

Decision of the Dispute Resolution Chamber

passed on 7 April 2022

regarding an employment-related dispute concerning the player Vincent Thill

BY:

Frans de Weger (Netherlands), Chairperson
Michele Colucci (Italy), member
Jérôme Perlmutter (France), member

CLAIMANT / COUNTER-RESPONDENT:

CD Nacional, Portugal
Represented by João Paulo Marques

RESPONDENT / COUNTER-RESPONDENT:

Vincent Thill, Luxembourg
Represented by Cristiano Novazio

INTERVENING PARTY:

FC Vorskla Poltava, Ukraine

I. Facts of the case

1. On 1 September 2020, the Portuguese club CD Nacional (hereinafter: *the club*) and the Luxembourgian player Vincent Thill (hereinafter: *the player*) concluded an employment agreement (hereinafter: *the contract*), valid between 10 September 2020 and the end of the 2023/2024 sporting season in Portugal, based on which he was entitled to receive the following amounts:
 - EUR 20,000 on 1 September 2020;
 - EUR 500 net as monthly housing allowance;
 - EUR 120,000 net for the season 2020/2021,
 - EUR 130,000 net for the season 2021/2022;
 - EUR 140,000 net for the season 2022/2023;
 - EUR 150,000 net for the season 2023/2024.
2. Article 9 of the contracts holds the following clause: *'The player hereby declares that he is fully informed about the SAD's Internal Regulations, as well as the anti-doping regulations and in that sense being forbidden of any activity that is in violation of those regulations under penalty of the provided sanctions'*.
3. At the start of the 2021/2022 season, the club informed the player that he should be present at the club's facilities for the pre-season training that would start on 5 July 2021, however, the player did not show up, as he *'need to undergo medical treatments'*.
4. On 12 July 2021, the club opened disciplinary proceedings against the player and a fine of EUR 1,250 was proposed for 5 days of unjustified absence.
5. On 19 July 2021, the club again opened disciplinary proceedings against the player and a fine of EUR 1,500 was proposed for 5 days of unjustified absence.
6. On 27 July 2021, the club again opened disciplinary proceedings against the player, proposing a suspension from work for 5 days.
7. On 3 August 2021, the club issued a fine in the amount of EUR 1,250 to the player, for missing the 5 matches as mentioned before and a confirmation of the imposition of said fine was sent to the player.
8. Also on 3 August 2021, the club issued a new fine in the amount of EUR 1,500 to the player, for an additional 5 unjustified absences and a confirmation of the imposition of said fine was sent to the player.
9. On 3 August 2021, the club again opened disciplinary proceedings against the player, and proposed to unilaterally terminate the contract, due to the repeated unjustified absences. In said letter, the player was provided 10 days to reply to said proposed sanction.

10. On 7 August 2021, the player was suspended from work for 5 days, and a confirmation of the imposition of said sanction was sent to the player.
11. On 14 August 2021, the player sent an email to the club, contesting all the previous letters and correspondence, explaining that the proposed sanction of terminating the contract is groundless, as the club was duly informed by the doctor of the national team of Luxembourg, as well as by his agent, about the player's physical situation and that fact that he had to undergo surgery.
12. On 20 August 2021, the club unilaterally terminated the contract of the player.
13. On 31 August 2021, the player signed a new contract with the Ukrainian club FC Vorskla Poltava (hereinafter: *Poltava*), valid for the period between 1 September 2021 and 30 June 2024, based on which, in the overlapping period between 1 September 2021 and 30 June 2024, he was entitled to the total amount of EUR 42,330.

II. Proceedings before FIFA

14. On 10 December 2021, the club filed the claim at hand before FIFA. A brief summary of the position of the parties is detailed in continuation.

a. Position of the club

15. In its claim, the club explains that the player never informed it about potential medical treatments he had to undergo, nor that it authorised any medical treatments. As a result, the club explains that the player missed 4 matches the club played in the pre-season, and 1 match for the Portuguese League cup.
16. The requests for relief of the club were the following:
 - EUR 1,000,000 as compensation for breach of contract, plus 5% interest *p.a.* as from the contractual breach;
 - CHF 3,000 as legal costs.

b. Position of the player

17. In his reply and counterclaim, the player denies the club's allegations and argues that the club was fully aware of the injury he suffered from 30 January 2021.
18. In this respect, the player explains that he was provided '*anti-inflammatory and reinforcement fitness exercises*', as well as an ultrasound on 3 March 2021 to recover from the injury, however without much success.

