Decision of the Single Judge of the Players´ Status Committee

passed on 27 July 2021

regarding an employment-related dispute concerning the coach Ray Power

BY:

Stefano La Porta (Italy), Single Judge of the PSC

CLAIMANT:

Ray Power, Republic of Ireland
Represented by Mr Alfonso León Lleó
and Mr Juan De Dios Crespo Pérez

RESPONDENT:

Guam Football Association, Guam
Represented by Mr Curtis C Vandeveld

I. FACTS OF THE CASE

1. In April 2019, the Irish coach, Mr Ray Power (hereinafter: *the coach* or *the Claimant*) and the Guam Football Association (hereinafter: *the FA* or *the Respondent*) initiated negotiations aimed at the conclusion of an employment contract.

2. On 4 August 2019, the Respondent –acting Mrs. Cheri Stewart, Executive Director of the FA, on its behalf– communicated to the Claimant via *Whatsapp* that the Claimant had been appointed as coach of the FA and that the lawyer of the FA would initiate the proceedings to obtain the Claimant´s VISA.

3. On 30 September 2019, the Claimant participated in a Workshop in representation of the FA in Singapur, which lasted until 5 October 2019.

4. On 7 September 2019 the parties signed an employment offer (hereinafter: *the offer*), in accordance with which the Respondent undertook to pay to the Claimant an annual gross salary of USD 108,284. The offer contains further conditions, such as, *inter alia*, that the employment would be full-time (40 hours per week), that the salary would be paid on a bi-weekly basis, that the Claimant would be entitled to a phone and computer and that the Claimant would be entitled to flight tickets. However, the said offer did not contain a specific duration, nor a starting date.

5. Moreover, the offer states the following: "*The above terms, conditions and benefits above are dependent on you securing a United States VISA that will authorize your employment in Guam. GFA shall not be liable or obligated to fulfil or provide you with the terms, conditions and benefits stated in this letter should you not be able to obtain the applicable visa to fulfil your role as Technical Director in Guam. Upon accepting the position, GFA will immediately initiate the paperwork for your United States VISA, including a written contract detailing your roles and responsibilities as Technical Director, with the aforementioned terms and conditions. Upon approval of the VISA, we will jointly discuss the feasible start date on your contract. Mrs. Cheri Stewart will be coordination with you on this matter*".

6. In the e-mail through which the Respondent sent the contract to the Claimant, on 7 September 2019, the former indicated to the latter that the proceedings to obtain a VISA for the Claimant could last from 2 weeks to 60 days.

7. On 18 September 2019, the Respondent requested the Claimant to provide his birth certificate in order to proceed with the VISA procedures, a picture of which was provided by the Claimant to the Respondent on the same day.

8. On 29 November 2019, the US Immigration Services rejected the VISA of the Claimant.

9. Between the 11th and the 13th of December 2019, the parties exchanged some emails aimed at solving the situation created upon the rejection of the Claimant´s VISA, where 2 options

were contemplated: 1.) appeal the decision of the USCIS; 2.) apply for a different kind of VISA.

10. By means of his letter dated 17 December 2019, the Claimant made a proposal to the Respondent, as follows: "*Hi all, I´m trying to give this process every chance, however, no is "do or die" time with this position. In 2 days I need to make an all or nothing decision for the sake of my family. Either we: go all in with new visas with a minimum of GFA paying my rent until we are on island, OR if the appetite to get me to Guam is no longer desired, then we will formally go our separate ways. I seek a response by 2 pm GMT (10pm Guam time) on Wednesday* [18 December 2019] *and I suggest we crack on from that decision. On Wednesday afternoon we will begin the process of finding schools for my kids, etc so there will be no going back from that. Regards, Ray*".

11. By means of its letter dated 18 December 2019, the Respondent informed the Claimant of the following: "*At the time of our earlier communications, both you and the GFA anticipated that you would qualify for admission into the United States. As you will recall from the Offer Letter, the terms, conditions and benefits are dependent on securing the US Visa that will authorize your employment in Guam. GFA shall not be liable or obligated to fulfil or provide you with the terms, conditions and benefits stated in such offer letter should you not be able to secure the visa. Though we have cooperated with you to obtain admission, unfortunately, your request has been denied. On December 17, 2019 your email message to Executive Director Cheri Stewart proposed two (2) alternatives for GFA consideration. The First option was for GFA to pay to you specified remuneration while the VISA process is pending on your new petition, an option GFA declines to accept. The Second option, without the concurrence of the prelusive language, that "we will formally go our separate ways" is accepted. We hereby accept that offer and withdraw the offer of employment extended to you. GFA had hoped that you would have been able to secure VISA admission into the United States and is disappointed that your VISA was denied. GFA thank you for your interest in employment with GFA but based on the circumstances and your demand for selection of alternative agreement as to continued pursuit of your employment, is forced to select the option to withdraw its previous offer of employment. GFA wished you success in your future employment*".

