



Bulletin TAS
CAS Bulletin
Boletín del TAS

2023/01



TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

Bulletin TAS
CAS Bulletin
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2023/1

Lausanne 2023

CAS 2021/A/7636
SønderjyskE Fodbold A/S v. Fédération
Internationale de Football Association
(FIFA) & Dabo Babes Football Club
27 June 2022

Football; FIFA “proposal” regarding compensation for training (art. 13 FIFA Procedural Rules); CAS jurisdiction; Condition for a FIFA proposal to become final and binding and admissibility of the appeal; Applicable law; Scope of FIFA authority to issue a “proposal”; Notification of a decision; Consequences of FIFA’s failure to issue a complete proposal

Panel

Mr Jacopo Tognon (Italy), President
Mr Mark Andrew Hovell (United Kingdom)
Mr Lars Hilliger (Denmark)

Facts

SønderjyskE Fodbold A/S (the “Appellant” or the “Club” or “SønderjyskE”) is a Danish football club, affiliated to the Danish Football Federation, which in turn is affiliated to the *Fédération Internationale de Football Association* (“FIFA”).

The *Fédération Internationale de Football Association* (“FIFA” or the “First Respondent”) is the international governing body of football, based in Zurich, Switzerland.

Dabo Babes Football Club (the “Second Respondent” or “Dabo”) is an amateur club from Nigeria, affiliated to the Nigerian Football Federation (the “NFF”), which in turn is affiliated to FIFA.

On 4 January 2019, the Appellant and the Second Respondent entered into a transfer agreement (the “Transfer Agreement”) for the definitive transfer of the player Nazifi Yahaya, according to which the Appellant agreed to pay to the Second Respondent the amounts as follows:

“1. SE pays a total transfer fee including training compensation of EUR 7,000 gross (VAT to be paid in Nigeria) to Dabo to be paid by release of TMS.

(...)

The Appellant and the Player signed an employment agreement valid from 5 January until 31 December 2019 according to which the Player was entitled to receive a monthly salary of DKK 21.500 gross as a remuneration for his professional services rendered in favour of the Appellant, plus bonuses (the “Employment Agreement”).

According to the Appellant, the Second Respondent was aware of the fact that the training compensation was included in the transfer fee.

However, the Second Respondent filed a claim before the FIFA Dispute Resolution Chamber (the “FIFA DRC”) requesting the distribution of the training compensation in connection with the transfer and registration of the Player.

On 23 November 2020, Dabo lodged a claim before the FIFA DRC, claiming EUR 186,500 and 5% interest *p.a.* as outstanding training compensation.

On 2 December 2020, the FIFA DRC Secretariat issued the following proposal (the “Proposal”) to SønderjyskE and Dabo:

"[...] in accordance with Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, i.e. the Procedural Rules, and the FIFA Circular 1689, please find enclosed the proposal made by the FIFA secretariat in accordance with the above mentioned provision.

In sum, the proposed amount due by the respondent to the claimant is as follows:

EUR 243'287.67 as training compensation, plus 5% interest p.a. as of the due date

In accordance with Article 13 of the Procedural Rules, it is informed that the parties have to either accept or reject the proposal within the 15 days following this notification via TMS, i.e. until 17 December 2020. In this regard, the Claimant is limited only to accept or reject the proposal, excluding hereby any possibility to amend its original claim.

In case a proposal is accepted by all parties or the parties fail to provide an answer to the FIFA Player Status' Department within stipulated deadline, the proposal will become binding.

*In case of rejection by the respondent [i.e. SønderjyskE], the latter will have five additional days, i.e. until 11 January 2021 to provide its position to the claim. Should the respondent wish to extend its deadline to file its position, it must request said extension before the expiration of the above mentioned date, in which case the deadline is automatically extended for **ten (10) additional days, i.e. until 21 January 2021** in accordance with Article 16 par. 11 of the Procedural Rules.*

Please also be informed that in case of rejection of the proposal by one of the parties, a formal decision on this matter will be taken by the Single Judge of the sub-committee of Dispute Resolution Chamber in due course.

Equally, we wish to point out that the relevant proposal will always be without prejudice to any formal decision which could be passed by the competent deciding body in

the matter at a later stage in case the proposal is rejected by one of the parties". (emphasis in original)

On 16 December 2020, Dabo informed the FIFA DRC Secretariat that it accepted the Proposal.