19. After '*around one week later*' an MRI scan was made, the player was allegedly told that he could continue to play, however, according to the player, he kept playing with pain between February and April 2021. Since 22 April 2021, the player could not participate in matches of the club anymore.
20. What is more, after the player's call up for international duty with the national team of Luxemburg, the national team's doctor, Dr Lara Heinz, confirmed to the club's medical staff, in the person of Dr Rui Almeida, that the player was '*complaining of pain on his symphysis and pubis*' and a special MRI scan was scheduled. Dr Rui Almeida confirmed the receipt of said email on 14 April 2021.
21. What is more, according to the player, on 21 April 2021, he was again called up by the Football Federation of Luxemburg, for participating in two matches with the national team of Luxemburg against Norway on 2 June 2021 and Scotland on 6 June 2021. During said call up, he again addressed to the medical staff of the national team of Luxemburg that he was feeling pain in his pubis done, and consequently, an X-ray on 23 June and an Echography on 25 June 2021 took place. The results of said medical examination were forwarded by Dr Lara Heinz by e-mail on 26 June 2021 to the sport director of the club, Mr Saturnino Sousa (to the address saturnino.sousa@cdnacional.pt and on 26 June 2021 to Dr Rui Almeida (to the address rui17almeida@gmail.com), however, no answer followed.
22. According to the player, on 3 July 2021, Dr Lara Heinz again informed the club's doctor, Mr Rui Almeida (via the address rui17almeida@gmail.com) this time about an urgent surgery, which was planned for 13 July 2021, thus giving the club to chance to contest said operation within 10 days and send a follow up email on this injury and surgery on 5 and 25 July 2021 to Mr Rui Almeida attaching new medical information, however no reply followed.
23. In view of the above, the player is of the opinion that the club was perfectly aware of his medical situation and that he had a valid reason to be absent as from 5 July 2021. Therefore, the player deems that the club acted in bad faith during the month of July and August 2021, by aiming at terminating the player's contract.
24. What is more, the player explains that the issue of the club not agreeing with the medical examinations, was brought up for the first time in the letter dated 3 August 2021, as the club and/or its medical staff failed to reply to the previous correspondence of the medical staff of the national team of Luxemburg.
25. In addition, the player argues that the club, during the disciplinary proceedings in July and August 2021, failed to indicate the rights of the player as well as that he was not provided with the club's internal regulations. Moreover, during the internal disciplinary proceedings, the club ignored several correspondences of the medical staff of the national team of Luxemburg.

26. In conclusion, the player argues that the club acted in bad faith, put his health at risk and terminated the contract without just cause, as a result of which he is entitled to compensation for breach of contract. In this respect, the player explicitly contested the amount of EUR 1,000,000 as claimed by the club, since said amount is not to be considered the player's real market value.
27. The requests for relief of the player were the following:
- EUR 377,670 as compensation for breach of contract by the club, consisting of the residual value of the contract in the amount of EUR 420,000, minus the amount of EUR 42,330 as the value of his new contract with the Ukrainian club Poltava.
 - To impose sporting sanctions on the club.
 - To order the club to pay legal and procedural costs.

c. Position of Poltava

28. Despite having been invited to do so, Poltava failed to reply to the club's claim.

d. Reply of the club to the counterclaim

29. In reply to the counterclaim of the player, the club explained that the player was perfectly aware of his rights (defence rights, proposed sanctions, facts he was accused of) during the proceedings as on 14 August 2021, he even replied to the letters of the club in connection with the disciplinary proceedings, by contesting the contents.
30. Also, the club points out that the player was aware of the club's internal regulations, as article 9 of the contract clearly refers to them.
31. Moreover, the club denies that the player's injury, or any other health condition, was the reason to terminate the contract, and points out that it never received the medical reports dated 22 June 2021, as well as the letter dated 23 June 2021 and the attached '*patient report*'.
32. Further, the club argues that the player was fully informed that the season would start on 5 July 2021, however failed to show up without any authorization from the club. Moreover, the club explains that the player underwent medical examinations without authorization of the club.
33. In conclusion, the club points out that it terminated the contract with the player due to his lengthy absence.

