Decision of the Dispute Resolution Chamber

passed on 15 July 2021

regarding an employment-related dispute concerning the player Andre Biyogo Poko

COMPOSITION:

Omar Ongaro (Italy), Deputy Chairman
Stéphane Burchkalter (France), member
Abu Nayeem Shohag (Bangladesh), member

CLAIMANT / COUNTER-RESPONDENT:

Göztepe SK, Turkey
Represented by Mr. Ludovic Deléchat

RESPONDENT 1 / COUNTER-CLAIMANT:

Andre Biyogo Poko, Gabon
Represented by Alexis Rutman

RESPONDENT 2:

Club Altay SK, Turkey

I. FACTS OF THE CASE

1. On 12 January 2018, the Turkish club, Kardemir Karabükspor Kulübü Dernegi (hereinafter: *Karabükspor*), and the Turkish club, Göztepe SK (hereinafter: *the club* or *the Claimant / Counter-Respondent*) concluded a transfer agreement by means of which the Gabonese player, Mr. Andre Biyogo Poko (hereinafter: *the player* or the *Respondent 1 / Counter-Claimant*), was transferred from Karabükspor to the club for a total amount of EUR 1,400,000.

2. On 16 January 2018, the club and the player signed an employment contract valid as from the date of signature until 31 May 2021 (hereinafter: *the employment contract*).

3. In accordance with clause 3 of the employment contract, the club undertook to pay the player, *inter alia*, the following remuneration:

   a. Season 2017/2018: total salary of EUR 300,000 net, payable in 5 monthly instalments of EUR 60,000;

   b. Season 2018/2019: total salary of EUR 650,000 net, payable in 1 monthly instalment of EUR 100,000 plus 9 monthly instalments of EUR 61,111;

   c. Season 2019/2020: total salary of EUR 700,000 net, payable in 1 monthly instalment of EUR 100,000 plus 9 monthly instalments of EUR 66,667;

   d. Season 2017/2018: total salary of EUR 750,000 net, payable in 1 monthly instalment of EUR 100,000 plus 9 monthly instalments of EUR 72,222; and

   e. EUR 1,500 per month as housing allowance.

4. Additionally, item k) of the specials provisions of clause 3 of the employment contract stipulated the following: "*the player is obliged to obey the Regulations of the club, to be determined and may be altered by the club at any time. The player hereby accepts to obey disciplinary sanctions, to be applied by the club against himself in case any contrary actions against said disciplinary instructions*".

5. On 10 July 2018, the club sent the player an official notice informing that its Board of Directors decided to impose a fine of EUR 25,000 on him based on art. 6.2 and 9.2 of the club's disciplinary regulations (hereinafter: *the disciplinary regulations*). In accordance with the club, the player did not attend the summer training and missed fitness preparation "*without any justification*".

6. On 27 August 2018, the club sent the player a second official notice informing that he violated art. 6.6 (a) and 9.7 of the disciplinary regulations and, consequently, that he should

pay a fine of EUR 15,000. Pursuant to the notice, the player "*was sent off the game field upon being shown a red card by the referee of the game as [the player] committed a foul at the 32nd minute of our professional football team's match played against Yeni Malatyaspor on 12 August 2018*". In accordance with the club, such fine was subsequently cancelled "*after some internal discussion and as a sign of trust towards [the player]*".

7. On 24 September 2018, the player put the club in default of payment of EUR 141,000 net, corresponding to his outstanding remuneration from the period between 1 May and 31 August 2018.

8. On 11 October 2018, the club sent the player a third official notice informing that he violated art. 6.1 lit. a), e) and s), 6.4 and 9.1 of the disciplinary regulations and, hence, was liable to pay a fine of EUR 56,000. The notice established, *inter alia*, the following: "*on 19 August 2018, on the day when our club played against Galatasaray, [the player] was pulled over and caught by cops when he was driving under the influence of alcohol (i.e. the intoxicated driver was [the player]. Moreover he and Nabil Ghilas went to a night club namely 'Dope' where they consumed beverages containing alcohol, and they left the premises intoxicated at 04:30 am. Both of the forenamed players were asked to submit their formal written defenses via e-mail. [The player] admitted the said incident and expressed his sorrow for what happened*". In addition, as a result of his actions the player also had to face proceedings before the national criminal court.

9. On 24 October 2018, the player sent the club another correspondence requesting payment of EUR 140,611 net, corresponding to his outstanding remuneration from the period between 1 May and 30 September 2018.

10. On 17 January 2019, the club sent the player a fourth official notice imposing a fine of EUR 30,000 as a result of the violation of art. 6.2 and 9.2 (a) of the disciplinary regulations. In accordance with the club, the player "*did not show up in a timely manner at the camp activity of our Professional Football Club scheduled to start on 02 Jan 2019. The player was asked to submit his formal written defence for this violation. Upon receiving his defence it is ascertained that, contrary to what he explained in his defence, there were other flights available for him to make it at the camp in a timely manner, but he preferred to fly with a flight of a latter date. Such improper conduct was performed by the player once before as well*".

11. On 15 May 2019, the player put the club in default of payment of EUR 195,333 net, corresponding to his outstanding remuneration from the period between 1 July 2018 and 30 April 2019.