12. By means of his email dated 4 March 2020, the Claimant contacted the Respondent, urging the latter to respect the terms of the offer and ascertaining that the employment relationship could not be make subject to the grant of a working visa ex. art. 18.4 RSTP.

13. By means of his letter dated 14 July 2021, the Claimant informed our services that he signed a new contract with Bangladesh Krira Shikkha Protishtan, valid as from 1 January 2021 until 31 December 2021, whereby the Claimant was entitled to a monthly salary of USD 8,000.

II. PROCEEDINGS BEFORE FIFA

14. On 31 December 2020, THE Claimant filed the claim at hand before FIFA. A brief summary of the position of the parties is detailed in continuation.

15. In his statement of claim, the Claimant requested to be awarded the residual value of the offer, plus 5% interest *p.a.* as from the date on which the offer was breached by the Respondent, as well as the amount of CHF 15,000 as legal fees and procedural costs.

a. The claim of the Claimant

16. According to the Claimant, the parties entered into an employment relationship on 4 August 2019, date on which the Respondent reliably communicated to him that he was appointed as the new coach of the FA; event that was confirmed by the fact that the parties concluded an employment contract (the offer) on 7 September 2019.

17. What is more –continued the Claimant– the fact that the employment relationship existed was also confirmed by different facts: 1.) the fact that the Claimant participated, as part of the FA, in a Workshop that took place in Singapur as from 30 September until 5 October 2019; 2.) the fact that the Respondent initially offered the Claimant to provide him with accommodation and even provided him with the contact of a real state agent in order to find proper housing.

18. In connection with the offer, the Claimant held that it contained the obligations of the coach, his salary, his working hours, holidays, etc. Hence, stated the Claimant, the said offer, upon its signing, became an employment contract that bound the parties.

19. As to the content of the offer regarding the condition precedent of the issuance of a working VISA for the coach, the Claimant stressed that the said requirement is null, insofar it contravenes art. 18.4 of the Regulations on the Status and Transfer of Players (RSTP), which reads as follows: "*The validity of a contract may not be made subject to a successful medical examination and/or grant of a work permit*".

20. In view of the above, the Claimant maintained that the Respondent terminated the contract without just cause and must be therefore liable to pay compensation to the Claimant.

b. Position of the Respondent

21. As to the competence, the Respondent firstly referred to art. 9.1 para g.) of the Rules Governing the Procedures of the Player´s Status Committee and the Dispute Resolution Chamber and stressed that the claim of the Claimant is inadmissible, insofar it does not contain the amount in dispute.

22. The Respondent secondly stressed that the request of the Claimant regarding legal fees and procedural costs shall be rejected in accordance with the FIFA jurisprudence.

23. Moreover, the Respondent argued that FIFA has no competence to adjudicate on the present dispute, insofar art. 22 lit c.) states that FIFA would be competent to decide upon employment-related disputes between a club or an association and a coach of an international dimension. In this respect, the Respondent argued that, even though no contract was ever entered into, the role of the Respondent under the offer was "*technical director*", which defers from a coach position, insofar the role of a technical director has a managerial staffing capacity, which is "*well beyond that of coaching*".

24. What is more, the Respondent highlighted that the offer did not contain any term or duration. In this respect, the Respondent referred to "*the law of the jurisdiction of Guam*", which "*controls*" and subject to which "*the agreement is terminable at will or either party*". In this context, the Respondent referred to the email sent by the Claimant on 17 December 2019 and held that it "*reasonably understood this to be an election to terminate the agreement by Claimant Ray Power as allowed by Title 17 Guam Code Annotated para. 55404*".

25. As to the substance, the Respondent held that, insofar the Claimant was contacted to be hired as "*technical director*", art. 18 para. 3 of the RSTP is not applicable.

26. Furthermore, the Respondent held that it replied to the Claimant´s email of 17 December 2019 within the deadline granted by the latter; the Respondent accepting the second option provided by the Claimant, *i.e.* the FA withdrew its offer of employment.

27. The Respondent acknowledged that the Claimant participated "*in a Technical Director workshop*", but since the condition precedent to employment did not occur, *i.e.* the Claimant was not granted the required VISA, no employment relationship was ever entered into.

