Arbitration CAS 2007/A/1380 MKE Ankaragücü Spor Kulübü v. S., award of 11 June 2008

Panel: Mr Rui Botica Santos (Portugal), President; Mr Kismet Erkiner (Turkey); Prof. Petros Mavroidis (Greece)

Football
Contract of employment
Burden of proof

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. The two requisites included in the concept of "burden of proof" are (i) the "burden of persuasion" and (ii) the "burden of production of the proof". In order to fulfil its burden of proof, a party must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequence envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party.

MKE Ankaragucu Spor Kulubu (the "Appellant" or the "Club") is a Turkish football club with its registered office in Ankara, Turkey, and it is a member of the Turkish Football Federation (TFF), which is, in turn, a member of FIFA.

S. (the "Respondent" or the "Player") is a professional football player, born in Ghana and of Ghanaian nationality.

This appeal was filed by the Club against the decision rendered by the FIFA Dispute Resolution Chamber on 4 April 2007 in favour of the Player (the "DRC Decision"), notified to the Parties on 28 August 2007.

The circumstances stated below are a summary of the relevant facts as established on the basis of the written submissions of the Parties and the documents produced by them. The FIFA file and the discussions held during the hearing were also taken into consideration.

On 6 August 2004, the Parties signed a document entitled "Professional Player's Contract", the official TFF uniform professional player's contract, which stipulated the remuneration terms of the Player (the "TFF Uniform Professional Player's Contract"), for the 2004/2005 football season, which, among other things, stipulates the Player's remuneration. The beginning date of this contract was 6 August 2004 and its expiry date 5 August 2005.

On a date, which it has not been possible to determine, the Parties signed another contract, which stipulated the payment terms for the 2004-2005 season. The Player submitted this document with his defence, signed by both Parties, which stipulates the Player's remuneration for the 2004/2005 season (the "Employment Contract 1"), valid until 31 May 2005.

On 29 July 2004, the Club alleges that it has been signed with the Player another agreement to replace the previous one signed, for the same 2004/2005 football season and also valid until 31 May 2005 (the "Employment Contract 2"). The two contracts were neither registered before the TFF nor attached to the official TFF Uniform Professional Player's Contract.

The Panel understands that, in Turkey, it is common practice to sign a private contract of employment, alongside the official TFF Uniform Professional Player's Contract, in which the Parties stipulate the real payment terms of the employment relationship. While only the signing Parties are aware of and retain the former contract, the latter contract is the only one registered with the TFF.

The Employment Contracts (both 1 and 2) stipulate the following effective remuneration terms of the Player, for the 2004/2005 football season:

a. USD 75,000 payable in 10 monthly instalments of USD 7,500 on the 10th day of each month starting from the month of August;

b. Payments per match (USD 75,000 for 34 matches):
   i) If the Player is in the starting eleven: USD 2,205
   ii) If the Player comes on as substitute: USD 1,654
   iii) If the Player stays on the substitutes' bench: USD 1,102

The Player also submitted a document signed by both Parties entitled "Contract", which stipulates that the Player should guarantee "good service" in consideration of which the Club would pay the Player the sum of USD 100,000 (the "Addendum to the Employment Contract"). USD 50,000 to be paid upon signing the contract and the remaining USD 50,000 to be paid by cheque dated 25 October 2004. The Addendum to the Employment Contract is not dated.

The only difference in the wording of the Employment Contracts 1 and 2 is that the first one, filed by the Player, establishes a payment of USD 50,000 if he takes part in a total of 26 matches during the 2004/2005 football season, including league and cup matches; while the wording of the second, filed by the Club, is more restrictive as it provides that the USD 50,000 bonus is only due if the Player plays 26 matches in the starting eleven.

The TFF informed FIFA that the Player played 22 matches in the starting eleven for the Club during the 2004/2005 football season and that he also came on as a substitute in 4 matches and he was in the squad, in a further 4 matches, but did not take part therein.

Besides the Parties' disagreement on the wording regarding the Player's right to the payment of the USD 50,000 bonus provided in section 3 of his contract, the Parties are also in disagreement

regarding several other payments claimed by the Player, under the Employment Contract 1, in the total amount of USD 154,034.

On 28 July 2005 the Player filed a claim against the Club before FIFA to recover the sums allegedly due to him in accordance with the contractual established remuneration conditions. The remuneration claimed to be due to the Player under the employment relationship was USD 284,534, comprised as follows:

a. 20 matches x USD 2,205 = USD 44,100;

b. 4 matches x USD 1,654 = USD 6,616;

c. 4 matches x USD 1,102 = USD 4,408;

d. Bonus of USD 50,000 for 26 matches played;

e. Salary of USD 75,000 for the 2004/2005 football season;

f. The sum of USD 100,000 for good service in accordance with the Addendum to the Employment Contract;

g. Amount claimed for matches missed through illness or injury 2 x 2 matches at USD 2,205 = USD 4,410.

The Player accepted that he had received the sum of USD 130,000 from the Club and claimed the outstanding amount USD 154,534 (cf. letter from the Player to TFF dated 7 July 2005).

The Player provided the DRC with a list of payments that he received by way of salary and bonuses, which total USD 130,500 (cf. letter from the player to FIFA dated 10 November 2005):

a.	10 August 2004	USD 15,000
b.	20 August 2004	USD 10,000
c.	21 September 2004	USD 30,000
d.	22 November 2004	USD 20,500
e.	14 December 2004	USD 5,000
f.	20 December 2004	USD 20,000
g.	9 February 2005	USD 20,000
h.	6 April 2005	USD 5,000
i.	25 May 2005	USD 5,000

If the contents of the letters from the Player dated the 7th of July and the 10th of November 2005 are checked, it will be seen that the amounts that the Player acknowledges and accepts as having been received from the Club, differ by USD 500.