12. On 19 July 2019, the club sent the player a fifth official notice by means of which it held that the player violated art. 6.2 and 9.2 (a) of the disciplinary regulations. Said notice established that the player "*did not show up in a timely manner at the camp activity of our Professional Football Club schedule on 03 July 2019*". As a consequence, the player was order to pay a fine of EUR 40,000 to the club.

13. On 27 October 2019, the player supposedly injured himself and was authorized by the club to go back to France in order to follow his medical treatment there. In accordance with the club, the player was supposed to return to Izmir, Turkey by no later than 4 January 2020 in order to get prepared for the club's training camp.

14. In November 2019 and in January 2020, the representatives of the player and the club exchanged e-mails regarding, *inter alia*: *(i)* the outstanding remuneration due by the club to the player; *(ii)* the player's absence in trainings; and *(iii)* the decisions of the club's Board of Directors.

15. On 19 March 2020, the Turkish Football Federation (TFF) suspended the football activities in the country until further notice due to the COVID pandemic.

16. On 15 April 2020, the club was notified about the suspension of its stadium naming rights sponsorship in light of the "*severe damages on the football sector and its financial stability*".

17. On 21 April 2020, the club sent an e-mail to its players referring to the severe economic impacts of the pandemic and informing that it intended to start renegotiations with the players taking into consideration the current FIFA recommendations.

18. On 28 April 2020, the club once again wrote to its players referring to the financial constrains arising from the pandemic.

19. On 30 April 2020, the player's representative wrote to the club and stated, *inter alia*, that he would analyse the reduction of the player's salaries as soon as the club provided him with a clear proposal in this regard. As to the disciplinary sanctions and outstanding remuneration, the player's representative requested the club to provide him with a spreadsheet for payments in order to calculate the amounts owed by the club to the player under the employment contract and to negotiate the sum due by the player to the club as penalties.

20. On 2 May 2020, the club sent the player an e-mail referring to the player's historic of undisciplined acts, as well as to his late return to the club after his injury and vacations. At the end, the club wrote the following: "*we declare that the penalties will be applied to him in accordance with the disciplinary regulations as a result of the player's contrary behaviour. At the end of this process, where the trust and goodwill of our club is seriously taken, we want to see you as soon as possible regarding the player's future in Götzepe*".

21. On 7 May 2020, the TFF issued a recommendation regarding employment contracts between clubs and players and technical staff members "*while preventing potential disputes that might rise out of the available contracts between the stakeholders due to these extraordinary times*".

22. On 12 May 2020, the club forwarded to the players the protocol published by the TFF regarding the return of the football-related activities.

23. On 23 May 2020, the club sent an e-mail to the players and clarified that it would apply a reduction of 20% on the players' salaries for the season 2019/2020.

24. On 27 May 2020, the club sent the players a proposed amendment to the employment contracts reducing the salaries by 20%.

25. In June 2020, the TFF allegedly decided to finish the season 2019/2020 playing "*behind closed doors*".

26. On 24 July 2020, the club sent the player a sixth official notice fining him for the sum of EUR 45,000 based on art. 6.2 and 9.2 (a) of the disciplinary regulations. The club argued that the player: "*did not show up in timely manner at the preparation camp activity for the second half of 2019-2020 Football Season of our Professional Football Club that started on 04 Jan 2020 without giving any excuse or receiving permission, and thus negatively affected the treatment process carried out by our medical team due to showing up late at the camp, and who did not attend the training held on January 05 2020, January 06 2020 and January 07,2020*".

27. On 30 July 2020, the player's representative wrote to the club via e-mail and asked it to provide the date of recall of the players for the first training of the season 2020/2021. Likewise, he stated that "*because of COVID-19 pandemic and the reduction of the number of flights from Africa, [he] need to arrange asap the trip for [his] client*".

28. On 10 August 2020, the player's representative once again wrote to the club regarding the player's travel to Izmir, Turkey and the impacts caused by the pandemic.

29. On 11 August 2020, the club replied to the correspondence of the player and stated that he was the only one missing practice. As such, the club stressed that: "*his behaviour is clearly against our disciplinary regulations and his obligations according to the player contract*". In accordance with the club, the player only arrived in Izmir, Turkey three weeks after the expected deadline.

30. On 17 August 2020, the club wrote to the player's representative stating that he "*did not attend the training without any permission, although he should be there at the latest on 10th August, as informed*".

31. On 19 August 2020, the club wrote to the player's representative and formalized that the player "*still did not come to Izmir, and he is not attending the camp/training again and again which is totally against to our disciplinary regulations*".

32. On 16 September 2020, the club sent to the player a list of payments made under the employment contract.

33. On 17 September 2020, the player's representative replied to the e-mail and, *inter alia*, made the following comments:

    a. As to the fines, the player contested each of the penalties imposed by the club. In particular, the player did not dispute the happenings, but mainly opposed the amounts of the fines *vis-à-vis* the content of the disciplinary regulations and its proportionality;

    b. As to the salaries and bonuses, the player stressed that the club still owed him: *(i)* EUR 37,000 for the 2018/2019 season; *(ii)* EUR 207,501 for the 2019/2020 season; and *(iii)* EUR 100,000 for the 2020/2021 season.