III. CONSIDERATIONS OF THE SINGLE JUDGE OF THE PSC

a. Competence and applicable legal framework

28. First of all, the Single Judge of the Players´ Status Comittee (hereinafter also referred to as *the Single Judge*) analysed whether he was competent to deal with the case at hand. In this respect, it took note that the present matter was presented to FIFA on 31 December 2020 and submitted for decision on 27 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.

29. Subsequently, the Single Judge referred to art. 3 par. 1 of the Procedural Rules and observed that in accordance with art. 23 par. 1 in combination with art. 22 lit. c) of the Regulations on the Status and Transfer of Players (edition October 2020), the Single Judge is, in principle, competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between an Irish coach and the Guam Football Association.

30. Subsequently, the Single Judge analysed which regulations should be applicable as to the substance of the matter. In this respect, he confirmed that, in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Player (edition January 2021), and considering that the present claim was lodged on 31 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

31. The Single Judge 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 Single Judge stressed the wording of art. 12 par. 4 of the Procedural Rules, pursuant to which he may consider evidence not filed by the parties.

32. In this respect, the Single Judge 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

33. The competence of the Single Judge and the applicable regulations having been established, the Single Judge entered into the merits of the dispute. In this respect, the Single Judge started by acknowledging all the above-mentioned facts as well as the arguments and the documentation on file. However, the Single Judge emphasised that, in the following considerations, he 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

34. The foregoing having been established, the Single Judge wished to briefly recall the key facts of the present case. The Single Judge firstly recalled that the parties concluded an employment offer, aimed at the conclusion of an employment contract. The said offer, continued the Single Judge, contained several of the necessary elements of a contract, *i.e.* the remuneration, the working hours, holidays and role; however, the said offer lacked of

essential elements such as the duration of the contract and the specific obligations of the parties.

35. Moreover, highlighted the Single Judge, the offer contained a condition precedent, *i.e.* the grant of a valid working VISA, in order for the parties to be in a position to enter into an employment relationship.

36. The above having been established, the Single Judge referred to the position of the Claimant, who argued that the offer is actually an employment contract, which bound both parties. In addition, observed the Single Judge, the Claimant held that he started to render services to the Respondent as from 4 August 2019, which is demonstrated by the fact that he participated in a workshop in Singapur on behalf of the Respondent as from 30 September until 5 October 2019.

37. Regarding the condition precedent inserted in the offer, noted the Single Judge, the Claimant held that the said condition is null and void, ex. art. 18.4 of the Regulations. In view of the above, observed the Single Judge, the Claimant held that the Respondent terminated the contract without just cause and shall therefore be held liable to pay compensation in an amount equal to the residual value of the contract, which was not determined by the Claimant in his statement of claim.

38. The Single Judge duly noted that, on its part, the Respondent firstly challenged the competence of FIFA, insofar: 1.) the claim of the Claimant does not specify the amount in dispute, which contravenes art. 9 para. 1 lit g) of the Procedural Rules: 2.) the offer stated that the role of the Claimant would be as technical director, not as coach; hence, since art. 22 of the Regulations does not grant competence to FIFA in connection with disputes arisen between a technical director (managerial position as per the Respondent) and a club or association with an international dimension, FIFA is not competent.

39. As to the substance, recalled the Single Judge, the Respondent acknowledged having concluded the offer, but held that it was an offer and not a contract, since the conclusion of the final contract was subject to the grant of the working permit, condition precedent that does not violate art. 18.4 RSTP, since the Claimant was to be hired as technical director, not as coach and, thus, the said article does not apply. What is more, observed the Single Judge, the Respondent held that the parties lawfully opted out of the offer (cf. emails exchanged on 17 and 18 December 2019), meaning that the agreement entered into between the parties was no longer in force.

40. In the first place, the competence of FIFA having been challenged –stressed the Single Judge– an analysis thereof shall be made. In this respect, continued the Single Judge, considering that the question of whether FIFA is competent to adjudicate on the present matter is directly linked to the merits of the case, a joint analysis of both, the competence and the substance of the present matter will be undertaken in continuation.

41. After a careful analysis of the content of the employment offer, explained the Single Judge, it is to be noted that it contains several of the necessary elements of a contract, such as the role, remuneration, working hours, vacation, provision of flight tickets, phone, computer, car and medical coverage.

42. However, essential elements as the duration of the contract and the obligations of the parties are not included. On the contrary, underscored the Single Judge, the offer specifies that the duration of the contract would be discussed at a later stage. In this respect, recalled the Single Judge, the offer explicitly states the following: "*Upon approval of the VISA, we will jointly discuss the feasible start date on your contract*".