SønderjyskE did not reply to the Proposal within the time limit granted therein.

On 18 December 2020, FIFA informed Dabo and SønderjyskE as follows (the "Appealed Decision"):

(...)

*[W]e would like to inform the parties involved that the proposal has become binding. Consequently, the Respondent, **SønderjyskE**, has to pay to the Claimant, **Dabo Babes FC**, within 30 days as from the date of this notification, if not done yet, the amount of **EUR 243'287.67, plus 5% interest p.a. as of the due date until the date of effective payment**.*

In the event that the aforementioned sum is not paid by the Respondent [SønderjyskE] within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

The Claimant [Dabo] is directed to inform the Respondent [SønderjyskE] immediately and directly of the account number to which the remittance is to be made and to notify the FIFA Dispute Resolution Chamber of every payment received". (emphasis in original)

On 8 January 2021, SønderjyskE filed an appeal against the Appealed Decision by submitting a Statement of Appeal before the Court of Arbitration for Sport (the "CAS") in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code").

Reasons

1. CAS Jurisdiction

The Appellant relied on Articles 57 and 58 of the FIFA Statutes as conferring jurisdiction on the CAS.

The First Respondent did not contest the jurisdiction of the CAS, whilst the Second Respondent disputed that the CAS has jurisdiction to hear the matter at hand. In particular, the Second Respondent contested the jurisdiction of CAS because: (i) the Appealed Decision was not a decision of a federation (FIFA) but a decision of the parties and it was of a mere informative nature and, thus, it was not an appealable decision; (ii) the Appellant had not exhausted all legal remedies available at FIFA since it did not reject the Proposal.

In light of the fact that the appealed decision i.e. a FIFA letter confirming the proposal issued by the FIFA DRC regarding the amounts in dispute relating to training compensation, produced legal effects towards the parties involved, it had to be considered as an appealable decision, pursuant to Article 58 para. 1 of the FIFA Statutes. Considering that there were no further internal remedies available at FIFA since FIFA decided that the proposal became final and binding, CAS had jurisdiction to hear this case.

2. Condition for a FIFA proposal to become final and binding and admissibility of the appeal

The Appealed Decision was notified to the Appellant on 18 December 2020 and the Appellant filed its Statement of Appeal on 8 January 2021. Therefore, the 21-day deadline to file the appeal was met. However, the Respondents disputed the admissibility of the

appeal arguing that in the absence of a clear objection made by the Appellant by the prescribed term, the Proposal submitted on 2 December 2020 had already entered into force and, thus, the Appealed Decision of 18 December 2020 could not be an appealable decision, being it of a merely informative nature. Therefore, in case SønnerjyskE wanted to challenge the Proposal, it had to object to the Proposal within the granted time limit.

As a first step, it is important to note that the proposal regarding the amounts in dispute relating to training compensation issued by the FIFA DRC in accordance with Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, i.e. the Procedural Rules, and the FIFA Circular 1689 (the proposal), becomes final and binding only in case both parties accepted the proposal or if none of the parties objects it within the stipulated term. In any case, the parties to which a proposal is addressed do not know whether the other party accepted or objected such proposal until proper confirmation is given by FIFA. Therefore, a proposal shall not be considered a final and binding decision. In this respect, pursuant to Article 13(3) FIFA Procedural Rules (2021 edition), only a "confirmation letter" from FIFA is a decision that definitely produces legal effects towards the parties involved.

As a result, an appeal filed by the appellant club within the deadline provided for by article R49 CAS Code against the appealed decision issued by the FIFA confirming the FIFA proposal is admissible. Indeed, while a proposal is not binding until confirmed by FIFA, the appealed decision is not of a mere informative nature but is a final decision producing legal effects towards the parties involved. Indeed, the consent of both

the Appellant and the Second Respondent – even tacit – was required before the Proposal could become final; without this, a confirmation letter, such as the Appealed Decision, was required.

3. Applicable law

Pursuant to Article 26 of the FIFA RSTP (2020 edition), disputes regarding training compensation “shall be assessed according to the regulations that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose”. Disputes related to training compensation and solidarity mechanism are usually governed by Annex 6 of the FIFA RSTP. Pursuant to the principle of *lex specialis derogat legi generali* (CAS 2017/A/5003, CAS 2015/A/4229, 2013/A/3274), Annex 6 of the FIFA RSTP prevails being it a more specific provision compared to the rules set forth by the FIFA Procedural Rules.