34. On 21 September 2020, the player put the club in default for the amount of EUR 207,501 net, corresponding to the outstanding remuneration due by the club to the player between 1 July 2019 and 31 May 2020. In the same opportunity, the player wrote the following: "*regarding to the COVID-19's consequences, I confirm that my client has refused your proposal to amend the employment contract concluded and, in particular, to reduce all wages by a percentage of twenty percent (20%) for the season 2019/2020 because the Turkish SuperLig was only suspended during two months and finalized on July 2020. Hence, it was not possible to amend the terms and conditions of the employment contract in such conditions because of proposal was illegal, inadequate and disproportionate*".

35. On 28 September 2020, the club sent the player a notice reiterating all his contractual breaches and confirming that a 20% reduction would be applied over his remuneration of the season 2019/2020. At the end, the club wrote as follows: "*we hereby serve an official notice and inform the player that all his receivables have been satisfied after such deduction was applied to his wages*".

36. On 30 September 2020, the club was notified about the termination of its lease agreement concluded with a company called Gürsel Aksel Sports & Fitness Center for the purposes of "*providing health services to the sports activities, athletes as well as to the public which was intended for use as a center for physical therapy, athlete's health, injury prevention and skill qualification*". Consequently, the club was ordered to return to the company the amount of TRY 2,000,000 paid in advance.

37. On the same date, *i.e.* 30 September 2020, the club also published an extensive report on the impact of COVID in its balance. The report referred to the pandemic process management, to its financial impacts and to the loss of incomes; as well as it contained documentary evidence and calculations on the matter.

38. On 23 October 2020, the Gabonese Football Federation (GFF) sent the club a letter informing that the player had been called-up to join the national team between 7 and 18 November 2020.

39. On 8 November 2020, the club sent the player a message establishing his traveling schedule for joining the national team. In accordance with the correspondence, the player would leave the club's premises on the same date and return on 17 November 2020. The flights tickets were attached to the e-mail.

40. On 16 November 2020, the player supposedly played his last match for the Gabonese national team, against Gambia, in said country.

41. Subsequently, the club sent the player and his wife messages via WhatsApp requesting the player's return to Turkey. The player did not take his flight scheduled to 17 November 2020 allegedly on account of the impossibility to secure a PCR test in Gabon after arriving from Gambia.

42. On 19 November 2020, the club sent FIFA an official request in order to open an investigation in line with annex 1 of the Regulations on the Status and Transfer of Players (RSTP) due to the player's failure to return to the club after joining the national team.

43. On the same date, *i.e.* 19 November 2020, the club's Board of Directors decided to fine that player for the seventh time for the sum of EUR 100,000, due to his absences in the trainings and consequent violation of art. 6.2 and 6.5 of the disciplinary regulations.

44. Also on 19 November 2020, the club sent the player a notice recalling the contractual breaches and requesting his immediate return to Izmir, Turkey within 36 hours.

45. On 20 November 2020, the player's representative wrote to the club via e-mail informing that the player missed the scheduled flight due to COVID restrictions and had already bought another flight ticket accordingly, scheduled to 21 November 2020. Said flight ticket was attached to the e-mail.

46. On 20 November 2020, the player acknowledged receipt of the club's notification regarding the fine of EUR 100,000, as a consequence of his late return to Izmir, Turkey. In this respect, the player referred to the restrictions in travel faced due to the pandemic, as well as it put the club in default for the payment of EUR 207,502 corresponding to fixed wages, collective games bonuses and interest. The player further contested the proportionality of the penalty and stressed, *in verbis*: "*According to the annual fixed remuneration of [the player] (EUR 750,000), the daily cost is EUR 3,750 so the fine must be EUR 18,750 (5 x EUR 3,750). Please note that without answer within 10 days e.g. by the 30th November 2020 at the latest, or if your decision to impose a fine of EUR 100,000 is maintained, I am under firm instructions by [the player] to bring this case before the FIFA Dispute Resolution Chamber*".

47. On 21 November 2020, the club replied to the player's notice and once again referred to the reduction of the salaries because of the COVID pandemic. Moreover, the club confirmed the imposition of the penalty, which it deemed to be fair and proportionate, as well as it requested the player's immediate return to the trainings, under penalty of terminating the employment contract with just cause.

48. On 22 November 2020, the player's representative wrote to the club and clarified that he could not fly to Izmir, Turkey due to the lack of PCR test. Accordingly, the player took the exam but the result was only published after the flight departure. Consequently, the player informed that he had already booked flight tickets to the next available flight. Once again, said flight tickets were enclosed to the correspondence.

49. On 23 November 2020, the player put the club in default and requested payment of EUR 74,211 corresponding to his salary, accommodation bonus and car bonus of October 2020, within the following 10 days.

50. On the same date, *i.e.* 23 November 2020, the club notified the player the termination of the employment contract with just cause. In this opportunity, the club referred to the eight fines imposed on the player, to the several warnings, as well as to the repeated severe breaches to the contractual duties. Finally, the club reserved its rights to lodge a claim against the player before FIFA.

51. On 24 November 2020, the player's representative replied to the termination notice and informed that he received the result of the PCR test and was going to Izmir on the same night.

52. On 2 December 2020, the player once again wrote to the club and requested payment of EUR 74,211 corresponding to his outstanding remuneration within the following 10 days.

53. On 1 February 2021, the player and the Turkish club, Altay SK (hereinafter: *Altay SK* or *the Respondent 2*), signed an employment agreement valid as from 1 February 2021 until 31 May 2021, for a total global remuneration of EUR 30,000.

