as image rights, bonus or any other contract an annex), the Respondent is invited to inform, by 18 January 2022, whether any such additional agreement exists and, in the affirmative, to provide, within the same deadline, copy of any such document.*
>
> *In addition, the Respondent, within the same deadline, is requested to provide a copy of his employment contract with FC Tobol.*
>
> *As to the disclosure of the Respondent's bank statements, the Sole Arbitrator decides to deny such request, as it clearly does not fall within the scope of Article R44.3 of the Code.*
>
> *The Sole Arbitrator also decides to reject the Appellant's request for disclosure of the termination letter sent to FC Tobol, since the Appellant failed to establish the material relevance of such document.*

Separately, the Sole Arbitrator notes that both Parties do not deem a hearing necessary in this matter. This notwithstanding, it is noted that the Appellant intends to rely on the testimony of Mr Santiago Riveros. Should the Appellant intend to maintain the requested testimony, a written and signed Witness Statement of Mr Riveros shall be submitted by 18 January 2022, failing which it shall be deemed that the Appellant renounced to the mentioned testimony.

Please be informed that once the documents requested have been filed, the Parties will be granted with a short deadline to submit short comments in that regard.

Finally, please be informed that, as instructed by the Sole Arbitrator, the entire case file of the FIFA proceedings has been requested".

29. On 12 January 2022, FIFA wrote to the CAS Court Office providing a copy of the entire FIFA case file. On the same date, the CAS Court Office provided the Parties with a copy of the entire FIFA case file.

30. On 17 January 2022, the Player wrote to the CAS Court Office providing a copy of the Tobol Employment Contract, and stating, *inter alia*, the following:

> *"2. First of all, the Respondent shall state that there are no additional agreements related to his employment contract with FC Spartak Subotica, meaning that the employment contract that he signed with said club is the only agreement signed between him and the aforementioned club which employment contract is already on file.*
>
> *3. On this note and for the sake of completeness, the Respondent wishes to emphasize that, since the head coach of FC Tobol, for some reason, stopped fielding him and verbally informed him that he will not play him anymore (the Player was not listed in the squad for last two official matches of FC Tobol), he was compelled to find a club which would play him regularly, all in order to regain his competitive form and increase market value.*
>
> *4. In this context, FC Spartak Subotica, as a relatively small club from his home country which is not able to pay high salary, decided to employ the Respondent on short term basis and provide him more playing time, which means that this should increase the possibility of the Player to find new employment under better conditions".*

31. On 18 January 2022, the Club wrote to the CAS Court Office submitting a written witness statement from Mr Riveros.

32. On 25 January 2022, the Club wrote to the CAS Court Office reiterating its queries about why the Spartak Subotica Employment Contract was lower in value than the Tobol Employment Contract. The Club reiterated its request for the disclosure of the termination agreement between the Player and FC Tobol.

33. On the same date, the CAS Court Office wrote to the Parties inviting the Player to provide his response to the Club's queries within 7 days. Further, the CAS Court Office stated the following on behalf of the Sole Arbitrator:

"As to the Appellant's reiterated desire for disclosure of the termination letter with FC Tobol, the Sole Arbitrator has already decided for its rejection. Failing any exceptional circumstance which would justify a reconsideration of the Sole Arbitrator's decision, the Appellant's reiterated request shall be considered moot".

34. On 1 February 2022, the Player wrote to the CAS Court Office providing his response to the Club's queries dated 25 January 2022.

35. On the same date, the CAS Court Office wrote to the Parties on behalf of the Sole Arbitrator informing them that, pursuant to Article R57 of the CAS Code, the Sole Arbitrator deemed himself sufficiently well informed to decide this case based solely on the Parties' written submission without the need to hold a hearing.

36. On 21 April 2022, the Player signed and returned a copy of the Order of Procedure to the CAS Court Office.

37. On 26 April 2022, the Club signed and returned a copy of the Order of Procedure to the CAS Court Office.

IV. THE PARTIES' SUBMISSIONS

38. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Club

39. In its Statement of Appeal, the Club submitted the following requests for relief:

"3.1. To admit this appeal procedure.