By a letter dated 14 October 2005, the Club stated its position, and confirmed that the Player *"(…) served to our club as a professional player for the season 2004/2005. Player take part in the starting 11 for 20*

matches; played as a substitute in 4 matches and in the 18 but did not take part for 4 matches, over the 34 league" matches.

In the said communication, the Club stated that it paid to the Player the total amount of USD 181,012 for the 2004/2005 football season and that the Club had, on several occasions, fined the Player, the fines totalling USD 66,959 and for this reason it paid to the Player the equivalent to USD 247,971 for the 2004/2005 football season. The Club also stated that the Player earned USD 230,124 in the 2004/2005 football season and that the amount paid by the Club (taking into consideration the fines = USD 247,971) *"(…) is more than the player's earnings for season 2004-2005"*.

By a fax dated 4 November 2005, the Player stressed the contradiction in the Club's position as stated on 14 October 2005, in which it started by informing FIFA that it paid the Player USD 181,012 in respect of the 2004-2005 season, in addition to the fines imposed on him in the total amount of USD 66,959 (and concludes, taking these two amounts into consideration that it had paid the Player the total amount of USD 247,971); when, in the same communication, the Club also states that the Player earned USD 230,124 for the 2004-2005 season and that the fines imposed totalled USD 66,950 instead of the amount initially referred to of USD 66,959.

Subsequently, in a letter dated 5 December 2005, the Club stated that the Player had received USD 217,272 and sent FIFA a copy of the relevant payment receipts related to the amounts allegedly paid to the Player.

In the letter dated 5 December 2005, the Club states that it imposed a fine of USD 22,000 on all players by virtue of a decision of 18 April 2005 and also says that *"(…) according to clubs records club owes USD 10,728 to the player and upon request this amount will be paid to the player"*. The Player rejected the fines imposed on him by the Club and stated that he had signed for all the payments made to him and requested the authentication of the signatures on the documents that the Club submitted for consideration.

The Player informed FIFA that the receipts with regard to his salary and bonus were in the Club's possession and that it refused to produce them. In fact, the Club never answered the DRC's communications sent to it requesting it (1) to send the originals of the above-mentioned receipts so that the Player's signature could be compared; and (2) to give details of precisely which debts the alleged payments referred to, in accordance with the receipts in question.

Finally, the Club stated, in accordance with the wording of the Employment Contract 2 that it submitted, that the Player would only be entitled to a USD 50,000 bonus, if he played 26 matches in the starting eleven. Accordingly, as the Player did not play this number of matches in the starting eleven he is not entitled to the bonus claimed of USD 50,000.

The DRC considered the financial aspects of the contractual relationship between the Parties and the information provided by the TFF and concluded that the Player was contractually entitled to receive the total amount of USD 284,534 for the 2004/2005 football season and that, as the Player had received the amount of USD 130,500 (including salaries and bonus for the relevant contractual relationship), the Club still owes him the total amount of USD 154,030.

The DRC considered that the Club had provided contradictory information by stating on 18 October 2005 that it paid USD 247,971 (or USD 181,012 without fines) to the Player and subsequently, on 5 December 2005, affirming that the Player had received the sum of USD 217,272.

In this context, DRC took note of the fact that, after FIFA, on 21 June and 16 August 2006, requested the Club to send the originals of the relevant payment receipts in order to analyse the contents thereof and the signatures thereon and in order to obtain a translation of the receipts in question, and that the Club failed to respond thereto.

In this respect, DRC *"(…) emphasized that, in accordance with the principle of the burden of proof, which is a basis principle in every legal system, each party to a legal procedure is responsible to corroborate its allegations. In other words, any party deriving a right from an alleged fact shall carry the burden of proof (cf. art. 12 par. 3 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber)".*

Since the Player denied that he had received the amounts of USD 217,272 or USD 247,971, as alleged by the Club, *"(…) it was the procedural obligation of the [Club] to present the originals of the relevant payment receipts in order to provide proof for its position and to refute the [Player's] allegations".*

DRC also concluded that, since the Club had failed to provide the originals of the payment receipts, as they have been requested to do, *"(…) it renounced to its right of defense and accepted the allegations of the [Player], i.e. that he received USD 130,500 from the [Club] only (cf. also art. 9 par. 3 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber)".*

With respect to the alleged fines, DRC considered that the same cannot be taken into consideration, *"(…) due to the fact that, on the one hand the alleged amounts imposed are excessive compared with the financial aspects of the contractual relationship, and on the other hand due to the fact that no proofs were provided by the [Club] that the [Player] was heard during the disciplinary procedure or that the decision in question was duly notified to the [Player]".*

As a consequence of all the above mentioned considerations, the DRC decided to accept the Player's claim with regard to the outstanding remuneration and determined that the Club is liable to pay the Player USD 154,034.

The DRC Decision was the following:

"1. The claim lodged by the Claimant, the player S., is accepted.

2. The Respondent, the club MKE Anaraguru Spor Kulubu, has to pay the amount of USD 154,034 to the Claimant.

3. The amount due to the player S. has to be paid by MKE Ankaraguru Spor Kulubu within the next 30 days as from the date of notification of this decision.

4. If the aforementioned amount is not paid within the aforementioned deadline, this matter shall be submitted to FIFA's Disciplinary Committee, so that the necessary disciplinary sanctions may be imposed.