II. PROCEEDINGS BEFORE FIFA

54. On 1 December 2020, the club filed the claim at hand before FIFA. A brief summary of the position of the parties is detailed in continuation.

a. The claim of the club

55. In its claim, the club maintained that it had always complied with its contractual duties whereas the player repeatedly breached his commitments. Accordingly, the club referred to the several fines imposed on the player, which are all deemed to be reasonable and proportionate in accordance with FIFA and CAS' jurisprudence.

56. In this respect, the club pointed out that it had taken a "*lenient approach to try to continue the contractual relationship with the player, who was a very important member of the team*". Nevertheless, the club stated that the player fail to improve his behaviour and missed

several trainings. Indeed, the club stressed that the player was still unreachable until the date of the claim.

57. In light of the above, the club claimed that the player "*clearly abandoned his job in clear violation of the employment contract*". Furthermore, the club held that the termination of said employment contract was an *ultima ratio* measure "*since the player was already disciplinarily sanctioned seven times for unjustified absences, not attendance to training camps, missing trainings and official games and misconducts throughout the duration of the contract*". Thus, the club is of the opinion that the termination of the employment contract on 23 November 2020 was made with just cause, "*the continuation of the employment relationship being impossible after several sever breaches of the contract and the player not returning to the club*".

58. As to the annual reduction of the player's annual salary for the season 2019/2020 season following the COVID pandemic, the club defended that it met all the requirements mentioned in COVID-19 FIFA's guidelines, as follows:

a. Attempt to reach a mutual agreement with the player: the club held that since the beginning of the pandemic, it took a positive action towards its employees to maintain their contractual relationships. Thus, the club alleged that it tried to find a mutual agreement with all its employees, including in particular the player concerned;

b. Application of the decision to the entire squad or only to specific employees: the club argued that it was able to reach agreements with almost all employees, treating them equally. As such, the club pointed out that "*almost all employees accepted the suggested reduction of the salary. Therefore, the club is of the firm opinion to have made all efforts possible to reach a fair solution with all its employees, including the player himself*";

c. Economic situation of the club: the club stated that it had to deal with big loss of revenues following the COVID-19 pandemic. In support of its allegations, the club filed a financial report showing that the reduction of all player's salaries was mandatory in order for the club to continue its activities and avoid bankruptcy;

d. Proportionality of the contract amendment: on its part, the club established that the reduction of 20% of the player's remuneration is "*totally fair and proportionate considering the big financial impact of the club's finances*";

e. Net income of the employee after any contractual adjustment: the club pointed out that, applying a 20% reduction on the 2019/2020 remuneration, the player would be entitled to receive EUR 560,000 (instead of EUR 700,000). Accordingly, the club deemed that such reduction does not affect the player's well-being. Moreover, the club stressed that "*at the time of termination of the employment contract, […] and contrary to the letter of the player's agent of 21 November 2020, the club had no overdue payables towards the player. To the contrary, the player had still fines to pay to the club in accordance with the disciplinary regulations of the club*".

59. In continuation, the club went on analysing the consequences of the breach of the employment contract by the player. In this respect, the club referred to art. 17 of the FIFA RSTP and made the following remarks:

    a. The player came from Karabükspor for a transfer fee amounting to EUR 1,400,000;

    b. There were still 6,5 remaining months of the employment contract and, as such, the club still had one very plausible opportunity to transfer the player to another club against compensation for the early termination;

    c. Consequently, the amortized transfer-fee amounts to EUR 216,667 (*i.e.* EUR 1,400,000 divided by 42 months then multiplied by 6,5 months);

    d. Furthermore, according to the website *transfermarkt.com* the player apparently had, at the time of the claim, a mercantile value of EUR 1,000,000;

    e. "*since it is very difficult to quantify the replacement costs for the Player, the Club is hereby kindly asking the DRC to take in consideration the residual value of the employment contract. Since the employment contract was terminated with just cause on 23November2020, it has to be considered that there was still 6,5 months contract left, i.e. a total amount of EUR 469,443 (6,5 x EUR 72,222)*"; and

    f. the player was fined seven times and the amount of EUR 110,000 remained outstanding and shall be taken into consideration in the calculation.

60. After indicating the foregoing, the club concluded that the player should pay it a compensation amounting to EUR 1,797,110, being the total of the lost opportunity (EUR 1,000,000), the amortized amount of the transfer fee (EUR 216,667), the residual value of the employment contract (EUR 469,443) and the unpaid fines (EUR 111,000).

61. Finally, the club requested sporting sanctions to be imposed on the player.

62. On 1 December 2020, the club lodged the claim at hand against the player requesting, *inter alia*, payment of EUR 1,797,110 as compensation for breach of contract plus 5% interest *p.a.* as of the date of termination (*i.e.* 23 November 2020).

b. The reply and counterclaim of the player

63. The player rejected the claim of the club and filed a counterclaim.

64. The player argued that the club did not have just cause to terminate the employment contract. In this respect, he recalled that he was called-up and joined the Gabonese national team for two matches against Gambia on 12 (in Gabon) and 16 November 2020 (in Gambia). As such, the Gabon FA had provided him with a ticket to return to Turkey on 17 November 2020 as the next match of the club would take place on 22 November 2020.

The player explained however that upon return from Gambia to Gabon, he could not book an appointment to take a PCR test and thus could not board his flight.