3.2 Partially revoke the Appealed Decision and reduce substantially the amount that the Club has to pay to the Player by compensation for breach of contract.

3.3 Partially revoke the Appealed Decision and decide that the Club shall not pay any amount regarding the flight tickets of the Player.

3.4 Condemn the Respondents to the payment of the arbitral costs of this proceeding.

3.5 To celebrate an oral hearing to explain the grounds of the appeal brief".

40. In its Appeal Brief, the Club submitted the following prayers for relief:

"1. To admit this appeal procedure.

2. *To partially revoke the Appealed Decision and reduce substantially the amount that the Club has to pay to the Player by compensation for breach of Contract.*

3. *Partially revoke the Appealed Decision and decide that the Club shall not pay any amount regarding the flight tickets of the Player.*

4. *In consequence, we ask to the Sole Arbitrator to issue a decision in which the Club shall be obliged to pay to the Player for the outstanding salaries, the compensation and the flight tickets a total amount of USD$600.000.*

5. *Subsidiarily, we ask to the Sole Arbitrator to issue a decision in which it is reduced the amount of the Compensation due to the Player established in the Appealed Decision.*

6. *To condemn the Respondent to the payment of the arbitral costs of this proceeding.*

7. *To celebrate an oral hearing to explain the grounds of the appeal brief.*

8. *To condemn the Respondent to the payment of legal fees in a total amount of USD$10.000".*

41. In summary, the Club submitted the following arguments in support of its Appeal:

i. Bonuses and salaries for the second year of the Employment Contract

42. The Club noted that in addition to the salaries remaining under the Employment Contract after termination, the FIFA DRC awarded the Player the advance payment bonus for the second year of the contract, in the amount of USD 100,000. Further, compensation for the second year of the contract was calculated at USD 58,833 a month, rather than the Player's monthly salary at the time of termination (*i.e.* USD 45,833).

43. The Club argued that:

"it makes no sense that the Club has to pay any amount of something that never happened. If there is a compensation that shall be paid to the Player, the fairness thing would be that the payment is based exclusively on what the Player was receiving at the time of the [Employment Contract's] termination. The advance payment (bonus) and new salary were agreed by the Parties as a conditional obligation depending on a condition subsequent. The enforceability of this obligation was dependent on a future and uncertain event. So, it will not produce any legal effects until it happened. Therefore, even if the [Employment Contract] was terminated by the Club, the condition of the new salary and specifically the new bonus, were never achieved. There is no reason to pay for something that never birth in a legal way".

44. Accordingly, the Club submitted that compensation for the second year of the Employment Contract should be calculated on a monthly salary of USD 45,833 rather than USD 58,833.

ii. The purpose of compensation for breach of contract

45. The Club did not deny that the Employment Contract was terminated by the Club without just cause. However, it submitted that the Player should be compensated according to the actual damages he suffered – which the Club claimed were *"nowhere near as high"* as was awarded in the Appealed Decision.

46. The Club submitted that in *CAS 2018/A/6050* the CAS panel did not grant any compensation to the player as there was no proof that he had suffered any real damage – *"since the player had entered into a new contract in which he would receive more money than in the previous one"*. The CAS panel in that case stated:

> *"When the Panel looks at the time left under the Employment Contract and the sums the Player would have expected to have been paid, it notes that he has covered this and more under the Qatari Contract. He has fully mitigated his losses and there was no evidence of any other losses or damages that he suffered as a result of the Club's actions.*
>
> *As such, the Panel sees no possibility to award him additional compensation from the Club, even though the Employment Contract was terminated with just cause, as he was able to find a new club and receive more money than he would have received from the Club".*

47. Similarly, the Club noted that in *CAS 2019/A/6463*, a club was not awarded damages because the CAS panel concluded that the club had saved significant expenses it would have incurred if not for the breach.

