

# “Professional Qualities” of Players, Coaches and Termination of the just cause Employment Contract

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## ABSTRACT

The issue of contractual stability between clubs and coaches has been raised more than once in the decisions of the Court of Arbitration for Sport. However, this issue is still relevant, since there are often disputes between clubs and players and coaches regarding the validity of termination of the employment contract with them. The article raises questions related to the interpretation of the concepts of efficiency and productivity of players, coaches in the practice of the FIFA Players' Status Committee and the Court of Arbitration for Sport, and achievement of a certain result in work. The author considers the problem of termination of employment contracts with players and coaches due to non-compliance of their professional qualities with the standards declared by clubs, and the application of sanctions to players on the basis of this. In addition, the use of the generalized term “professional qualities” in relation to such disputes is proposed and justified, and the prospects for using the CAS practice in the future are noted.

Keywords: grounds for termination of the employment contracts, just cause, practice of the FIFA Players' Status Committee and the Court of Arbitration for Sport

The regulation of the issues of the labor of football players and coaches in the FIFA perimeter offers a basic minimum of protection of the rights and legitimate interests of sports entities and does not pretend to be detailed regulations. For example, the FIFA Regulations on the Status and Transfer of Players<sup>1</sup> (hereinafter the Regulations) provides for several grounds for the termination of contracts concluded by clubs with professional football players<sup>2</sup>.

The provisions of Art. 13 of the Regulations establish two basic grounds for the termination of a contract between a professional player and a club: upon expiration of the contract or by mutual agreement. Along with them, the Regulations provide for special grounds expressed in the declaration of will of one of the parties to the contract: 1) just cause; 2) sporting just cause; 3) without just cause.

The just cause criteria are not listed in the provisions of Art. 14 of the Regulations, as a result, the cause is established for each particular case with account of all the circumstances. In assessing the presence or absence of just cause the Court of Arbitration for Sport (hereinafter the CAS, arbitration) follows its practice<sup>3</sup> and demands that one of the parties should commit a major violation of the contract terms. The behavior violating the terms of the employment contract, by default, cannot be an excuse for terminating the agreement at the initiative of one of the parties. However, if there are several violations or one violation continues, the inadmissibility of the party's behavior in terms of the contractual obligations reaches such a level of seriousness that the other party has the right to terminate the agreement. A similar explanation is contained in the official FIFA's commentary to the Regulations<sup>4</sup>.

The employment relations in professional sports are to be terminated when the “affected” party cannot in good faith expect the other party to continue the employment relations because the latter has committed a major breach of the contract<sup>5</sup>. As noted by the arbitration in Arbitration CAS 2016/A/4693 Al Masry Sporting Club vs. Jude Aneke Ilochukwu, award of 24 April 2017<sup>6</sup>, before resorting to such an ultima measure the party is advised to notify the defaulting party of the need to cease the violation: despite the optionality of notification on such a matter in labor relations in professional sports, the ar-

<sup>1</sup> Regulations on the Status and Transfer of Players [Electronic resource]. URL: <https://www.fifa.com/about-fifa/official-documents/law-regulations/index.html> (accessed on: 25.04.2020).

<sup>2</sup> Considering the grounds for termination of contracts with coaches in this paper, we extend the relevant conclusions to assistant coaches as similar personnel.

<sup>3</sup> See: Arbitration CAS 2007/A/1352 MKEAnkaragücü Spor Kulübüvs. Charles Edouard Coridon, award of 25 June 2008, para. 18; Arbitration CAS 2008/A/1447 E. v Diyarbakirspor, award of 29 August 2008, para. 12; Arbitration CAS 2009/A/1956 Club Tofta Itróttarfelag, B68 vs. R., award of 16 February 2010, para. 5.

<sup>4</sup> Commentary on the Regulations for the Status and Transfer of Players, article 14 [Electronic resource]. URL: <https://resources.fifa.com/image/upload/fifa-rstp-commentary-2006.pdf?cloudid=eeorr2eogoidxlbwhr8> (accessed on: 25.04.2020).

<sup>5</sup> See: Arbitration CAS 2008/A/1447 E. v Diyarbakirspor, award of 29 August 2008, para. 12.

<sup>6</sup> Arbitration CAS 2016/A/4693 Al Masry Sporting Club vs. Jude Aneke Ilochukwu, award of 24 April 2017.

bitration considers notices to be an important step that may influence the cessation of the violation especially if the violation has not reached a “completely unacceptable level”<sup>7</sup>.