65. The player furthermore argued that when the club put him on notice for his belated return, it did not avail such communication to his representative, and that such notice was short. The player also argued that on 19 November 2020 – in spite of having being informed by his representative as to why he had been late – the club fined EUR 100,000.

66. The player argued that the club wrongly stated that no PCR test was needed to fly with Turkish Airlines, and that ultimately he was able to secure a test and flew back as soon as possible on 24 November 2020, but that upon arrival the club had already terminated the contract. The player denied that he was unreachable between 18 and 22 November 2020 and referred to the several emails sent by his representative in this respect.

67. As to the previous disciplinary sanctions, the player was of the position that all of them had been properly addressed at their time, and that the club illegally rendered a penalty of EUR 100,000 for facts that had taken place months before and only 4 days after his late arrival from the Gabonese team. The player argued that the club was always arbitrary in its disciplinary decisions. The player contests their validity and asked FIFA to annul all fines imposed.

68. The player then turned to issue of late payments by the club and explained that the club was "*systematically*" late in paying his dues. He noted that he constantly complained about such late payments.

69. As to the reduction of his salaries, the player turned to art. 6 of the employment contract and argued that any amendment must have been made in writing. He argued that the such reduction was illegal on the basis of the DRC jurisprudence and on the grounds that:

    a. No *force majeure* has been demonstrated;

    b. The evidence of the club's finance status was made by the club itself and dated 30 September 2020;

    c. The club filed no evidence that it indeed engaged the player in good faith negotiations, and that the e-mails filed purely amount to information letters and do not reflect bilateral negotiations;

    d. The club has not adduced any evidence that under Turkish law the 20% reduction was licit.

70. The player in continuation contested the amount sought by the club as compensation and argued that a market value of EUR 1,000,000 extracted from a private website cannot serve as basis for such assessment. Equally, the club's assessment of a payment of EUR 216,667 as non-amortized transfer fee versus a salary of EUR 30,000 cannot be considerable

reasonable. The player also rejected the sought replacement costs as the player has not been replaced by the club.

71. The player accordingly requested to be paid:

a. EUR 413,361 as outstanding remuneration related to the 20% reduction; as well as

b. compensation for breach of contract in the amount of EUR 431,991, broken down as follows:

(i) *pro-rata* salaries from November 2020 until May 2021 in the amount of EUR 452,591; plus

(ii) *pro-rata* housing allowances from November 2020 until May 2021 in the amount of EUR 9,400; minus

(iii) the mitigated amount of EUR 30,000 received under the Altay SK contract.

72. The player additionally asked to be awarded EUR 200,000 as compensation on the grounds of the club's "*inacceptable and violent behaviour*", as well as the imposition of sporting sanctions on the club and interest of 5% *p.a.* as of 23 November 2020.

c. The position of Altay SK

73. During the course of the proceedings, the club acknowledged that the player signed the new employment agreement with Altay SK and requested the former to be considered as a party to this dispute in line with the content of art. 17, par. 4 of the FIFA RSTP.

74. Nevertheless, in spite of being invited to present its position to the club's claim, Altay SK failed to so.

d. The reply of the club to the player's counterclaim

75. The club reiterated its own statement of claim.

III. CONSIDERATIONS OF THE DISPUTE RESOLUTION CHAMBER

a. Competence and applicable legal framework

76. First of all, the Dispute Resolution Chamber (hereinafter also referred to as *Chamber* or *DRC*) analysed whether it was competent to deal with the case at hand. In this respect, it took note that the present matter was presented to FIFA on 1 December 2020 and submitted for decision on 15 July 2021. Taking into account the wording of art. 21 of the January 2021 edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: *the Procedural Rules*), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.

77. Furthermore, the members of the Chamber referred to art. 3 par. 1 of the Procedural Rules and observed that in accordance with art. 24 par. 1 in combination with art. 22 lit. b) of the Regulations on the Status and Transfer of Players (edition February 2021), the Dispute Resolution Chamber is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a Gabonese player and two Turkish clubs.

78. Subsequently, the Chamber analysed which regulations should be applicable as to the substance of the matter. In this respect, it confirmed that, in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Player (edition February 2021), and considering that the present claim was lodged on 1 December 2020, the October 2020 edition of said regulations (hereinafter: *the Regulations*) is applicable to the matter at hand as to the substance.

b. Burden of proof

79. The Chamber recalled the basic principle of burden of proof, as stipulated in art. 12 par. 3 of the Procedural Rules, according to which a party claiming a right on the basis of an alleged fact shall carry the respective burden of proof. Likewise, the DRC stressed the wording of art. 12 par. 4 of the Procedural Rules, pursuant to which it may consider evidence not filed by the parties.

80. In this respect, the Chamber also recalled that in accordance with art. 6 par. 3 of Annexe 3 of the Regulations, FIFA's judicial bodies may use, within the scope of proceedings pertaining to the application of the Regulations, any documentation or evidence generated or contained in TMS.

c. Merits of the dispute

81. The competence of the DRC and the applicable regulations having been established, the DRC entered into the merits of the dispute. In this respect, the DRC started by acknowledging all the above-mentioned facts as well as the arguments and the documentation on file. However, the DRC emphasised that in the following considerations it will refer only to the facts, arguments and documentary evidence, which it considered pertinent for the assessment of the matter at hand.

i. Main legal discussion and considerations

82. The foregoing having been established, the members of the DRC turned their attention to the documentation on file and acknowledged that the parties strongly dispute whether the club had just cause to terminate the employment contract and the consequences that follow.