5. *The Claimant, S., is directed to inform the Respondent, MKE Ankaraguru Spor Kulubu, directly and immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*

(…)".

On 11 September 2007, pursuant to art. 61 para. 1 of the FIFA Statutes, the Club filed the "Statement of Appeal" against the DRC Decision with the CAS, in which it appealed against the DRC Decision.

On 24 September 2007, the Club filed the "Appeal Brief" in which it states the factual and legal grounds of the appeal, together with some documents and evidence upon which it intends to rely.

On 15 October 2007, the Player filed his "answer" in which he included the factual and legal grounds in answer to the appeal, together with all documents and evidence upon which he intends to rely.

On 4 January 2008 the Panel requested from the Club the original payment receipts that the Club asserts had been paid to the Player, together with their translation into English.

On 1 February 2008 the Club furnished the CAS with the requested original payment receipts together with their translation. A copy of the said documentation was sent to the Respondent.

On 13 February 2008, upon request of the CAS, the TFF sent a communication containing a copy of the disciplinary decisions imposed to the Player during the season 2004-05 and also stated that *"S. played in the starting eleven in 20 matches for our club MKE Ankaragücü, he was also substitute player in 4 matches but never entered the game"*. A copy of the said correspondence was also sent to the parties.

On 18 March 2008, a hearing took place in Lausanne, Switzerland.

On 28 March 2008, the CAS requested the Appellant to provide (i) the original receipts related with all payments to the Player during the season 2003/04 and (ii) a statement specifying the nature and the breakdown of the amounts mentioned in the receipts under point (i).

On 2 April 2008 the CAS sent a communication to FIFA, stating:

"On the occasion of the hearing held on 18 March 2008 at the CAS headquarters in Lausanne, the Appellant stated that the federative contract no 03437, which is herewith enclosed, was part of the FIFA file, as it was sent by them to FIFA. Nevertheless, the Panel has carefully checked the file that was sent on 20 December 2007 by FIFA without finding such document. In view of the insistence of the Appellant, I would be very grateful if you could check if that document exists in the original FIFA file that you have on records and that, by "mistake", was not sent to CAS. (…)".

On 9 April 2008 FIFA send a correspondence by virtue of which it confirmed that the contracted requested was not remitted to the DRC by the parties involved during the investigations of the relevant procedure before the DRC.

On 18 April 2008 the Club provided the CAS Court Office with a new bunch of documents and, consequently, the Player was invited to comment on them, which he actually did on 7 May 2008.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed by the Parties, derives from art. 61 para. 1 of the FIFA Statutes and R47 of the Code of Sports-related Arbitration (the "CAS Code").

2. The Parties confirmed the jurisdiction of CAS by signing the order of procedure.

3. It follows that the CAS has jurisdiction to decide this dispute. The mandate of the panel follows from Article R57 of the CAS Code, according to which the panel has full power to review the facts and the law of the case. Furthermore, this provision states that the panel may issue a new decision, which replaces the decision challenged, or may set aside the decision and refer the case back to the previous instance.

Applicable Law

4. Art. R58 of the CAS Code reads as follows:

   "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".

5. Then, art. 60(2) of the FIFA Statutes provides as follows:

   "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".

6. Neither the Employment Contract 1 or 2 nor the Addendum to the Employment Contract contains any choice-of-law clause and the Parties have not otherwise specifically agreed on the applicable law.

Preliminary procedural issues

7. During the hearing, the Appellant has made references to two documents that were neither in the CAS file nor in the FIFA file. The Appellant insisted that the referred documents were

supposed to be in the file, at least in the FIFA file. CAS Court Office took the responsibility to check with FIFA whether the file received was complete. In any case, the Appellant's counsel made an application pursuant to R56 of the CAS Code to request the filing of two documents. The Respondent objected to the filing request invoking late submission of them. The President of the Panel may, as per article R56 of the CAS Code, allow the parties to produce new evidence, only in case of *exceptional circumstances*. The President of the Panel also noted that the requested documents to be filed were in Turkish language without any translation into English language.

8. The President of the Panel decided to reject the request based on the fact that the Appellant had not invoked any fact or circumstances to prove the existence of exceptional circumstances that would justify the late production of the two documents. In any case, the President of the Panel also underlined that the CAS Court Office is going to confirm with FIFA whether the documents are or not in the FIFA file, in which circumstances the Panel will take them into consideration. After the oral submissions and argument of the Parties, the Panel decided to request the Club pursuant to R44.3 of the CAS Code and with a view to a proper decision of the matters raised in the appeal, to submit some new documents.

9. On 18 April 2008, the Club lodged the following documents:
   a. Standard employment contract dated 5 February 2004;
   b. English translation of the previous mentioned document;
   c. Power of Attorney given by the Respondent to Mr. Cumhur Bati, attorney;
   d. English translation of the previous mentioned document;
   e. Attachment to the standard employment contract dated 6 August 2004;
   f. Original payment receipt dated 10 February 2004 related to the payment of USD 50,000 (nature: sign-on-fee);
   g. Original payment receipt dated 11 February 2004 related to the payment of USD 7,500 (nature: guarantee payment);
   h. Original payment receipt dated 4 March 2004 related to the payment of USD 5,000 (nature: guarantee payment);
   i. Original payment receipt dated 27 April 2004 related to the payment of USD 7,000 (nature: guarantee payment);
   j. Original payment receipt dated 28 April 2004 related to the payment of USD 7,000 (nature: guarantee payment);
   k. Original payment receipt dated 29 April 2004 related to the payment of USD 6,000 (nature: guarantee payment);
   l. Original payment receipt dated 12 May 2004 related to the payment of USD 13.000 (nature: guarantee payment);

10. The Appellant added a note to explain that *"for the 2003/2004 football season these payments correspond to what was due by the Appellant to the Respondent whose contract entered into effect on February 5, 2004 only"*.