The employment contract between the club and the professional football player in Arbitration CAS 2015/A/4039 Nashat Akram vs. Dalian Aerbin Football Club, award of 3 February 2016<sup>8</sup> stipulated the player’s right to unilaterally terminate the contract in the event of the club’s salary arrears of more than three months. The player did not contest this clause of the contract and signed it, thereby agreeing with the unambiguous wording of the condition. It followed from the materials of the case that the salary arrears did not exceed 36 days, which meant, in accordance with the *pacta sunt servanda* doctrine, lack of violation on the part of the club, which would have been serious for the occurrence of just cause. Indeed, the club’s debts violated the contractual obligations, but according to the position of the arbitration, it was not a major violation in order to be just cause for the player to terminate the employment contract.

Are the “professional qualities” of a football player, coach, a just cause for the club to terminate the contract, or is it an example of termination of an agreement without a just cause?

The term “professional qualities” of an athlete, a coach is not enshrined in the provisions of the Regulations, which preconditions the resort to the law enforcement practice of the sports jurisdictional bodies of the FIFA and the CAS presenting only a few relevant decisions.

In the practice of the FIFA Committee on the Status of Players (hereinafter the Committee) and the CAS, the issue of “professional qualities” was considered in the context of the “performance” of a football player, that is, his performance in competitions.

## 1. “Professional qualities”: is it a just cause?

First of all, it should be noted that athletes’ “professional qualities” can be the subject of consideration both of the disputes between a club and a player and the disputes arising between clubs, which will be demonstrated by us later in the judgments given. As evidenced by the practice of the FIFA jurisdictional bodies, such cases are primarily related to the requirements for the execution of a transfer contract.

For example, in dispute No.05171060-e<sup>9</sup> the football club terminated the employment contract with the player due to “poor performance” which could not be assessed when the employment contract was concluded with him, and refused to fulfill the terms of the transfer agreement. In considering the case, the Committee noted that the validity of the transfer agreement concluded by clubs is independent of the employment relations between the club and the player, reflecting the autonomy and independence of the two legal relationships arising between different subjects. As a result, the transfer agreement between clubs remains in effect despite the subsequent termination of the employment contract between the player and the new football club<sup>10</sup>. The same requirements were stated in dispute No.05172111-e<sup>11</sup>: when the employment contract between the player and the football club was terminated within six months for reasons of “unexpectedly poor results of the player”, and the position of the Committee was predictably similar to dispute No. 05171060-e.

In either case the committee did not assess “poor performance” from the point of view of just cause, since the employment relationship between the club and the player is not the subject of this jurisdictional body (fall within the jurisdiction of the FIFA Dispute Resolution Chamber). Nevertheless, both decisions put an end to the question of the interrelation between the transfer agreement and the subsequent termination of the employment contract, even if there is a hypothetical just cause related to the “professional qualities” of the player. In our opinion, any doubts about “professional qualities” should be settled before the conclusion of the transfer contract, otherwise the legal force of such an agreement is not questioned. Is it possible to draw a parallel with “professional qualities” and the execution of labor contracts in connection with the conclusion made? The proposed analogy may seem to be appropriate for the following reason. An agreement with a football player is most often the result of a transfer contract, with exception of a “free agent” situation, and if the player’s qualities are known at the time of making the transfer decision, the employment contract is concluded by the new club also based on this

<sup>7</sup> Ibid, para. 105.

<sup>8</sup> Arbitration CAS 2015/A/4039 Nashat Akram vs. Dalian Aerbin Football Club, award of 3 February 2016.

<sup>9</sup> 05171060-e. Decisions of Players’ Status Committee. Club vs. Club Disputes [Electronic resource]. URL: <https://resources.fifa.com/image/upload/05171060-e-2908628.pdf?cloudid=avrogetf9fwbnqjhkq28> (accessed on: 25.04.2020).

<sup>10</sup> Ibid.

<sup>11</sup> 05172111-e. Decisions of Players’ Status Committee. Club vs. Club Disputes, para. 8 [Electronic resource]. URL: <https://resources.fifa.com/image/upload/05172111-e-2916776.pdf?cloudid=av3kczvz9wjgr2ywdcho> (accessed on: 25.04.2020).

factual circumstance. But let us turn to the CAS practice where “professional qualities” were considered in connection with the discussion of a “just cause” for terminating an employment agreement.

In the disputes of Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp<sup>12</sup> and Arbitration CAS 2011/A/2597 Anorthosis Famagusta FC vs. Heinz Peter Vollmann<sup>13</sup> the arbitration considered the issue of the “professional qualities” of the coach and his assistant as a just cause: the employment contracts were terminated due to the “absence of sporting results”. The football club considered the lost match and, as a consequence, exclusion from the tournament as the “absence of sporting results”.

The contracts concluded with the coach and his assistant stated the grounds for the club to terminate the agreement unilaterally in the event of a “major” violation of the terms or for another “serious reason”. It can be noted that this wording is an attempt by the club to formulate a “just cause” used for professional football players’ contracts. In the opinion of the club, a “serious reason” must mean any major violation and/or major failure to comply with the terms of the contract, the disciplinary rules of the employer and/or the national football association and/or systematic wrongful behavior.