43. In view of the above, the Single Judge stressed that there are 2 events that affect the validity of the offer and its consideration as an employment contract.

44. On the one hand, as art. 18.4 RSTP, stipulates, contracts cannot be made subject to the grant of a work permit. Hence, the paragraph of the offer that contains the grant of the work permit as condition precedent to the validity of the offer is to be deemed null and void in application of the referred article.

45. On the other hand, the Single Judge determined that the offer lacks of the essential elements of an employment contract, insofar the said offer does not contain the duration of the employment relationship, nor the obligations of the parties, elements which are definitely essential in order for an agreement to be considered as an employment contract (cf. art. 319 and 320 SCO; as well as CAS2006/A/1024).

46. Thus, in view of the lack of the said essential elements and considering the wording of the offer, which provided that the duration of the contract would be discussed at a later stage, the Single Judge concluded that the expectation created on the parties was that an employment relationship was not entered into by signing the said offer, but rather that the employment contract would be concluded at a later stage. What is more, continued the Single Judge, the offer only refers to the position of the Claimant as technical director, without providing a description of the obligations of the parties, which hinders the Single Judge from analysing whether the duties of the Claimant as per the offer were the ones of a coach or if, on the contrary and as pointed out by the Respondent, were managerial obligations, different from the ones of a coach.

47. However, emphasized the Single Judge, not only objective elements as the offer shall be analysed. Subjective elements such as the parties´ performances shall be considered (actions imply intentions). In this regard, continued the Single Judge, it is acknowledged by the parties that the coach started to render services to the Respondent, at least on 30 September 2019, when the Claimant participated in a workshop on behalf of the Respondent. The aforementioned event, together with the content of the email sent by the Respondent to the Claimant on 4 August 2019, whereby the former informed the latter that the Board of Direction had approved his appointment, created the expectation on the Claimant that an employment relationship had been entered into (*fumus boni iuris*).

48. Hence, the Single Judge concluded that the parties did enter into an employment relationship, which duration –given the lack of specificity neither on the contract nor on any other agreement (oral or written)– is to be considered as undetermined. However, continued the Single Judge, it must be noted that the parties exchanged emails on 17 and 18 December 2019, whereby the Claimant offered the Respondent to terminate the employment relationship, which was accepted by the Respondent (cf. points 11 and 12 above).

49. Thus, underscored the Single Judge, in accordance with art. 335 SCO, which states that "*an employment relationship for an unlimited period may be terminated by either party*", the parties validly exercised their mutual right to opt out of the contract; exercise that does not seem to be subject to any other requirement beyond its notification, considering the open-ended nature of the employment relationship. What is more, emphasized the Single Judge, taking into account that it was the Claimant who proposed to opt out of the contract, action that finds a legal support in art. 335 SCO, it is our opinion that the Claimant cannot be awarded any kind of compensation regarding "*the residual value of the contract*", as requested (*venire contra factum proprium not valet*).

50. Nevertheless, wished to highlight the Single Judge, given that the Claimant seems to have rendered some services for the Respondent, he could eventually be entitled to the outstanding remuneration due to him. However, the Single Judge noted that, in his claim, the Claimant failed to request a specific amount and also failed to provide documentary evidence in support of any eventual entitlement of the Claimant to receive outstanding remuneration from the Respondent (cf. art. 12.3 of the Procedural Rules).

51. Thus, given that the parties freely terminated their employment relationship on 18 December 2019 and that the Claimant is not requesting any outstanding remuneration, the Single Judge determined that the claim of the Claimant is fully rejected.

d. Costs

52. In continuation, the Single Judge of the PSC referred to art. 25 par. 2 of the Regulations in combination with art. 18 par. 1 of the Procedural Rules, according to which in the proceedings before the Players´ Status Committee relating to disputes regarding solidarity mechanism costs in the maximum amount of CHF 25,000 are levied. The costs are to be borne in consideration of the parties' degree of success in the proceedings.

53. In this respect, the Single Judge of the PSC referred to art. 18 para. 1 lit i.) of the Procedural Rules, in accordance with which for any claim or counterclaim lodged between 10 June 2020 and 31 December 2020 (both inclusive), no procedural costs shall be levied. Thus, considering that the claim of the Claimant was lodged on 31 December 2020, the Single Judge determined that no procedural costs are levied in connection with the matter at hand.

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

Decision of the Single Judge of the Players´ Status Committee

1. The claim of the Claimant, Ray Power, is rejected.

2. This decision is rendered without costs.

For the Single Judge of the Players´ Status Committee:

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:

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