11. On May 6, 2008, the Player filed a reply in which he reaffirmed that all the payments received after April 2004 contained a handwritten note, which identified the nature of the payment, which was not the case with regard to the said documents and concludes that *"(…) the documents covering the US$50,000.00 and US$20,000.00 the Club claims (…) are fictitious. The Club is only trying to run away from paying the legitimate claim (…)"*.

12. On 9 April 2008, FIFA informed CAS that the documents referred by the Appellant *supra "(…) were not remitted to the DRC by the parties involved during the investigations of the relevant procedure before the DRC"*. Therefore, the Panel rejected the request of the Appellant in this regard.

13. The Panel refused the filing of the documents a., b., c., d. and e. identified in para. 9. filed by the Club under R.56 of the CAS Code because the Panel considered that the Club had failed to prove that exceptional circumstances had occurred, which justified the late filing of the said documents. This decision is in line with the Panel's decision described in para. 7 and 8 where the Club tried to file the same documents in the proceedings.

Admissibility

14. During the hearing, following the final submissions of counsel for the Appellant, the Panel understood that the Club, in addition to seeking the annulment of the FIFA Decision, also claims that *"the sanctions taken by the club against the player shall be executed and outstanding penalties shall be collected from the playe*r*"*, as it is requested in the Statement of Appeal filed by the Club before CAS on 11 September 2007.

15. According to the provisions of article R48 of the CAS Code, the Statement of Appeal must, *inter alia,* state the *"request for relief"*, while article R51 of the CAS Code provides that the Appeal Brief must state *"the facts and legal arguments giving rise to the appeal (…)"*.

16. Although the Appeal Brief filed by the Club only mentions the claim for the setting aside of the FIFA Decision, and makes no mention, at the foot thereof of the claim for the penalties imposed on the Player by way of disciplinary sanction, the Panel considers that the failure to include the claim in the Appeal Brief, in no way, prejudices the consideration and deciding of the question regarding the possible entitlement of the Club to the payment of the penalties imposed on the Player. Indeed this understanding is also congruent with the Panel's mission as accepted by both Parties in the Order of Procedure.

17. In any event, the Panel clarifies that the consideration of the alleged penalties imposed on the Player and the possible payment thereof to the Club as a consequence of the disciplinary sanctions imposed is limited to the sanctions referred to in section 3 of the Appeal Brief, in the sum of USD 22,000. Were this not so, we would have to consider any other claim

regarding this matter as unintelligible or unjustified, as no facts or circumstances have been pleaded, which entitle the Panel to decide this question, in addition to the sanctions referred to in the Appeal Brief.

18. The Club has failed to adduce any evidence in addition to the alleged sanctions, which total USD 22,000 and has not even pleaded any facts with regard thereto.

19. In the FIFA proceedings, the Appellant referred to sanctions totalling USD 66,959 (cf. letter from the Appellant dated 4 November 2005). In the reply of TFF to CAS dated 13 February 2008, a copy of the disciplinary decision of 19 November 2004 which imposed a fine of YLT 10,000,000 on the Player is submitted.

20. As the Club, in its Appeal Brief, merely pleads and proves the pecuniary sanctions imposed of the Player, which total USD 22,000, the Panel has decided to strike out the claim regarding the debt allegedly owed by the Player to the Club with regard to disciplinary sanctions, in addition to those pleaded in the Appeal Brief in the sum of USD 22,000, on the grounds that the same are unintelligible.

The Merits of the Dispute

21. The purpose of these proceedings is to decide the appeal lodged by the Club against the DRC Decision which orders it to pay the Player the sum of USD 154,034.

22. According to the DRC Decision, the Club failed to discharge its burden of proof in respect of the facts pleaded in its defence and this was essentially the grounds for the DRC's decision to order the Club to pay the abovementioned amount.

23. When considering this appeal, the Panel will essentially have to decide the following matters:

    (1) The legal value of the documents submitted by the Club and challenged by the Player, as evidence of the payment of the amount claimed from it;

    (2) The existence or not of the alleged disciplinary proceedings and the efficacy of the penalty imposed by the Club on the Player on 22 April, in the sum of USD 22,0000;

    (3) Whether agreed the contractual relation, with regard to the falling due of the sum USD 50,000 during the 2004/2005 season, is subject to the precondition that the Player has played only 26 games for the Club (including league and cup matches), as the Player claims, or whether the payment of the said sum is subject to the precondition that the Player plays in the said 26 matches as a member of the starting 11 players.

24. Before commencing the analysis of the matters of fact and law and the making of a decision with regard thereto, it is appropriate to explain the rules applicable to the burden of proof, in accordance with the applicable law.

25. According to the general rules and principles of law, facts pleaded have to be proved by those who plead them, *i.e.*, the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proved by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. These rules are clearly enshrined in art. 12 para. 3 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber and were duly taken into consideration by the DRC.

26. This principle is also stated in the Swiss Civil Code. In accordance with Article 8 of the Swiss Civil Code *"Unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its right"* (free translation from the French original version – *"Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit"*).

27. The burden of proof for the facts alleged by the Club lies on the Club itself. 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 (cf. CAS 2005/A/968 and CAS 2004/A/730).

28. The Club must, therefore, produce evidence of the facts described in its written statements and, must accordingly satisfy the two requisites included in the concept of "burden of proof": (i) the "burden of persuasion" and (ii) the "burden of production of the proof".