Terminating the contract the football club considered the failure to achieve certain sporting results to be both a “major” violation of the contract terms and another “serious reason”: non-observance of the disciplinary rules<sup>14</sup>. The club decided that the coach had seriously violated the “explicit and implied terms” of the agreement (failure to achieve results) and internal rules (team performance). Referring to paragraph “C” of the club’s internal regulations and, in particular, the chapter on the team’s performance, it was pointed out that the team’s performance did not meet the standards requested by the club and the discipline of the players was not properly built by the coach<sup>15</sup>. Thus, although the sporting result was not a condition of the agreement, the achievement of certain sports results, according to the club, was “an implied condition of the agreement”.

The coach and the assistant coach, in their turn, stated that they were not aware of the internal rules referred to by the club and could not guarantee the team’s sporting success<sup>16</sup>. In addition, it was noted that the club could not answer a number of questions throughout the proceedings, including: “What internal rules did the coach and his assistant violate?”, “What particular behavior caused such a violation?”, “How were these internal rules adopted by them, or at least brought to their attention?”, “Why was the club not obliged to give a warning notice before terminating the contract, if these offenses on the part of the coach and his assistant are of such a serious nature?”

While considering both disputes, the CAS formulated an unambiguous legal position: the absence or non-achievement of sporting results cannot generally be the grounds in and of themselves for terminating the employment contract, and such a reason cannot be a just cause, since the coach and assistant coach cannot guarantee the sporting success of the team<sup>17</sup>.

In the dispute of Arbitration CAS 2015/A/4161 Vladimir Sliskovic vs. Qingdao Zhongneng Football Club, award of 28 April 2016: 1) the employment relations with the assistant coach ended three days after the last of three training sessions was missed; 2) the club did not produce any evidence of his previous unacceptable behavior; 3) the club did not give the assistant any explanation about the reasons. In the process of resolving the dispute, the club specified that due to the systematic absence of the assistant coach from training, the “quality indicators” of the team and the players undoubtedly deteriorated. According to the club, the result was a violation of the club’s disciplinary rules governing the activities of the coaching staff<sup>18</sup>. As you can see, this is an attempt to establish an interrelation between the deterioration of the “professional qualities” of the team, the players, manifested by the results of the performances, and the misconduct of the assistant coach, and thereby to find a just cause for his subsequent dismissal.

The arbitration tribunal noted that, following the requirement of good faith behavior of the participants of labor relations, the club was required, at least, to initiate disciplinary proceedings against the assistant: he could have been sent a warning in order to stop the violations, and then, if the unacceptable situation persisted, other disciplinary sanctions, such as reprimand or a fine, could have been applied.

<sup>12</sup> Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp.

<sup>13</sup> Arbitration CAS 2011/A/2597 Anorthosis Famagusta FC vs. Heinz Peter Vollmann.

<sup>14</sup> Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp, paras. 2.8–2.10.

<sup>15</sup> Ibid, paras. 2.9, 2.10.

<sup>16</sup> Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp, para. 2.14; Arbitration CAS 2011/A/2597 Anorthosis Famagusta FC vs. Heinz Peter Vollmann, para. 2.13.

<sup>17</sup> Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp, paras. 9, 10.

<sup>18</sup> Arbitration CAS 2015/A/4161 Vladimir Sliskovic vs. Qingdao Zhongneng Football Club, award of 28 April 2016, para. 8.

Dismissal should have been the last disciplinary measure (ultima) if the violation reached a serious level and "... not all the errors of the employee unambiguously entitle the club to unilaterally terminate the employment contract"<sup>19</sup>.

Acting within the framework of the above reasoning and relying on the facts proved in the process, the CAS reasonably considered that the absence of the assistant from three workouts could not be considered to be major violations, justifying the unilateral just cause termination of the employment relations by the club. Thus, the CAS did not find any causal relationship between the deterioration of the sports performance of the team, players and the behavior of the assistant coach. Despite the fact that the "professional qualities" of the assistant coach himself were not considered as the grounds for terminating the employment contract, this decision seems interesting from a different point of view. The "professional qualities" of the players and the team as a whole only indirectly depend on the activities of the coaches and (or) assistant coaches and, accordingly, do not always influence the results. This approach of the arbitration tribunal seems to be more than logical. Otherwise, early termination of the employment contract by the club with the coach would have been carried out with enviable regularity and in most cases on a "just cause" without an adequate compensation to the latter, destroying the very existence of the stability of the contractual relations declared by the FIFA as the guiding principle in the provisions of Section IV of the Regulations.