III. Considerations of the Dispute Resolution Chamber

a. Competence and applicable legal framework

34. 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 10 December 2021 and submitted for decision on 7 April 2022. Taking into account the wording of art. 34 of the October 2021 edition of the Procedural Rules Governing the Football Tribunal (hereinafter: *the Procedural Rules*), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.
35. Subsequently, the members of the Chamber referred to art. 2 par. 1 of the Procedural Rules and observed that in accordance with art. 23 par. 1 in combination with art. 22 lit. b) of the Regulations on the Status and Transfer of Players (March 2022 edition), 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 Portuguese club and a Luxembourgian player, with the involvement of a Ukrainian club.
36. 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 Players (March 2022 edition), and considering that the present claim was lodged on 10 December 2021, the August 2021 edition of said regulations (hereinafter: *the Regulations*) is applicable to the matter at hand as to the substance.

b. Burden of proof

37. The Chamber recalled the basic principle of burden of proof, as stipulated in art. 13 par. 5 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 Chamber stressed the wording of art. 13 par. 4 of the Procedural Rules, pursuant to which it may consider evidence not filed by the parties, including without limitation the evidence generated by or within the Transfer Matching System (TMS).

c. Merits of the dispute

38. Its competence and the applicable regulations having been established, the Chamber entered into the merits of the dispute. In this respect, the Chamber started by acknowledging all the above-mentioned facts as well as the arguments and the documentation on file. However, the Chamber 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

39. The foregoing having been established, the Chamber moved to the substance of the matter, and took note of the fact that the parties strongly dispute whether or not the player was validly absent from the club's premises in the period between 5 July and 20 August 2021, and whether the other party had complied with the medical contractual obligations as per the contract.
40. In this context, the Chamber acknowledged that it its task was to determine what the contractual obligations of both parties in the mentioned period were, and whether it can be established that one of the parties had a valid reason to terminate the contract.
41. In this respect, the members of the Chamber noted that the club - on 20 August 2021 - decided to terminate the contract of the player, because of his alleged unauthorized absence from the club in the period between 5 July 2021 (when the season has started) and 20 August 2021, the day of termination of the contract.
42. After having analysed the argumentation from both parties, which is on file, the Chamber summarized that it turns out that the club is of the opinion that the player should have reported at the club's premises on 5 July 2021, despite being injured, while the player is of the opinion that the club was or should have been fully aware of his injury and that he had valid reasons to not show up at the club on 5 July 2021.
43. First of all, the Chamber was eager to emphasise that only a breach or misconduct which is of a certain severity justifies the termination of a contract. 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 ensure 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 only ever be an *ultima ratio* measure.
44. From the extensive documentation submitted by mainly the player, the members of the Chamber noted that the player, via the medical staff of the national team of Luxemburg had submitted extensive medical documentation, which were sent to an email address of Mr Rui Almeida, that was still in force in April 2021. What is more, the Chamber noted that - since the club and/or Mr Rui Almeida failed to answer to said correspondence - it can be understood that the player was under the assumption that he would not need to report back to the club immediately.
45. On the other hand, the members of the Chamber wished to point out that the club, allegedly via WhatsApp on 3 July and 4 July 2021, had informed the player that he needed to return to the club and that it did not agree with the operation, albeit in quite ambiguous wording. The player only confirmed that the doctor of the national team had sent medical documentation to the club.

46. Moreover, the Chamber also deemed it important to point out that throughout the entire disciplinary proceedings in July and August 2021, only in the letter dated 3 August 2021, the club brought up for the first time in a constructive way that it does not agree with the player undergoing medical treatment. Also, apart from the letter dated 3 August 2021, the player was never requested to present his official position as to the proposed sanctions. Another point that the members of the Chamber deemed vital to point out that is that the club failed to submit a copy of its internal disciplinary regulations, although the player, by signing the contract, apparently confirmed to be aware of those.
47. Additionally, the Chamber pointed out that the disciplinary proceedings that were initiated by the club, did not appear to have followed a due process, as the player was not properly requested to provide his position to the proposed sanctions.
48. Taking all the above into account, the members of the Chamber, on the one hand, established that the player could have been more communicative on his contractual obligations with the club (and not only focussing on the medical aspects) and not directly assume that he would not need to report back to the club. On the other hand, the members of the Chamber wished to give weight to the circumstance that the club should have acted in a more diligent way and trying to communicate on the medical issues of the player with the medical staff of the national team of Luxemburg, rather than starting several disciplinary proceedings against the player and eventually terminating the contract on 20 August 2021.
49. Based on the foregoing, the Chamber was of the firm opinion that the alleged breach of the contract by the player could not legitimately be considered as being severe enough to justify the termination of the contract, and that there would have been more lenient measures to be taken. In conclusion, the Chamber concluded that, by unilaterally terminating the contract on 20 August 2021, by not replying to several medical reports from the medical staff of the national team of Luxemburg and by not following a due process during the disciplinary investigations, the club acted in inaccurate way and as such, the termination of the contract cannot be considered the *ultima ratio*.
50. In conclusion, the Chamber therefore established that the club had terminated the contract with the player on 20 August 2021 without just cause and is to be held liable for the consequences thereof. As a result, the player is therefore entitled to outstanding remuneration and compensation for breach of contract. Already at this point, the Chamber decided to reject the club's claim.

ii. Consequences

51. 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.