48. The Club therefore submitted that a party claiming compensation must prove the existence of real damage caused by the breach of contract. The Club argued that in the present case, the Player never proved any damages. In the Appealed Decision, the FIFA DRC simply applied some criteria in Article 17.1 of the FIFA Regulations on the Status and Transfer of Players (the "RSTP"), such as the residual value of the contract and the mitigation. However, the FIFA DRC *"never took into consideration other objective criteria or the principle of the specificity of sport"* when calculating damages.

iii. Relevant criteria for calculating damages

49. The Club submitted that the residual value of the Employment Contract and mitigation are not the only criteria to be applied in the calculation of damages. The Club once again cited *CAS 2018/A/6050* and *CAS 2019/A/6463* and noted that the CAS panel in the latter case stated:

> *"The list of criteria set out in Article 17.1 RSTP is illustrative and not exhaustive. Other objective factors can and should be considered, such as the loss of a possible transfer fee and the replacement costs, provided that there exists a logical nexus between the breach and loss claimed. In the analysis of the relevant criteria, the order by which those criteria are set forth by Article 17.1 RSTP is irrelevant and need not be exactly followed by the judging body. It is for the latter to carefully assess, on a case by case basis, all the factors and determine how much weight, if any, each of them should carry in calculating compensation. (…) While the judging authority has a*

"wide margin of appreciation" or a "considerable scope of discretion", it must not set the amount of compensation in a fully arbitrary way, but rather in a fair and comprehensible manner. (…)".

50. The Club therefore submitted that the following factors should also be taken into account:

a. Positive interest

51. The Club noted that pursuant to the principle of positive interest, an injured party should be put in the position that it would have been in but for the contractual breach. The Club stated that although this is *"an important and useful criterion"* the most important thing is to establish the real damage that the injured party suffered. Therefore it is not necessary to strictly follow the positive interest principle. In the present case, the Club claimed that the Player did not prove he suffered damage and simply filed a claim asking *"for a millionaire compensation"* which *"makes no sense"*.

b. Sports related consequences

52. The Club stated that soon after the termination of the Employment Contract, the Player signed the Tobol Employment Contract. In July 2021, the Player terminated the Tobol Employment Contract and signed the Spartak Subotica Employment Contract. The Club cited *CAS 2017/A/5228*, and argued that, pursuant to the principle of "specificity of sport" set out in Article 17 of the FIFA RSTP, it is not only the financial situation that needs to be taken into account but the *"hypothetical sporting situation of the Player without the breach of Contract by the [Club] vs. his sporting situation after the breach of Contract"*.

53. The Club submitted a report from Driblab, a consulting and football analytics company, which analysed the Player's performances at the Club compared to FC Tobol. The Club argued that the Player had, *"in all senses, better results with FC Tobol"*. The Player's performances at FC Tobol resulted in him returning to European football and according to this data, *"it is clear that the sporting career of the Player wasn't affected in the negative manner because of the breach"* of the Employment Contract. Further, the Club submitted that *"it is not worth to be a genius that the European Football is much better than the Arabic Football"*, and questioned whether the Player was really suffering from the termination of the Employment Contract.

c. Financial damages

54. The Club submitted that the total value of the Tobol Employment Contract and the Spartak Subotica Employment Contract should be considered as mitigation for any compensation awarded to the Player.

d. The obligation to prove damages

55. The Club cited Article 42 of the Swiss Code of Obligations (the "SCO"), which states that *"a person claiming damages must prove that damage occurred"*. The Club claimed that the Player failed to

prove any damage, and requested the Sole Arbitrator to award damages based on the actual damage and harm the Player can prove.

e. The Player's contract with FC Spartak Subotica

56. The Club requested the disclosure of the Spartak Subotica Employment Contract, and stated that although this was not considered in the Appealed Decision (as it did not exist at the time), the CAS is able to consider it in these appeal proceedings due to the *de novo* principle.

iv. Flight tickets

57. The Club noted that the FIFA DRC awarded the Player USD 1,788 relating to flight ticket expenses. However, the purpose of including flight tickets in the Employment Contract was to facilitate the Player's arrival and departure from Saudi Arabia during his time at the Club. Consequently, if the Player was no longer in Saudi Arabia, the Player did not need those tickets. The Club noted that the situation would be different if the Player had to pay for those tickets, but that was not the case here. Accordingly, the Club requested that this amount be reduced from any compensation awarded to the Player.