29. In order to fulfil the burden of proof, the Club must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequence envisaged by the Club. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party.

30. Having clarified the law, the Panel shall now decide the matters raised in this appeal on the basis of the facts pleaded by the Parties, the evidence adduced by them and the debate at the hearing.

A. The legal value of the documents submitted by the Club and challenged by the Player, as evidence of the payment of the amount claimed from it

31. The Player claims the sum of USD 154,034 from the Club in respect of outstanding amounts due to him under the Employment Contract 1. The Player presented a detailed list of all the amounts that he is entitled to under the Employment Contract 1 (USD 284,534), with regard to 2004/2005 football season, and acknowledges receipt of payments in the total amount of USD 130,500. The Player's claim is for the difference between these two figures, *i.e.* USD 154,034.

32. On 4 January 2005, in response to the Player's claim, the Club presented a list of all the receipts in respect of payments to the Player in relation to the 2004/2005 football season, and attached copies of the relevant receipts to the said list. According to the list submitted by the Club, the following payments/amounts have been paid to the Player:

No.	Date	Amount	The Panel's Comments
1	10 Aug. 2004	USD 15,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount. This payment is also confirmed in the Player's letter dated 10 November 2005.
2	20 Aug. 2004	USD 10,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount. This payment is also confirmed in the Player's letter dated 10 November 2005.
3	21 Sept. 2004	USD 30,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount. This payment is also confirmed in the Player's letter dated 10 November 2005.
4	12 Nov. 2004	USD 20,512	The document contains the Player's handwritten annotation confirming the receipt of "twenty thousand five hundred" only. The receipt of this USD 20,500 is also confirmed in the Player's letter dated 10 November 2005. At the hearing, the Player corrected the typing error contained in his letter dated 10 November 2005 confirming that the correct payment date is 12 November 2004 and not 22 November as it is mentioned in his letter and in the DRC Decision.
5	14 Dec. 2004	USD 5,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount. This payment is also confirmed in the Player's letter dated 10 November 2005.
6	20 Dec. 2004	USD 5,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount. However, the Player's letter dated 10 November 2005 also confirms the receipt, on the same date, of USD 20,000 and not USD 5,000 as is stated in the receipt. At the hearing the Player corrected the fact stated in his letter dated 10 November 2005 that the USD 20,000 amount includes receipt of the payment of the USD 5,000 paid on 20, 21, 22 and 23 December 2004.

7	21 Dec. 2004	USD 5,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount and, as corrected by the Player at the hearing, this amount is included in his letter dated 10 November 2005 as part of the amount received on 20 December 2004.
8	22 Dec. 2004	USD 5,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount and, as corrected by the Player at the hearing, this amount is included in his letter dated 10 November 2005 as part of the amount received on 20 December 2004.
9	23 Dec. 2004	USD 5,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount and, as corrected by the Player at the hearing, this amount is included in his letter dated 10 November 2005 as part of the amount received on 20 December 2004.
10	24 Dec. 2004	USD 5,000	This document contains the Player's handwritten annotation, but it is not included in the Club's payment list provided on 4 January 2005 and not included in the list provided by the Player on 10 November 2005.
11	31 Jan. 2005	USD 50,000	The document does not contain the Player's handwritten annotation confirming the receipt of the relevant amount, and it is not confirmed in the Player's letter dated 10 November 2005.
12	09 Feb. 2005	USD 20,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount. This payment is also confirmed in the Player's letter dated 10 November 2005.
13	8 March 2005	USD 20,000	The document does not contain the Player's handwritten annotation confirming the receipt of the relevant amount, and it is not confirmed in the Player's letter dated 10 November 2005.
14	06 April 2005	USD 5,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount, and this payment is also confirmed in the Player's letter dated 10 November 2005.

15	12 April 2005	USD 11,760	The document contains the Player's handwritten annotation stating that he "received $11,760 USD for 4 matches". This payment is not included in the Player's letter dated 10 November 2004 and the Player clarified that this payment is related to winning bonus and not the agreed fees per match.
18	25 May 2005	USD 5,000	The document contains the Player's handwritten annotation confirming the receipt of the relevant amount. This payment is also confirmed in the Player's letter dated 10 November 2005.
	TOTAL	USD 217,272	

33. In addition to the above mentioned amounts, the Club clarifies that on 22 April 2005 it imposed a fine on the Player in the total amount of USD 22,000 and that the said amount should also be taken into consideration as a payment to the Player. Considering this fine and the amounts referred to in the list provided by the Club above, the Club justifies an alleged payment of USD 239,272. The question with regard to the disciplinary sanctions will be considered and decided in the following section of this award.

34. The Player categorically denies the Club's allegation that he received any of the amounts mentioned in items 11 (USD 50,000) and 13 (USD 20,000) and clarifies that the amount described in item 5 above (USD 11,760) should not be taken into consideration because is not related to the fee payment of the matches under the Employment Contract 1. The payment of USD 11,760 is related to a "winning bonus" for 4 matches.