## 2. "Professional qualities" as the grounds for applying sport sanctions

In case of Arbitration CAS 2012/A/2844 Gussev Vitali vs. C.S. Fotbal Club Astra & Romanian Professional Football League (RPFL) the football club applied a "disciplinary sanction" in the form of a 25% salary reduction.

The club referred to the fact that the sanction applied to the player was based on the internal acts of the club and was a disciplinary one. In this case, the sanction is not related to the absence of facts of participation in the matches, but to the player's attitude to the training process. The footballer was obliged to attend training, but as a result of the failure to appear, he showed sports inefficiency and low performance<sup>20</sup>. In this case it seems to be appropriate to consider the grounds declared by the club in the aspect of "professional qualities", since such qualities are also applied to the cases of the issue of the physical condition of an athlete. The CAS noted that it is unacceptable and unreasonable to impose sports sanctions on a player and terminate the contract due to his "performance" in the competition. There are no specific criteria to assess the quality of an athlete's play, as well as to compare with the player's performance in the previous season. Consequently, the "professional qualities" of a football player cannot provide the grounds for a sanction that negatively affects labor remuneration, unless the player's inappropriate behavior was proven<sup>21</sup>.

It seems correct to apply the position of the arbitration tribunal by analogy to the cases of termination of the contract based on certain "professional qualities" ("efficiency" and "productivity") of a football player: these grounds cannot be a just cause. Firstly, as noted by the CAS, there are no efficiency and productivity criteria to apply such grounds. In this case, the issue of inappropriate performance of the duties assigned to the player was not considered. Secondly, the assessment of the professional qualities should be made by the football club at the stage of the conclusion of the contract, and not during its period of validity. Consequently, the level of performance or professional qualities should not act as a just cause for terminating an employment contract.

## Conclusions

In the decisions considered by us the "professional qualities" were assessed by the clubs based on the lack of the coach's sporting results, efficiency ("performance"), as well as the physical abilities of the football player. It is quite obvious that the concept of "professional qualities" in practice is represented by collectively (efficiency, productivity, achievement of a certain result) substantiated grounds artificially created in the interests of motivation for terminating the employment contract in accordance with Art. 14 of the Regulations.

<sup>19</sup> Ibid, para. 114.

<sup>20</sup> Arbitration CAS 2012/A/2844 Gussev Vitali vs. C.S. Fotbal Club Astra & Romanian Professional Football League (RPFL), para. 4.11.

<sup>21</sup> Arbitration CAS 2012/A/2844 Gussev Vitali vs. C.S. Fotbal Club Astra & Romanian Professional Football League (RPFL), para. 8.24.

Despite the absence of the concept of “professional qualities” in the provisions of the FIFA Regulations, it is also difficult to find any consistency of the positions of the Committee and the arbitration tribunal regarding the content of this term. Nevertheless, the arguments of the football club regarding the effectiveness or professional qualities of its staff (football player, coach) were not accepted as a just cause. This is, undoubtedly, important for the formation of the subsequent preclusive practice preventing interpretation of a just cause as universal grounds masking the real reason for unilateral termination with the absence of the obligation to pay compensation.

The legal consequences of the termination of employment by the club with the coach, assistant coach in the absence of a just cause should be considered with account of the provisions of Chapter IV of the Regulations. As noted in the dispute of Arbitration CAS 2015/A/4161 Vladimir Sliskovic vs. Qingdao Zhongneng Football Club, award of 28 April 2016, this chapter is aimed at maintaining contractual stability both between clubs and coaches, and with assistant coaches.

The only way to protect the interests of the club in the situation of assessing the effectiveness or professional qualities of a player seems to be for the Committee to set requirements to the club with which the player transfer agreement was concluded. It should be noted, however, that in such cases, a prerequisite will be the misbehavior of the defendant club which may be expressed, for example, in fraud or misrepresentation at the time of the conclusion of the agreement, which is quite hard to prove. The Regulations do not point out this basis for the nullity of the transfer agreement, and it will be necessary to refer to the law enforcement practice of the Committee and the arbitration tribunal describing specific precedents. Will your situation match them? The factual circumstances are most likely to prevent speaking about the identity of the two cases bringing the full burden of proving the wrongfulness of the actions of the counterparty club back to you. Therefore, it is necessary to identify the potential of a football player before concluding a transfer agreement, and even more so before concluding an employment contract with him.

In our opinion, the existing practice of the Committee and the CAS allows another important conclusion: “professional qualities”, whatever content of this concept is meant by the clubs, do not have the status of “implied conditions” of a contract between a club and a professional football player or coach. This means that such qualities cannot be presented either as a major violation or failure to comply with the terms of the contract, or as a major violation of the employer’s disciplinary rules, or as systematic misbehavior.