B. The Player

58. In his Answer, the Player submitted the following prayers for relief:

> *"- rejecting all reliefs sought by the [Club] in its Requests for Relief from the Appeal Brief; and*
>
> *- confirming entirely the challenged FIFA DRC Decision, and*
>
> *- ordering the [Club] to pay all the costs of the proceedings before CAS, and to pay a significant contribution towards the legal fees and other expenses incurred to the Player in connection with these proceedings of at least CHF 10,000.00".*

59. In summary, the Player made following arguments in support of his Answer to the Club's Appeal:

i. Bonuses and salaries for the second year of the Employment Contract

60. The Player stated that the Club's argument that the advance payment and salaries of the second season of the Employment Contract not being relevant to the amount of compensation, *"could not be more wrong"*. The Player noted that Article 17 of the FIFA RSTP made it clear that the residual value of a prematurely terminated contract was the starting point in calculating compensation. The Player stated that the Club's arguments to the contrary were *"completely absurd"* and should be disregarded.

61. With respect to the advance payment for the second year of the Employment Contract, the Player noted that this amount was fixed (*i.e.* not conditional) and the Club's claims to the

contrary were *"a blatant fabrication"*. The Player noted that this issue had been previously considered in *CAS 2015/A/4361*.

ii. Calculation of compensation

62. With respect to the various CAS and FIFA jurisprudence that the Club cited, the Player argued that key details in these cases were intentionally omitted by the Club. For example, the Club cited a paragraph from *CAS 2018/A/6050*, which stated that FIFA or the CAS can decrease a party's damages, but failed to cite the very next paragraph which stated that the *"time remaining"* on a contract plays a major role in determining compensation.

63. The Player cited *CAS 2018/A/6029*, and noted that in that case the CAS panel confirmed that compensation should be awarded pursuant to Article 17 of the FIFA RSTP, which provides for compensation *"in light of the principle of "positive interest…"*.

iii. The Club's arguments regarding the specificity of sport

64. The Player rejected all of the Club's arguments regarding the amount of compensation being reduced on the basis of various sporting factors. The Player noted specifically that it was *"quite astonishing"* that the Club sought to compare the level of football in Saudi Arabia with the level of football in Kazakhstan and Serbia. The Player also noted that the Club failed to provide any evidence to substantiate such an argument. In any event, such a factor was not relevant to the calculation of damages under Article 17 of the FIFA RSTP.

iv. Flight tickets

65. The Player argued that a contract does not need to specify an amount with respect to flight tickets, in order for it to be awarded as damages. The Player claimed that in the present case, he did in fact provide evidence of the prices of airline tickets to his home destination, so this amount was correctly awarded by the FIFA DRC.

v. Spartak Subotica Employment Contract

66. The Player submitted that although the FIFA DRC did not take into account the salaries included in the Spartak Subotica Employment Contract, it did take into account the salaries under the Tobol Employment Contract. Given that the salaries under the Spartak Subotica Employment Contract are lower than those in the Tobol Employment Contract (and the relevant periods overlap), there is no need to reduce the amount of compensation any further as the Player's mitigation has already been taken into account in the Appealed Decision.

67. Further, in response to the Club's repeated queries regarding why the Spartak Subotica Employment Contract was lower in value than the Tobol Employment Contract, the Player stated:

"4. In this sense, statement of the Club that it "was confusing that the Player agreed to sign an agreement for the termination of the contract with FC Tobol, without receiving a good enough compensation and just to regain his competitive form" while invoking that he would earn until November 2021 in FC Tobol app USD 19,000.00 and that the salary for the same period FK Spartak Subotica was app USD 1,000.00, demonstrates just how far Appellants allegation from reality of football are.