83. Accordingly, the DRC highlighted that the club based the termination of the employment contract on the player's late return after being called-up by the Gabonese national team. Furthermore, the Chamber observed that the club mentioned the player's historical of disciplinary breaches (and fines) as an evidence that he gave cause to the termination.

84. In addition, the members of the DRC were also mindful that the player was called-up to join the Gabonese national team on 8 November 2021 and was expected to return to the club on 18 November 2021. Nevertheless, due to administrative problems in the context of the pandemic, the player only returned to the club on 24 November 2021, when the employment contract had already been terminated by the club.

85. In this scenario, the Chamber recalled its long-standing standing jurisprudence according to which that only a breach or misconduct which is of a certain severity justifies the termination of a contract without prior warning. In other words, only when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, a contract may be terminated prematurely. Hence, if there are more lenient measures which can be taken in order for an employer to assure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can always only be an *ultima ratio*.

86. With the above in mind and after having carefully analysed the parties' submissions, the DRC unanimously concluded that a 6-days' delay during a worldwide pandemic crisis cannot be deemed as a substantial breach of an employment contract, capable of triggering the consequences of an unlawful termination. The Chamber found it pivotal to its conclusion the fact that, conversely to the club's argumentation, the player submitted enough evidence to demonstrate that the club was fully aware of his difficulties to go back to Izmir as per the several e-mails exchanged between the parties' representatives.

87. Notwithstanding the above, the members of the Chamber went on analysing the club's allegation regarding the player's historical of indiscipline. In this respect, the DRC also concurred that the club's argumentation could not be deemed as a valid reasoning for the premature termination of the employment contract. In this respect, the Chamber highlighted that the other alleged breaches committed by the player had already been individually addressed (and punished) by the club. In particular, the DRC outlined that the club's standard practice was to impose fines on the player, being the amounts directly reduced from his entitlements.

88. Along the same lines, the members of the DRC considered that the club had already fined the player due to his absence after attending the matches with the Gabonese national team. Consequently, the Chamber was eager to determine that the club adopted a controversial conduct toward the player by punishing him with two different sanctions (*i.e.* a fine and the termination of the employment contract) over the same conduct.

89. Additionally, the Chamber observed that, once the player informed that he could not fly back to Izmir due to COVID restrictions, the club granted him with a 36 hours' deadline in order to resume his duties, what is not reasonable nor proportionate bearing in mind that the player's representative had already made the club's management aware of the fact that the player could not travel due to external elements (*i.e.* PCR test and flight's scale). The Chamber further noted that in its default notice, the club only addressed the player himself and not his legal representative, with whom the club was frequently exchanging correspondence.

90. Subsequently, the members of the DRC deemed it noteworthy the fact that the player filed convincing evidence proving that the club was systematically in default of its financial duties under the employment contract, so that their representatives were in close contact in order to find a balance between their rights and obligations. As such, the Chamber was convinced that the club could have taken more lenient measures before abruptly terminating the employment contract (*i.e.* a suspension or a formal notice with a reasonable deadline for the player to cure the breach).

91. Consequently, by carefully analysing the documentation at its disposal, the Chamber was of the opinion that the termination of the employment contract was not an *ultima ratio* measure.

92. Therefore, the DRC unanimously decided that no just cause on the club's part has taken place and, hence, that its claim was rejected. The DRC further decided that the club shall be liable to the consequences that follow.

ii. Consequences

93. Having stated the above, the members of the Chamber turned their attention to the question of the consequences of such unjustified breach of contract committed by the club.

94. In this regard, the DRC sought to establish which payments had remained outstanding at the time of the termination. In addition, taking into consideration art. 17 par. 1 of the Regulations, the Chamber decided that the player should be also entitled to receive compensation from the club.

95. At this point, the Chamber took due note of the club's argumentation regarding the effects of the COVID-19 pandemic.

96. Accordingly, the Chamber firstly wished to highlight that FIFA issued a set of guidelines, the COVID-19 Guidelines, which aim at providing appropriate guidance and recommendations to member associations and their stakeholders, to both mitigate the consequences of disruptions caused by COVID-19 and ensure that any response is harmonised in the common interest. Moreover, on 11 June 2020, FIFA has issued an additional document, referred to as FIFA COVID-19 FAQ, which provides clarifications on the most relevant questions in connection with the regulatory consequences of the COVID-19 outbreak and identifies solutions for new regulatory matters.

97. The DRC also wished to refer to the fact that said guidelines – as per the explicit wording of FAQ no. 16, as well as pages 6 and 7 of the FIFA COVID-19 Guidelines – are only applicable to "*unilateral variations to existing employment agreements*". Therefore, except where a termination of a contract occurred following a unilateral variation made as a result of COVID-19 (in which case the validity of the variation must first be assessed under the guidelines), said guidelines do not apply to assess unilateral terminations of existing employment agreements. The Chamber further noted that for the assessment of disputes that are presented before the FIFA judicial bodies concerning the unilateral termination of a contract, the FIFA Regulations as well as the established jurisprudence of the Chamber shall apply.