35. We shall now consider each of these credits individually:

    a. Regarding the alleged payment of USD 11,760:

        i) The Player claims that the sum in question is solely related to the payment of winning bonuses for four matches,, as it is indicated in the document, and not to the contract fee of USD 2,205 per match played, as can be easily proved by simple arithmetic (USD 2,205 multiplied by 4 would result in a total amount of USD 8,820 and not USD 11,760).

        ii) At the hearing, the Club claimed that the sum in question was in respect of salaries and winning bonuses, although it did not manage to explain the breakdown of the said sum according to the nature of the corresponding credits;

        iii) Of the burden of proof that part of the sum of USD 11,760 is in respect of salaries, lies upon the Club;

        v) Taking into consideration the rules regarding the burden of proof, the Panel is of the opinion that the Club has failed to prove that the amount in question was in respect of salaries.

b. Regarding the alleged payments in the sum of USD 50,000 and USD 20,000.

i) The Player acknowledges the signature on the receipts described as items 11 and 12 in section 32, although he claims that the payments in question relates to a date prior to the date which appears on the receipts.

ii) In the light of the doubt raised, the Panel decided to request the Club to submit the documents referred to. It is not possible on the basis of the documents lodged by the Club in the proceedings, to establish whether the amounts referred to the alleged payments in the sum of USD 50,000.00 and US$20,000.00 are related to payments of the financial obligations assumed by the Club to the Player in respect of the 2004/2005 season.

iii) The original documents submitted by the Club contain insufficient evidence to convince the Panel that the same are related to the payment of the amounts pleaded. Moreover, the said receipts do not bear a handwritten note by the Player, contrary to that which the Panel considers, on the basis of its the consideration of the other receipts, to have been proved to be the Player's custom.

iv) The Panel's said understanding is also based on the Club's constant uncertainty regarding the amounts actually paid to the Player. As the DRC itself commented, the Club has, on various occasions, adopted contradictory positions with regard to the sum actually paid to or received by the Player, *i.e.:* on 14 October 2005 it stated that *"Club paid USD 181.012 to the player for the season 2004-2005. (…)"* and *"Besides these payments due to club regulations club fined the player on various occasions and the sum of these fines are USD 66,959 (…)"* totalling USD 247,971 (or USD 181,012 without fines); in the same communication, two paragraphs below, the Club affirmed that *"Player earned USD 230,124 for the season 2004-2005. Club paid USD 181.012 – plus USD 66,950 – fine applied to the player. The money paid to the player and the fines total is more than the player's earning for season 2004-2005 (…)"*. Subsequently, in a letter dated 5 December 2005, the Club stated that *"(…) according to clubs records club owe USD 10.728 to the player and upon players request this amount will be paid to the player"*.

v) The Panel's understanding is also based on the conviction that the receipts issued by the Club do not demonstrate the existence of the required organised accounting system as is required. The receipts are not numbered sequentially by a computer program, and do not include the identity of the issuer. No bank conciliation has been carried out in order to prove the payment of the said amounts. Payments of large sums of money in cash should be supported by irrefutable evidence, failing which the debtor will be unable to make proper proof of the payments made.

36. Taking into consideration the matters stated above, the Panel considers that the sums of USD 50,000 and USD 20,000 and the sum of USD 11.740 (in part payment of salaries), claimed by the Player in the FIFA proceedings, must be paid to the Player.

B. *The existence or not of the alleged disciplinary proceedings and the efficacy of the penalty imposed by the Club on the Player on the 22nd of April, in the sum of USD 22,0000*

37. The Club claims that it properly imposed sporting sanctions in the sum of USD 22,000 on the Player, which sum should be set-off against the sums claimed by the Player in respect of unpaid salaries. The Club has submitted the following evidence in support of its said claim:

    a. A receipt dated 6 May 2005, which bears the Player's signature and refers to the sum of USD 22,940. The pecuniary sanction is sometimes referred to as being USD 22,000 and sometimes as USD 22.940. At the hearing, the Club explained this difference by reference to changes in the exchange rate used and that the Panel should, for the purposes of this decision take the sum of USD 22,000 into consideration as the counter value in US dollars of YTL 30,000,000;

    b. A notice dated 22 April 2005 addressed to and signed by the Player's alleged lawyer (Mr. Cumhur Bati), which states *"Club Board's decision dated 18.04.2005 and no. 5 the penalty of 15.000 YTL + 15.000 YTL totally 30.000 – YTL (USD 22,000) was given to the player"*.;

    c. A letter from the TFF dated 13 February 2008, with copy of the decisions regarding the penalties that the Appellant imposed on the Player, which were sent to the TFF;

    d. A copy of the Club's accounting records, which include the penalty allegedly imposed. This accounting record is of the sum of YTL 30,051.40 – with the following description *"S. $ 22,940"*;

    e. A letter from the Club to the TFF, dated the 27th of April 2005, which identifies all the players penalised by the Club's Management Board at a meeting on the 18th of April 2005, *"due to manners and behaviours before, during and after the match with Samsunspor, played on January 10, 2005, in accordance to the related provisions of Internal Directive of Club"*; and

    f. A document entitled "Minutes" dated the 20th of April 2005, which states:

       "Pursuant to resolution ruled by Management Board of MKE Ankaragucu Sports Club on 18.04.2005, the fine penalty given to the football players have been notified to the sportsmen during the meeting held on 20.04.2005 by the General Manager of the Club by reading and furthermore was hung on the announcement panel of the club. A copy of the resolution will be sent to [TFF]. (…)".

38. The Club submitted no further evidence in addition to the abovementioned evidence and merely clarified at the hearing that the sanction was imposed in order to impose more discipline on the players and to motivate them to improve their sporting performance, as the Club was having poor results.

39. The Player, however, claims that he was not aware of the alleged disciplinary proceedings and that he had received no notice of any pecuniary sanction.

40. After having considered the evidence adduced in the proceedings and the clarifications provided at the hearing, the Panel stated that it did not doubt the existence of the decisions attached to the abovementioned communication from the Club, or the fact that the same had been effectively and timely registered with the TFF.