5. First of all and for the sake of completeness, the Respondent shall emphasize that Appellant's calculation of the sum that the Player would have earned with FC Tobol until the expiration of the employment contract with it is wrong, given that the Player's residual remuneration for 4 months calculated to KZT 7,600,000.00, i.e. USD 17,500.00, while the Player's remuneration from said contract is agreed in gross amount, not in net amount (income tax in Kazakhstan is 10%), meaning that the above-mentioned sum the Player would have earned with FC Tobol is USD 15,750.00, and not USD 19,000.00 like the Appellant stated.

6. In this regards, it is important to emphasize that the Appellant is arguing on this topic as if the difference between two salaries in FC Tobol and FK Spartak Subotica was huge, when in reality and given the Player's salary with FK Spartak Subotica for corresponding period of USD 1,340.00 (and not of USD 1.000,00 as the Appellant in wrongfully claiming), the difference in two sums is app USD 14,410.00 for a period of 4 months which sum surely in the world of football today does not represent the amount for which any football player world sit on the sidelines for half of season and not play, which would surely happen to the Player had he not opted to change teams in summer of 2021".

V. JURISDICTION OF THE CAS

68. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

69. According to Article 57(1) of the FIFA Statutes:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".

70. Furthermore, the jurisdiction of the CAS was confirmed by the Order of Procedure duly signed by both Parties.

71. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

72. The Appealed Decision was notified to the Parties on 6 September 2021. The Club lodged its Statement of Appeal and Appeal Brief with the CAS on 27 September 2021 and 22 October 2021 respectively, in accordance with Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee. The Player also filed his Answer in accordance with Article R55 of the CAS Code.

73. It therefore follows that this Appeal is admissible.

VII. APPLICABLE LAW

74. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

75. The Sole Arbitrator observes that Article 56(2) of the FIFA Statutes (2021 edition) stipulates the following:

"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

76. As such, the Sole Arbitrator is satisfied to primarily apply the various regulations of FIFA and, subsidiarily, Swiss law should the need arise to fill a possible gap or *lacuna* in the various regulations of FIFA.

VIII. MERITS OF THE APPEAL

A. The Main Issues

77. As a preliminary matter, the Sole Arbitrator notes the Appealed Decision found that the Club terminated the Employment Contract without just cause and awarded the Player damages comprising of (i) unpaid salaries, (ii) compensation for the breach of contract, and (iii) the value of flight tickets. In the present Appeal, the Club does not dispute that it terminated the Employment Contract without just cause. However, it claims that the amount awarded as compensation to the Player should be reduced and no sum should be paid for the flight tickets. As such, the Sole Arbitrator does not need to, and will not, reconsider the issue of whether the Employment Contract was terminated with just cause or not - that issue was settled in the Appealed Decision. The only dispute between the Parties relates to the appropriate amount of compensation.

78. The Sole Arbitrator observes that the only issues to be resolved are therefore:

a) How should damages for breach of contract be calculated?

b) What is the mitigated compensation?

c) Should the value of flight tickets be awarded as compensation to the Player?

d) What is the total amount of compensation payable to the Player by the Club?

79. These issues will be considered in turn.

a) How should damages for breach of contract be calculated?

80. As starting point, the Sole Arbitrator notes that the Appealed Decision awarded the Player unpaid salaries amounting to USD 171,038 (net), plus 5% interest p.a. as follows:

- USD 79,242 as from 16 November 2020;
- USD 130 as from 1 December 2020;
- USD 45,833 as from 1 January 2021;
- USD 45,833 as from 1 February 2021.

81. The Club did not deny that these amounts remain unpaid. As such, according to the *pacta sunt servanda* principle, the Sole Arbitrator deems that that Club must pay the above amounts, along with interest, to the Player.

82. The Sole Arbitrator then turns to the question of compensation for breach of contract, which the FIFA DRC determined to be USD 1,129,094.40 (net). In this regard, the Sole Arbitrator notes the Club requested the total amount of compensation, including outstanding salaries, to be reduced to a total of USD 600,000 or less.

