

Review

Sports Law Group



FC Sion v Essam El-Hadary & FIFA / Fenerbahçe v Appiah – Important decisions on compensation in club v player disputes

The Court of Arbitration for Sport (“CAS”) has issued two decisions of particular importance to clubs, players and agents in relation to the unlawful termination of employment contracts by players. The CAS decisions in *FC Sion* and *Appiah* are of legal significance on a number of issues. However, they are most useful in confirming the approach to the assessment of the damages players must pay if they are found to have terminated their contracts without just cause.

In both decisions, the CAS refused to follow a literal application of the factors applied by the FIFA Dispute Resolution Chamber (“DRC”) in calculating compensation under Article 17 of the FIFA Regulations. Instead, the CAS based its assessment on the Swiss law principle of “positive interest”. Put simply, this principle aims to return the injured party to the position he would have been in had the contract been performed properly.

The CAS’ approach confirms that the factors set out in Article 17 should not be applied in a way so as to arrive at an award of compensation that fails to reflect a party’s actual loss. It also consigns to history the pro-player approach favoured in *Heart of Midlothian v Webster & Ors* (CAS 2008/A/1298-300). The decision in *FC Sion* and *Appiah* bring the CAS’ jurisprudence on contractual disputes more in line with the English common law approach to damages.

This should be good news for the football industry as compensation should now be assessed according to the actual loss suffered by an injured party. Therefore, whilst quantum may still be disputed, at least the approach to its assessment should now be clearer. The positive interest principle is flexible enough to allow clubs to recover a broad spectrum of loss – i.e. including what it may cost a club to replace the player with one of similar quality, and commercial losses.

Whilst as set out below, the CAS’ application of the principle led to very different results in each case, the decisions nevertheless represent positive steps in the approach to assessing compensation in club v player disputes.

Key findings

In both *FC Sion* and *Appiah*, the DRC found the players to have unilaterally terminated their contracts without just cause within the protected period. As a result, both players were ordered to pay compensation in accordance with Article 17, with El-Hadary being ordered to pay €900,000, and Appiah €2.3m. In the former case, El-Hadary’s new club, FC Sion, was also held jointly and severally liable for payment of the compensation and both he and the club suffered sporting sanctions: El-Hadary was banned from playing for four months and FC Sion was banned from registering new players for two registration periods.

Both players appealed the DRC decisions to the CAS. However, although the CAS upheld the DRC decisions in relation to liability (i.e. the CAS agreed that both players had terminated their contracts without just cause), it varied the compensation awards considerably.

In *FC Sion*, whilst upholding the decision to impose sporting sanctions on El-Hadary and FC Sion, the CAS varied the compensation award from €900,000 to \$796,500. It focussed on what it would cost Al-Ahly, El-Hadary’s former club, to replace him with a player of similar quality. It firstly took into consideration evidence adduced at the hearing that FC Sion would have been willing to pay \$600,000

“In the Panel’s opinion an amount of compensation of USD 796,500 would allow Al-Ahly to go [to] the market and replace the Player with a player of analogous value.”
FC SION

for the Player before his termination. Secondly, it considered that FC Sion was willing to pay the Player \$488,500 until the point at which his contract with Al-Ahly would have expired.

It therefore found that to be put in a position as if the contract had not been breached, Al-Ahly would have to spend \$1,088,500 (i.e. a transfer fee of \$600,000 and wages of \$488,000) to replace El-Hadary with a player of comparable value. From that figure, the CAS then deducted what Al-Ahly had saved by not having to pay the remainder of El-Hadary's contract (\$292,000) and arrived at a final figure of \$796,500.

In Appiah, the CAS overturned the DRC decision and reduced the compensation award from €2.3m, to zero.

In this case, the CAS accepted the argument advanced on behalf of Appiah that even if compensation was payable by him, applying the positive interest principle should mean that the amount saved by Fenerbahçe through not having to pay him for the remainder of his contract was equal to or greater than the amount it lost. Fenerbahçe had claimed compensation of over €12m in its appeal from the DRC decision. That included claims for €4.78m for the residual value of Appiah's contract (including the period of a unilateral option exercised by the Club), €4.17m for the non amortised costs (including his transfer fee, signing on fee, and agents fees), and €3m relating to the Player's breach in light of the "specificity of sport" (which included loss of commercial revenue).

However, the CAS favoured Appiah's argument. It decided that because Appiah had been injured for the period from before his termination until after the expiry of his contract, any loss suffered by Fenerbahçe was outweighed by the saving it made by not having to pay him for the remainder of his contract. The CAS therefore decided that replacement cost was not relevant because Fenerbahçe would always have had to replace an injured player, commercial revenues were not recoverable because no evidence had been adduced by the Club; and whilst Fenerbahçe had non-amortised costs of €2.4m, Appiah's termination had in fact saved Fenerbahçe the obligation to pay the Player approximately €2.6m for the remainder of his contract. The CAS also confirmed the well established jurisprudence of the DRC and CAS that unilateral options are unlawful and as a general rule, will not be binding.

Significance of the CAS decisions

The football industry should take heart from the CAS decisions in *FC Sion* and *Appiah*. They are consistent with the CAS ruling in *Shakhtar Donetsk v Matuzalem & Ors* (CAS 2008/A/1519-20) and they dispel any notion that players may terminate their employment contracts with impunity. Similarly, the CAS' confirmation that compensation should be based on the "positive interest" principle is important. It is encouraging that international tribunals are willing to take into account the whole spectrum of an injured party's loss, not just the residual value of a player's contract. This is a positive step for any party seeking to protect its interests in the event of a player unlawfully terminating his contract and provides important support for the overriding principle of the maintenance of contractual stability in football.

Hammonds Sports Law Group acted for Stephen Appiah in *Fenerbahçe Spor Kulübü v Stephen Appiah* (CAS 2009/A/1856/1857).

FURTHER INFORMATION

For more information on either of the decisions, please contact:

Peter Limbert

T: +44 (0)207 655 0262

E: peter.limbert@hammonds.com

Stephen Sampson

T: +44 (0)207 655 1481

E: stephen.sampson@hammonds.com

WWW.HAMMONDS.COM

If you do not wish to receive further legal updates or information about our products and services, please write to: Richard Green, Hammonds LLP, Freepost, 2 Park Lane, Leeds, LS3 2YY or email richard.green@hammonds.com.

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“the Panel concludes that...in these circumstances, when... Fenerbahçe saved more money [through the termination of the contract] compared to its losses ...no compensation shall be awarded ...and...no sporting sanction shall be imposed upon the Player.”
APPIAH