41. In any event, the Panel can find no convincing proof in any of the evidence adduced, to the effect that the Player was informed or given notice of:

    a. the commencement of the disciplinary proceedings;

    b. to file his defence or to be heard within the ambit of the disciplinary proceedings commenced;

    c. that the sanction imposed is in accordance with the limits imposed by the Club's internal disciplinary regulations;

    d. of the disciplinary decision taken by the Club.

42. In addition to the lack of any evidence of the facts listed above, the Panel also identified other facts, which militate against the Club's claims:

    a. The inconsistency between the amounts in US dollars of the penalty of YTL 30,000. In some documents, the counter value of the penalty is USD 22,000; while in other it is USD 22,940. It also noted that the amount in Turkish lira (YTL) is also not constant. In the Club's accounts the sum of USD 22,940 has a counter value of YTL 30,051.40 and not YTL 30,000 as in the documents registered with the TFF.

    b. The original of the receipt referred to in 37 a. above – dated 6 May 2005 – which bears the Player's signature. In addition to the fact that the Player denies that the signature on the receipt is his, the original document is torn into 4 pieces, which gives the impression that it was destroyed for some reason. The Club's explanation at the hearing that sometimes these things happen because of mistakes made by clerical staff, did not convince the Panel.

    c. The considerable gap between the occurrence of the facts underlying the imposition of the disciplinary sanction (the game on the 30th January 2005) and the imposition of the sanction (18th of April 2005). This time gap is even more difficult to understand, when the aim of the sanction was to motivate and discipline the Player, with a view to improving their sporting performances.

43. The fact that no player reacted against the imposition of the pecuniary sanction imposed, which as the Club's General Manager clarified at the hearing, is at the top of the scale of pecuniary sanctions.

44. Disproportion between the pecuniary sanction and the Player's remuneration. Like the DRC, the Panel takes the view that the pecuniary sanction decided by the Club was, in any event, manifestly excessive and disproportionate in terms of the Player's remuneration. It must be borne in mind that the Player received the sum of USD 2.205 per game if he played in the starting 11, (ii) USD 1.654 if he played as a substitute and (iii) USD 1.102 if he was a member of the squad but did not play.

45. The decision dated the 18th of April 2005, which was registered with the TFF neither identifies the conduct for which the Player was liable to be penalised in accordance with the Club's internal regulations, nor identifies the internal rules violated by the Player. In addition

to these omissions, it is also noted that the decision does detail the approval of the decision. For example the disciplinary decision taken on 19 November 2004 expressly states that the decision was taken by "acclamation".

46. The lack of any power of attorney granted by the Player to the lawyer Mr. Cumhur Bati, so that he would have special powers to accept service of notices on behalf of the Player. The fact that lawyer Mr. Cumhur Bati represented, or assisted, the Player in the negotiations with the Club, is not proof and gives rise to no presumption that he represented the Player in disciplinary matters, as the Club seeks to maintain.

47. With regard to the fines allegedly imposed by the Club on the Player, the Panel considers that the said facts cannot be taken into consideration, as the Club failed to prove the existence of the disciplinary proceedings in accordance with its internal regulations and/or that the alleged disciplinary decision regarding the imposition of a fine of USD 22,000 on the Player was even duly served to him.

48. This being so, and taking into consideration the matters stated in sections 37 and ff above of this award, the Panel is of the opinion that the Club has failed to prove the facts on which the right it claims with regard to the imposition of a fine in the sum of USD 22,000 is based, as it is required to do in accordance with general principles and rules regarding the burden of proof.

C. Whether the agreed contractual remuneration conditions, with regard to the falling due of the sum USD 50,000 during the 2004/2005 season, is subject to the precondition that the Player has played only 26 games for the Club (including league and cup matches), as the Player claims, or whether the payment of the said sum is subject to the precondition that the Player plays in the said 26 matches as a member of the starting 11 players.

49. Finally, the Panel must consider the Parties' positions with regard to the two versions of section 3 of the Employment Contract 1 and Employment Contract 2, which have been pleaded and decide whether or not the sum of USD 50,000 was due and payable.

50. The document entitled Employment Contract 1 submitted by the Player and that submitted by the Club (Employment Contract 2) are not identical so far as the terms of the precondition for the payment of the USD 50,000 bonus is concerned, although both documents are otherwise identical and bear the true signatures of the Parties on the final page thereof.

51. While the Player has submitted a version of the Employment Contract 1, in which the payment of the sum of USD 50,000 is subject to the precondition that the Player play in 26 matches during the 2004/2005 football season; the Club has submitted a version of the Employment Contract 2 according to which the payment of the sum of USD 50,000 is subject to the precondition that the Player play in 26 matches, as a member of the first 11.

52. It should be noted that the Club does not deny the existence and signing of Employment Contract 1.

53. The Club claims that Employment Contract 1 was revoked by mutual agreement and the Parties signed a new contract – Employment Contract 2 – in which they agreed to revise the condition regarding the payment of de USD 50,000 in section 3 of the initial contract, as detailed above.

54. The Player claims the right to the bonus in question as he played in 26 games for the Club: (i) 20 games in the starting eleven; (ii) 4 games as a member of the 18-member squad as a substitute, who go on field during the game; and (iii) 4 games in which he was a member of the 18-member squad, as a substitute, but did not go on field during the game. This information was confirmed to the CAS Court Office, on the 13th of February 2008, by the TFF, which stated that *"(…) during the 2004-2005 football, S. played in the starting eleven in 20 matches for* [the Club and the Player] *was substitute player in 4 matches and entered the game afterwards,* [the Player] *was also substitute player in 4 matches but never entered the game"*.