83. The Sole Arbitrator notes that the Employment Contract does not contain a liquidated damages clause. Accordingly, noting once again that it was undisputed between the Parties that the Club terminated the Employment Contract without just cause, the Sole Arbitrator refers to Article 17(1) of the FIFA RSTP:

"In all cases, the party in breach shall pay compensation. (…) unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".

84. Pursuant to established CAS jurisprudence, an injured party is entitled to damages pursuant to the principle of "positive interest", which aims to reinstate an injured party to the position it

would have been had the contract been performed until its expiry (see *inter alia*, CAS 2016/A/4679; CAS 2012/A/2698). Indeed, this has now been codified into the FIFA RSTP, which states in Article 17(1) that, subject to any collective bargaining agreement at domestic level, compensation due to a player shall be calculated as follows:

- In case the player did not sign a new contract following the termination of his previous contract, as a general rule the compensation shall be equal to the residual value of the prematurely terminated contract;

- In case the player signed a new contract by the time of the FIFA decision, the value of any new contracts is to be deducted as "mitigated compensation". Additional compensation can be awarded in egregious circumstances, but the overall compensation can never exceed the residual value of the prematurely terminated contract.

85. The Sole Arbitrator sees no reason to depart from the above-mentioned principles and methodology and he rejects the Club's position that the Player has failed to prove his losses. The Employment Contract itself is the starting point of such proof. Accordingly, in the present case, the starting point for calculating compensation for breach of contract is the residual value of the Employment Contract at the date the Club prematurely terminated the agreement. FIFA calculated the residual value of the Employment Contract to be USD 1,166,660 (net).

86. The Sole Arbitrator notes that the Club submitted numerous arguments in an attempt to justify the reduction of this amount, such as:

- the Player did not prove he suffered damage and simply filed a claim asking *"for a millionaire compensation"* which *"makes no sense"*. The Player should be awarded damages based on the actual damage and harm he can prove;

- the Player's performances at FC Tobol resulted in him returning to European football and according to his performances there, *"it is clear that the sporting career of the Player wasn't affected in the negative manner because of the breach"* of the Employment Contract; and

- claiming that the advance payment for the second year and the increase in salary for the second year should be ignored.

87. However, the Sole Arbitrator considers that none of the arguments advanced by the Club are sufficient justification for any reduction of compensation. Dealing first with the Club's argument that damages should only be awarded based on actual damage the Player can prove, the Sole Arbitrator notes that the damage suffered by the Player was, in fact, "proven" by the mere fact that he suffered the premature termination of the Employment Contract. Pursuant to regulations set by FIFA in the FIFA RSTP, and in long standing CAS jurisprudence, this is sufficient to "prove" that damage occurred and give rise to a right to compensation. Put simply, but for the termination without just cause, the Player would have remained at the Club and been entitled to the sums set out in the Employment Contract.

88. As noted by the Sole Arbitrator in CAS 2018/A/6064 (emphasis added):

> *"98. However, the Sole Arbitrator notes that the purpose of Article 17 of the FIFA RSTP is to reinforce contractual stability between professionals and clubs (see Art. 13 of the FIFA RSTP), i.e. to strengthen the principle of pacta sunt servanda by acting as a deterrent against unilateral contractual breaches and terminations committed by a club or by a player (see CAS 2005/A/876, page 17; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 92; CAS 2008/A/1568, para. 6.37; CAS 2017/A/5111, para. 132).*
>
> *99. Furthermore, according to the FIFA RSTP Commentary (No 6 to Article 14), a party "responsible for and at the origin of the termination of the contract is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed".*
>
> *100. Thus, in line with the previous jurisprudence of the CAS, the party at the origin of the termination of the employment agreement shall be liable to pay compensation for damages suffered by the other party (see CAS 2017/A/5111 para. 134 and CAS 2012/A/3033, para. 72).* ***In this sense, Art. 17 RSTP closely follows Art. 337b SCO, which also provides the party not being in breach of the contract with a right to seek full compensation for the damage suffered (see CAS 2013/A/3398, para. 67)****".*

89. The Club did not explain what further steps the Player could and should have taken to "prove" the damage he suffered, but in any event the Sole Arbitrator considers that requiring the Player to do so would not only create a new, and unjustified, standard and burden of proof for injured parties in similar situations, but it would also be contrary to the provisions of the FIFA RSTP, established CAS jurisprudence and Article 337b of the SCO (as quoted above). As stated above, the production of the Employment Contract is proof enough. Accordingly, the Sole Arbitrator rejects all the Club's arguments in this regard.