52. The Chamber observed that at the time of termination, there was no outstanding remuneration to be paid by the club to the player, as the player's claim is limited to compensation for breach of contract.
53. As a consequence, the Chamber deemed that no outstanding remuneration should be awarded to the player.
54. Having stated the above, the Chamber turned 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.
55. In application of the relevant provision, the Chamber held that it first of all 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 Chamber established that no such compensation clause was included in the employment contract at the basis of the matter at stake.
56. As a consequence, the members of the Chamber 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.
57. Bearing in mind the foregoing as well as the claim of the player, the Chamber proceeded with the calculation of the monies payable to the player under the terms of the contract from the date of its unilateral termination until its end date. Consequently, the Chamber concluded that the amount of EUR 420,000 (i.e. the amounts of EUR 130,000, EUR 140,000 and EUR 150,000) serves as the basis for the determination of the amount of compensation for breach of contract.
58. 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.

59. Indeed, the player found employment with the Ukrainian club FC Vorskla Poltava. In accordance with the pertinent employment contract, the player was entitled to a total amount of EUR 42,330 in the overlapping period. Therefore, the Chamber concluded that the player mitigated his damages in the total amount of EUR 42,330.
60. Subsequently, the Chamber referred to art. 17 par. 1 lit. ii) of the Regulations, according to which a player is entitled to an amount corresponding to three monthly salaries as additional compensation should the termination of the employment contract at stake be due to overdue payables. In the case at hand, the Chamber however noted that it was effectively the club which had unilaterally terminated the contract.
61. In this respect, the DRC decided to not award any additional compensation to the player.
62. Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the club must pay the amount of EUR 377,670 to the player (i.e. EUR 420,000 minus EUR 42,330), which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter.
63. Lastly, taking into consideration the player's request as well as the constant practice of the Chamber in this regard, the latter decided to award the player interest on said compensation at the rate of 5% *p.a.* as of 10 December 2021 until the date of effective payment.

iii. Compliance with monetary decisions

64. Finally, taking into account the applicable Regulations, the Chamber referred to art. 24 par. 1 and 2 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.
65. 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. The overall maximum duration of the registration ban shall be of up to three entire and consecutive registration periods.
66. Therefore, bearing in mind the above, the DRC decided that the club must pay the full amount due (including all applicable interest) to the player within 45 days of notification of the decision, failing which, at the request of the player, a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods shall become immediately effective on the club in accordance with art. 24 par. 2, 4, and 7 of the Regulations.

67. The club shall make full payment (including all applicable interest) to the bank account provided by the player in the Bank Account Registration Form, which is attached to the present decision.
68. The DRC recalled that the above-mentioned ban will be lifted immediately and prior to its complete serving upon payment of the due amounts, in accordance with art. 24 par. 8 of the Regulations.

d. Costs

69. The Chamber referred to art. 25 par. 1 of the Procedural Rules, according to which *"Procedures are free of charge where at least one of the parties is a player, coach, football agent, or match agent"*. Accordingly, the Chamber decided that no procedural costs were to be imposed on the parties.
70. Likewise and for the sake of completeness, the Chamber recalled the contents of art. 25 par. 8 of the Procedural Rules, and decided that no procedural compensation shall be awarded in these proceedings.
71. Lastly, the DRC concluded its deliberations by rejecting any other requests for relief made by any of the parties.

IV. Decision of the Dispute Resolution Chamber

1. The claim of the Claimant / Counter-Respondent, CD Nacional, is rejected.
2. The counterclaim of the Respondent / Counter-Claimant, Vincent Thill, is accepted.
3. The Claimant / Counter-Respondent has to pay to the Respondent / Counter-Claimant, the following amount:
 - EUR 377,670 as compensation for breach of contract without just cause, plus 5% interest *p.a.* as from 10 December 2021 until the date of effective payment.
4. Full payment (including all applicable interest) shall be made to the bank account indicated in the enclosed Bank Account Registration Form.
5. Pursuant to art. 24 of the Regulations on the Status and Transfer of Players if full payment (including all applicable interest) is not made **within 45 days** of notification of this decision, the following **consequences** shall apply:
 1. The Claimant / Counter-Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration the ban shall be of three entire and consecutive registration periods.
 2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.
6. The consequences **shall only be enforced at the request of the Respondent / Counter-Claimant** in accordance with article 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.
7. This decision is rendered without costs.

For the Football Tribunal:



Emilio García Silvero
Chief Legal & Compliance Officer

NOTE RELATED TO THE APPEAL PROCEDURE:

According to article 57 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 17 of the Procedural Rules).

CONTACT INFORMATION

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