4. Scope of FIFA authority to issue a “proposal”

As per the clear wording of Article 13 of the FIFA Procedural Rules and the FIFA Circular no. 1689, FIFA administration has in principle the authority to issue a proposal to the parties involved in disputes regarding training compensation with respect to the amounts owed, upon condition that (1) the dispute has no complex facts and legal issues or (2) in cases in which the FIFA DRC has a clear and established jurisprudence. The condition that the dispute concerns no complex factual or legal issues shall be ascertained on a *prima facie* basis. Furthermore, the FIFA administration shall establish, always on a *prima facie* basis, whether all the regulatory requirements for being entitled to receive training compensation are met. According to the mechanism of article 13 of the FIFA Procedural

Rules, (i) FIFA has in principle the authority to issue proposals, if either of the pre-requisites (1) and (2) are met; (ii) FIFA has ample discretion in making that assessment (CAS 2020/A/7252 & CAS 2020/A/7516) but it should not act arbitrarily and should carry out proper due diligence; (iii) failure by a party to respond to a proposal qualifies as acceptance; (iv) notification of a proposal via TMS is valid and permitted (CAS 2004/A/574); (v) the parties have the duty to regularly check the “Claims” tab in TMS. The occurrence of all the above requisites has to be verified on a case-by-case basis.

In this specific case, the Panel held that FIFA administration went beyond its margin of ample discretion in determining the complexity of the case and it did not appear to conduct sufficient due diligence or sufficient investigation prior to determining to issue the Proposal. The Panel was therefore of the opinion that this case should not have been qualified as “simple” and that pre-requisite was not engaged. As such the FIFA administration should not have issued the Proposal but referred the case to the FIFA DRC.

In light of the above, the Panel finds that the FIFA administration, in this specific case, was not entitled to issue the Proposal notified to the Parties on 2 December 2020.

5. Notification of a decision

As a basic rule, a decision or other legally relevant statement is considered as being notified to the relevant person whenever that person has the opportunity to obtain knowledge of its content irrespective of whether that person has actually obtained knowledge. Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content. In this respect, in case

of failure of a party to respond to or reject a FIFA proposal notified by TMS within 15 days, such proposal is considered accepted, and the party is considered having waived the right to request a formal decision. Thus, there are two requirements that have to be met for having a “receipt” of a communication, namely the communication must have entered into the “sphere of influence” of the addressee and one can expect under the circumstances that the addressee takes note of it. Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content (CAS 2019/A/6253).

Thus, the Panel found that a failure of a party to reject a proposal constitutes a waiver of the right to request a formal decision. Furthermore, a club shall regularly check the “Claims” tab in TMS, failing which such club will bear the disadvantages deriving therefrom.

6. Consequences of FIFA’s failure to issue a complete/correct Proposal

In consideration of all the foregoing, the Panel found that in the case at hand the FIFA administration had exceeded its ample discretion in the evaluation of the complexity of the dispute. This was simply not a matter that should have been sent down the fast-track route. Therefore, pursuant to Article R57 of the CAS Code, the Panel annulled the Appealed Decision and referred the case back to FIFA.

In this respect, the Panel noted that Article R57 of the CAS Code allows CAS panels to issue a new decision or to annul the decision and refer the case back to the previous instance. In circumstances where there was no decision taken on the merits at the first instance, the Panel determined that it should not render a decision

on the merits of the case and substitute a FIFA decision which never considered the merits, rather it is more appropriate to return the case to FIFA (see *CAS 2012/A/2854; Mavromati/Reeb, op. cit., Article R57 N 20*). Indeed, the Panel found that the objectives of not depriving the parties of one level of adjudication and of allowing a unitary assessment of all the relevant aspects of the dispute should prevail over the advantages with respect to time and costs that a direct adjudication on the merits of the case by a CAS panel would imply.

Decision

In light of the foregoing, the Panel upheld the appeal filed by SønderjyskE Fodbold A/S on 8 January 2021 against the decision issued by FIFA on 18 December 2020 and referred back to FIFA for a formal decision on the merits said decision.