98. Additionally, analysing the concept of a situation of *force majeure*, the members of the Chamber noted that, based on the contents of the FIFA COVID-19 Guidelines and the FIFA COVID-19 FAQ, FIFA did not declare that the COVID-19 outbreak was a *force majeure* situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of *force majeure*.

99. In other words, in any given dispute, it is for a party invoking *force majeure* to establish the existence of said event under the applicable law/rules as well as the consequences that derive in connection thereto. The analysis of whether a situation of *force majeure* existed has to be considered on a case-by-case basis, taking into account all the relevant circumstances.

100. Following these general observations, the members of the Chamber went on to analyse whether in the matter at hand, any of the parties to the employment contract had made a unilateral variation to their existing agreement prior to the unilateral termination of such contract by the club.

101. In this respect, the members of the Chamber agreed that the decision of the club to unilaterally reduce 20% of the player's salary payments during the season 2019/2020 has to be considered as a unilateral variation to the employment relationship between the parties. It was clear to the Chamber that the club, at first, did not terminate the employment contract, but only altered the salary payment. As a result, the Chamber concluded that the FIFA COVID-19 Guidelines and the FIFA COVID-19 FAQ are applicable to the matter at hand when having to assess the legitimacy of the pertinent unilateral alteration.

102. Accordingly, in application of the FIFA COVID 19 Guidelines, the DRC noted that unilateral decisions to vary agreements will only be recognised where they are made in accordance with national law or are permissible within collective bargained agreements (CBA) structures or another collective agreement mechanism.

103. Likewise, the Chamber stressed the contents of art. 12 par. 3 of the Procedural Rules, pursuant to which any party claiming a right on the basis of an alleged fact shall carry the burden of proof. As an example, a party should provide independent legal advice from a qualified legal practitioner in the relevant jurisdiction which confirms that the unilateral variation was a valid exercise of the national law referred to in the agreement, CBA, or other collective agreement mechanism.

104. Turning to the evidence on file as well as the submissions of the parties, the Chamber confirmed that the club has not adduced substantial evidence capable of demonstrating that the unilateral variation of the player's salary was made on the basis of the national law, or any collective agreement. Furthermore, the club has not demonstrated that the national law does not address the issue of *force majeure*.

105. In addition, the DRC wished to highlight that the pieces of evidence filed by the club illustrated the financial impacts of COVID in its finances, however were not deemed as sufficient to prove a situation entitling the club to unilaterally vary the terms of the employment contract. What is more, the members of the Chamber were observant that the Turkish league was only suspended for two months, whereas the club reduced the player's salary for the entire season (2019/2020) and in a retroactive manner – which could not be considered reasonable nor proportionate in accordance with the common approach of the Chamber.

106. Alike, the DRC also remarked that, in accordance with the documentation brought forward by the parties, there were already amounts in delay before the COVID outbreak, compromising the club's argumentation in this regard.

107. Based on the foregoing considerations, the Chamber unanimously concluded that the unilateral variation of the employment contract cannot be considered licit, entailing that the club should have paid the player's agreed remuneration as established in the employment contract.

108. With this in mind, the members of the Chamber once again turned their attention to the documentation on file – and especially to the calculation presented by the player – in order to determine the *quantum* due by the club. By doing so, the DRC stressed that the breakdown presented by the player together with the contradictory e-mails and notices exchanged between the parties could not lead to comfortable satisfaction degree regarding the exact amounts that remained outstanding under the employment contract. Put differently, the DRC determined that the player could not provide sufficient evidence as to how he arrived at the claimed amount of EUR 413,631.

109. Accordingly, the Chamber was firm to determine that the only amount that remained sufficiently proved and contractually-based by the player was the one equivalent to the unlawful reduction of the player's remuneration in connection with COVID. As such, the members of the DRC recalled the general legal principle of *pacta sunt servanda* and unanimously ascertained that the club should be liable to pay the player as outstanding remuneration the total amount of EUR 140,000, corresponding to 20% of his annual remuneration.

110. Additionally, the DRC, in line with its constant jurisprudence as well as the requests of relief of the player, decided to grant interest at the rate of 5% *per annum* on said amounts as from their due dates (*i.e.* the following day upon which they fell due) until the date of effective payment.

111. Having stated the above, the Chamber turned its attention to the calculation of the amount of compensation payable to the player by the club in the case at stake. In doing so, the Chamber firstly recapitulated that, in accordance with art. 17 par. 1 of the Regulations, the amount of compensation shall be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including 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, and depending on whether the contractual breach falls within the protected period.

112. In application of the relevant provision, the Chamber held that it first had to clarify as to whether the pertinent employment contract contained a provision by means of which the parties had beforehand agreed upon an amount of compensation payable by the contractual parties in the event of breach of contract. In this regard, the DRC established that no such compensation clause was included in the employment contract at the basis of the matter at stake.

113. As a consequence, the DRC determined that the amount of compensation payable by the club to the player had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations. The Chamber recalled that said provision provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of compensation payable.

114. Bearing in mind the foregoing as well as the counterclaim of the player, the Chamber proceeded with the calculation of the monies payable to the player under the terms of the employment contract until its expiry date. Consequently, the Chamber concluded that the amount of EUR 459,532 corresponded to the residual value of the employment contract (*i.e.* salaries from November 2020 (*pro rata*) until May 2021 and housing allowances) and should serve as the basis for the determination of the amount of compensation for breach of contract.