90. The Sole Arbitrator also rejects the Club's attempt to compare of level of football in Saudi Arabia to that in Kazakhstan and Serbia, in an attempt to argue that the Player did not actual suffer any sporting damage as a result of the premature termination of the Employment Contract. As the Player rightly noted, the level of football the Player played at after the termination bears no relevance to the calculation of damages under Article 17 of the FIFA RSTP. Whilst this could have an indirect impact through the level of mitigation the Player earned after leaving the Club, the issue of mitigation is a separate issue altogether (considered further below). Accordingly, the Sole Arbitrator rejects all the Club's arguments in this regard.

91. In summary, in addition to the payment of unpaid salaries and interest, the Sole Arbitrator concludes that, subject to any reductions for mitigation and flight tickets (addressed further below), the Player is owed, in principle, the residual value of the Employment Contract – in the amount of USD 1,166,660 (net) - due to the termination of the Employment Contract without just cause by the Club.

b) What is the mitigated compensation?

92. Turning then to the issue of mitigated compensation, the Sole Arbitrator notes that this amount was calculated by the FIFA DRC as USD 37,565.60, which equated to the value of the Tobol Employment Contract for the applicable overlapping period between it and the Employment

Contract. After the Appealed Decision was issued, the Tobol Employment Contract was terminated by mutual consent. The Player subsequently entered into a further contract – the Spartak Subotica Employment Contract**.** As this contract was entered into after the FIFA proceedings, this was not taken into account in the Appealed Decision. However, pursuant to the *de novo* principle, the Sole Arbitrator is able to take the Spartak Subotica Employment Contract when calculating damages.

93. The Sole Arbitrator notes that there was a disagreement between the Parties between the exact value of the Spartak Subotica Employment Contract, and subsequently the level of mitigated compensation. The Club claimed that the value of the Tobol Employment Contract for the applicable period was USD 19,000, whilst the Spartak Subotica Employment Contract was worth USD 1,000. Conversely, the Player submitted that the two values were USD 15,750 and USD 1,340 respectively. Further, the Club repeatedly questioned whether the amounts disclosed by the Player were accurate. The Club repeatedly requested the disclosure of various documents such as the termination agreement between the Player and FC Tobol, to verify the accuracy of the relevant figures.

94. Ultimately however, the Sole Arbitrator considers that the dispute between the Parties regarding the valuation of the respective contracts, and the reasons for the allegedly low value of the Spartak Subotica Employment Contract do not change the position on mitigated compensation in this case.

95. As the Player noted, the Appealed Decision reduced the level of compensation due to him by the entire value of the Tobol Employment Contract. The Player submitted that the value of the Spartak Subotica Employment Contract was lower than the Tobol Employment Contract. The Club alleged that the value of the Spartak Subotica Employment Contract *"did not make sense"* and alleged that there may have been other ancillary contracts which the Player was not disclosing, but ultimately could not provide any evidence to substantiate these allegations. The Sole Arbitrator recalls that it is *"well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based"* (CAS 2015/A/3904), and the Club failed to meet its burden of proof in this regard. In any event, the Sole Arbitrator could foresee circumstances where a player would sacrifice part of his or her salary to join a different club, where his or her chances of playing were increased.