55. The Club claims that the Player did not play in 26 games in the starting eleven so that the condition regarding the payment of the USD 50,000 bonus was not complied with.

56. The question before the Court is unrelated to the interpretation of the legal transaction (construction or clarification of the meaning of the Employment Contract 1 and 2) or the resolution of any contractual insufficiency or lacunae (which are a consequence of any failure on the part of the Parties to make provision as to any circumstance) – which are matters which fall to be decided within the ambit of the theory of the construction of legal transactions – but is rather a matter of fact, which is related to an evidential question *i.e.* which of the two versions of the employment contract submitted is applicable to the 2004-2005 football season.

57. It is evident to us that the burden of proof regarding the signing of Employment Contract 2 lies with the Club. It is the Club, which has to prove that the Player accepted the alteration of the payments terms in the manner it describes.

58. In the light of the matters pleaded by the Player and the considerations written below regarding the document submitted, the lodging of a copy of Employment Contract 2 cannot be accepted alone as sufficient and conclusive evidence of the contractual alteration claimed by the Club.

59. For evidence to be conclusive it has comprise in a logical explanatory context, which, in the opinion of the decisor, convinces him or her as to the value of the evidence adduced, without doubts or uncertainties.

60. In defence of its position, the Club could and should submit other evidence, in addition to the production of Employment Contract 2, in order to rebut any doubts regarding the signing thereof, for example witness evidence.

61. As the Player denies the signing of Employment Contract 2, and claims that he did not sign the same, the Panel cannot accept the mere production of Employment Contract 2 as conclusive evidence, given a series of factors and circumstances of the case, which are detailed below.

62. Therefore, it is for the Panel to ascertain the terms of the agreement between the Parties with regard to the conditions governing the payment of the USD 50,000 bonus. This being so, the Panel must have recourse to facts related to the transaction, such as the circumstances as to time and place, in which the negotiations took place, the conduct of the Parties in the formation and performance of the contract, the terms and conditions agreed with regard to previous seasons and custom and practice in relation to the engagement of football players. We shall now consider these aspects.

63. The Parties signed a contract for the 2004-2005 season and, a few months later decided to alter the conditions regarding the payment of the sum of USD 50,000. What is the basis of this alteration?

64. The explanation given by the General Manager was in order to motivate the Player to play in the starting eleven. With all due respect, the Panel cannot understand how the alteration of the payments terms, in a manner prejudicial to the Player, can result in increased motivation on the Player's part, particularly as the alteration, which was hypothetically more beneficial to the Club, does not involve any benefit for the Player. Furthermore, it must be borne in mind that: (1) the selection of the starting eleven is a matter for the Club manager, without any involvement on the part of the Player in the decision; and (2) no evidence was adduced that the Player refused or was not interested in being a member of the starting eleven. In the Panel's opinion, the remuneration stipulated in the contract was already a major reason for the Player to seek to be a member of the starting eleven. It is again noted that the Player received the sum of: (i) USD 2.205 if he played in the starting eleven; (ii) USD 1.654 if he was a member of the squad and played as a substitute; and (iii) USD 1.102 if he was a member of the squad but did not play.

65. In addition, the Panel also lists a series of other matters, which lead it to doubt the evidential value of the document regarding Employment Contract 2, i.e.:

    a. The first page of both contracts (Employment Contracts 1 and 2) – the page on which there is a discrepancy regarding the condition to which the payment of the sum of USD 50,000 is subject, is not initialled by the Parties.

    b. In Employment Contract 2 the font and font size printed on the first page differs from the font and font size on the second and last page of the document.

    c. On the second and last pages of the contracts (Employment Contract 1 and 2), the font and font size and also the layout are the same so that they appear to be part of the same document. It is true, as the Club indicated to the Panel, that the signatures and the Club's stamp are not the same. However, the Panel considers, by way of a rejection of the said comment, that the fact that only one original version, which is signed on the

last page thereof, has been lodged in the proceedings, means that it is not possible to determine whether the same is part of a second contract or one of two copies of the first contract.

66. Taking into consideration the above, associated with the custom and practice in connection with the hiring of football players, in which there is rarely a reduction of players' payment terms when their contracts are renewed (except in special circumstances, which, if they existed, should have been pleaded by the Club), leads this Panel to the conclusion that the payment terms alleged by the Club as applicable to the contractual relation in question were not proven and, for this reason, this Panel shall apply the same as had been agreed in the Employment Contract 1.

67. Also relevant to the Panel's consideration of and decision regarding what was agreed between the Parties in this regard, is the fact that the Club did not register a copy of the Employment Contract 2, which it claims was applicable to the contractual relationship in question, with the TFF (cf. the undated communication from the TFF in reply to FIFA's request dated the 4th of January 2006, with regard to the sending of a copy of the employment contract between the Club and the Player).

D. In conclusion

68. In the present appeal, the Panel considers that the Club has not sufficiently proved the facts alleged in its written submissions. In fact, the documents presented by the Club were not considered enough to, in a balance of probabilities, convince the Panel of the facts it intends to prove.

69. As a consequence of all the above mentioned considerations, the Panel has decided by majority to dismiss the Club's appeal and to find for the Player on his claim with regard to the outstanding remuneration and to make an award against the Club for the payment of the total outstanding amount of USD 154,034 to the Player.

The Court of Arbitration for Sport rules:

1. The appeal filed on 11 September 2007 by the Appellant against the decision passed on 4 April 2007 by the FIFA Dispute Resolution Chamber is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 4 April 2007 is upheld.

(…)

5. All other or further claims and counterclaims are dismissed.