115. In continuation, the Chamber verified as to whether the player had signed an employment contract with another club during the relevant period of time, by means of which he would have been enabled to reduce his loss of income. According to the constant practice of the DRC as well as art. 17 par. 1 lit. ii) of the Regulations, such remuneration under a new employment contract shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the player's general obligation to mitigate his damages.

116. Indeed, the player found employment with Altay SK. In accordance with the pertinent employment agreement, the player was entitled to a total remuneration of EUR 30,000, which was considered for the sake of mitigation of damages.

117. Therefore, taking on account of the specificities of the case at hand, the Chamber unanimously decided that the club must pay the amount of EUR 429,532 to the player (*i.e.* EUR 459,532 minus EUR 30,000) for breach of contract in the present matter. The Chamber confirmed for the sake of completeness that because the termination had not taken place due to overdue payables, no additional compensation was due to the player.

118. With regard to the claimed interest, the Chamber, applying the constant practice of the DRC decided to award the player 5% interest *p.a.* on the said amount as from the date of the claim (*i.e.*1 December 2020).

119. For the sake of conclusion, the DRC deemed it appropriate to point out that the request for compensation for moral damages mentioned by the player had no legal or regulatory basis and pointed out that no corroborating evidence had been submitted that demonstrated or quantified the damage suffered.

iii. Compliance with monetary decisions

120. Finally, the Chamber referred to par. 1 and 2 of art. 24bis of the Regulations, which stipulate that, with its decision, the pertinent FIFA deciding body shall also rule on the consequences deriving from the failure of the concerned party to pay the relevant amounts of outstanding remuneration and/or compensation in due time.

121. In this regard, the DRC highlighted that, against clubs, the consequence of the failure to pay the relevant amounts in due time shall consist of a ban from registering any new players, either nationally or internationally, up until the due amounts are paid and for the maximum duration of three entire and consecutive registration periods.

122. Therefore, bearing in mind the above, the DRC decided that, in the event that the club does not pay the amounts due to the player within 45 days as from the moment in which the player communicates the relevant bank details to the club, provided that the decision is final and binding, a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods shall become effective on the club in accordance with art. 24bis par. 2 and 4 of the Regulations.

123. The DRC recalled that the above-mentioned bans will be lifted immediately and prior to its complete serving upon payment of the due amounts, in accordance with art. 24bis par. 3 of the Regulations.

124. Lastly, the DRC concluded its deliberations by rejecting any other requests for relief made by any of the parties.

d. Costs

125. The Chamber referred to article 18 par. 2 of the Procedural Rules, according to which *"DRC proceedings relating to disputes between clubs and players in relation to the maintenance of contractual stability as well as international employment related disputes between a club and a player are free of charge".* Accordingly, the Chamber decided that no procedural costs were to be imposed on the parties.

126. Likewise and for the sake of completeness, the Chamber recalled the contents of art. 18 par. 4 of the Procedural Rules, and decided that no procedural compensation shall be awarded in these proceedings.

IV. DECISION OF THE DISPUTE RESOLUTION CHAMBER

1. The claim of the Claimant / Counter-Respondent, Göztepe SK, is rejected.

2. The claim of the Respondent 1 / Counter-Claimant, Andre Biyogo Poko, is partially accepted.

3. The Claimant / Counter-Respondent has to pay to the Respondent 1 / Counter-Claimant, the following amounts:

   - EUR 140,000 as outstanding remuneration plus 5% interest *p.a.* as from 23 November 2020 until the date of effective payment; and

   - EUR 429,532 as compensation for breach of contract plus 5% interest *p.a.* as from 15 March 2021 until the date of effective payment.

4. Any further claims of the Respondent 1 / Counter-Claimant are rejected.

5. The Respondent 1 / Counter-Claimant is directed to immediately and directly inform the Claimant / Counter-Respondent of the relevant bank account to which the Claimant / Counter-Respondent must pay the due amount.

6. The Claimant / Counter-Respondent shall provide evidence of payment of the due amount in accordance with this decision to **psdfifa@fifa.org**, duly translated, if applicable, into one of the official FIFA languages (English, French, German, Spanish).

7. In the event that the amount due, plus interest as established above is not paid by the Claimant / Counter-Respondent **within 45 days,** as from the notification by the Respondent 1 / Counter-Claimant of the relevant bank details to the Claimant / Counter-Respondent, the following consequences shall arise:

   1. The Claimant / Counter-Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods. The

aforementioned ban mentioned will be lifted immediately and prior to its complete serving, once the due amount is paid.
(cf. art. 24bis of the Regulations on the Status and Transfer of Players).

2. In the event that the payable amount as per in this decision is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee.

8. This decision is rendered without costs.

For the Dispute Resolution Chamber:

Emilio García Silvero
Chief Legal & Compliance Officer

NOTE RELATED TO THE APPEAL PROCEDURE:

According to article 58 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision.

NOTE RELATED TO THE PUBLICATION:

FIFA may publish this decision. For reasons of confidentiality, FIFA may decide, at the request of a party within five days of the notification of the motivated decision, to publish an anonymised or a redacted version (cf. article 20 of the Procedural Rules).

CONTACT INFORMATION:

Fédération Internationale de Football Association
FIFA-Strasse 20 P.O. Box 8044 Zurich Switzerland
www.fifa.com | legal.fifa.com | psdfifa@fifa.org | T: +41 (0)43 222 7777