96. Therefore, based on the evidence before him, the Sole Arbitrator could only conclude that the value of the Spartak Subotica Employment Contract was lower than that of the Tobol Employment Contract. As such, as the Player effectively failed to earn the sums the FIFA DRC deducted from him in the Appealed Decision, the amount of compensation awarded in the Appealed Decision proved, in fact, to be lower than the actual amount of damages the Player could have been entitled to. As the Player did not file an appeal against the Appealed Decision, the Sole Arbitrator cannot award a higher amount than that granted in the Appealed Decision. Therefore, the amount of mitigated compensation does not need to, and cannot, be amended.

97. Accordingly, for all the reasons set out above, the Sole Arbitrator concludes that the mitigated compensation amount in the Appealed Decision (USD 37,565.60) should be maintained. The

amount of compensation for breach of contract is therefore USD 1,129,094.40 (net), which is USD 1,166,660 less USD 37,565.60.

98. The Sole Arbitrator notes that in the Appealed Decision, FIFA awarded interest of 5% p.a. as from 23 March 2021 on this amount of compensation. Neither Party made any specific submissions with respect to the interest on this amount. As such, the Sole Arbitrator rules that 5% interest should be awarded on this amount, from 23 March 2021.

c) Should the value of flight tickets be awarded as compensation to the Player?

99. In the Appealed Decision, FIFA awarded the Player USD 1,788 corresponding to the value of two flight tickets for the Player, in light of clause 4 of the Employment Contract which states that the Club was to pay for *"two tickets round trip for the player entire the season from home to Gassim to home and. [sic]"*.

100. The Club argued that the purpose of including flight tickets in the Employment Contract was to facilitate the Player's arrival and departure from Saudi Arabia during his time at the Club. Consequently, if the Player was no longer in Saudi Arabia, the Player did not need those tickets. The Club noted that the situation would be different if the Player had to pay for those tickets, but that was not the case here. The Player argued that a contract does not need to specify an amount with respect to flight tickets, in order for it to be awarded as damages so FIFA correctly awarded this amount.

101. On balance, the Sole Arbitrator agrees with the Club's position. The wording of clause 4 of the Employment Contract suggests that the Club was to provide the Player with two round trip tickets a season. The purpose of clubs including such a provision is, as the Club has stated, to facilitate a player's arrival and departure from the Club's country of residence. If the player was no longer employed by the Club, it follows that he no longer has to fly to the country where the Club is based.

102. Upon the premature termination of the Employment Contract by the Club, the Player no longer needed to fly to Saudi Arabia. As the Club noted, the situation would be different the Player had paid for the tickets, and was awaiting reimbursement by the Club. Based on the evidence before the Sole Arbitrator, the Player had not demonstrated that he made any such payment. As such, there is no need for the Player to be reimbursed for these costs. Accordingly, the Sole Arbitrator concludes that FIFA erred in awarding this amount as compensation to the Player.

103. In summary, the amount of compensation awarded in the Appealed Decision should be reduced by USD 1,788.

d) What is the total amount of compensation payable to the Player by the Club?

104. For all the reasons set out above, the total amount of compensation payable to the Player by the Club is:

- USD 171,038 (net), as outstanding remuneration, plus 5% interest p.a. as follows:

- USD 79,242 as from 16 November 2020;
- USD 130 as from 1 December 2020;
- USD 45,833 as from 1 January 2021;
- USD 45,833 as from 1 February 2021.

- USD 1,129,094.40 (net), as compensation for breach of contract, plus 5% interest p.a. as from 23 March 2021.

B. Conclusion

105. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Sole Arbitrator determines that the Appeal is partially upheld. The Appealed Decision is amended by the removal of Item 2(c) of the Appealed Decision. All other aspects of the Appealed Decision are confirmed.

106. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 27 September 2021 by Al-Raed Club against the decision rendered on 19 August 2021 by the FIFA Dispute Resolution Chamber is partially upheld.

2. The decision rendered on 19 August 2021 by the FIFA Dispute Resolution Chamber is amended as follows:

   a. Item 2(c) is deleted; and

   b. In all other aspects the Appealed Decision is confirmed.

3. (…).

4. (…).

5. All other and further motions or prayers for relief are dismissed.