



The

FIVB TRIBUNAL

Mr. Piotr Stolarski, Single Judge

herewith issues the following

DECISION

on the Request for Review filed by

Ms. Tatiana Artmenko (“Applicant”)
represented by Mr. Joseph Gayer,
Adv., Zysman, Aharoni, Gayer & Co. Law Offices,
41-45 Rothschild Blvd., Tel Aviv 6578401, Israel

vs.

Lokomotiv Baku Women Volleyball Club (“Respondent”)
12, Byul-Byul Avenue, Baku, Azerbaijan, AZ 1000,
represented by its Director, Mr. Khayal J. Rahimov

1. The Parties

1. The Applicant is a professional volleyball player from Israel.
2. The Respondent is a professional volleyball club in Baku, Azerbaijan.

2. The FIVB Tribunal Judge

3. Article 1.5 of the FIVB Tribunal Regulations (“Regulations”) provides as follows:

“1.5 Cases before the FIVB Tribunal shall be heard by all five (5) members, unless one or more of the members is unavailable or ineligible due to reasons of conflict (see Article 9) and, thus, replaced by a substitute judge from the same Confederation. However, in the event that a case only involves parties from the same Confederation, that case shall be heard by the judge from that Confederation as a single judge unless a hearing by the full FIVB Tribunal is requested by one of the parties. If that member has the same nationality as one of the parties, he/she shall be replaced by the substitute member from the same Confederation. If both the member and the substitute member from the Confederation in question have the nationality of one of the parties, the FIVB President shall appoint ad-hoc a neutral judge from the same Confederation provided that he/she possesses the qualifications set out in Article 1.3 above”.

4. Since both parties come from Europe and none of the parties requested a hearing by the full FIVB Tribunal, this Request for Review will be heard by the judge of the FIVB Tribunal coming from Europe, acting as a single judge.
5. On 5 March 2014, Mr. Erhard Rubert, regular member of the FIVB Tribunal coming from Europe, was forced to resign as the judge on this case. He was replaced by the substitute member, Mr. Piotr Stolarski (hereinafter the “Judge”). The Judge does not have the same nationality as any of the parties and the parties did not challenge his appointment.

3. Facts and Proceedings

3.1 Background Facts

6. On 1 August 2012, the Applicant and the Respondent entered into a contract whereby the Claimant agreed to play for the Respondent’s A team for the 2012-2013 season in exchange for a salary of USD 100,000 net, payable in 10 equal instalments, and other financial benefits (hereinafter the “Contract”).

7. The Contract contained, among others, the following provisions:

4. Payment

The Club will pay a total amount of US\$100,000 (One Hundred Thousand US dollars net per season) to the Player due to this contract, following the below mentioned terms and conditions, without bonuses reimbursement.

The club will pay \$10,000 when the player arrive in Azerbaijan, after he medical checkup)

The payment rates must be payed like these conditions:

- 2012 September 30	\$10,000
- 2012 October 30	\$10,000
- 2012 November 30	\$10,000
- 2012 December 30	\$10,000
- 2013 January 30	\$10,000
- 2013 February 28	\$10,000
- 2013 March 30	\$10,000
- 2013 April 30	\$10,000
- 2013 May 31	\$10,000

Total: US\$ 100.000 (One Hundred Thousand US dollars US) Net. [sic]

5. Accommodation

The Club provides the Player with a fully furnished flat. [...] In case this contract expires, or is terminated because of any reason, the Player should return the keys and free the flat to the Club as it was the moment one moved in.

[...]

6. Fulfillment of the Rules

The Player is obliged to fulfill the sport law, sport ethics, good will rules, the Club's principles, work regulations, rules and decisions taken by the Club's Board of Directors, Executive Committee, Directors, Manager and Coach.

The Player should protect the interest of the Club and avoid harming the Club's name and reputation, hence be respectable and honorable.

The obligations stated herein form a "fulltime" duty and the working days and hours will be determined by the Club. The Player is obliged to be attending at all team's training sessions and games, including holidays. [sic]

7. Sickness

The Player will have health insurance supplied by the Club.

10. Jurisdiction

The parties hereby agree that in case any dispute arises as to the fulfillment or interpretation of this Contract, they should submit their application translated into English to the jurisdiction of the courts of: Azerbaijan Baku.”

8. The Applicant played for the Respondent for several months, and the Respondent made the salary payments for such period as required by the Contract.
9. On 15 February 2013, the Applicant (injury) during a training session and sought medical care from the Respondent. Upon a medical examination at the orthopaedic department at Baku’s Central Hospital, the physician stated that the injury did not require surgery and prescribed physical therapy.
10. The Applicant originally engaged in physical therapy but the injury was not healing as she expected. Thus, the Applicant wanted to seek a second opinion at a medical and rehabilitation centre for athletes in Barcelona, Spain. Originally, the Respondent granted permission for the Applicant to seek a second opinion in Barcelona; however, it revoked its permission a few hours before the Applicant’s scheduled flight to Barcelona.
11. After futile attempts to communicate between the Parties, the Applicant nevertheless decided to fly to Barcelona and seek a second medical opinion on 2 March 2013.
12. On 4 March 2013, the Applicant was diagnosed with (injury) by the doctor at the medical and rehabilitation centre for athletes in Barcelona. On the next day, she had (treatment) without telling the Respondent beforehand. Subsequently, the Applicant stayed in Barcelona for an additional month to rehabilitate (body part) at the medical and rehabilitation centre for athletes in Barcelona.
13. On 9 April 2013, the Applicant returned to Baku. Upon her return, the Respondent refused to pay any further salaries and fringe benefits for April and May 2013. The Respondent also withheld a bonus earned by the Applicant for qualification to the “Playoff 12” of the CEV Champions League.
14. On 8 November 2013, the Respondent paid the bonus earned by the Applicant for the qualification to the “Playoff 12” of the CEV Champions League.

3.2 The Proceedings before the FIVB Tribunal

15. On 23 October 2013, the CEV Mediation Chamber issued a decision in the present manner in accordance with Article 45.11 of the FIVB Sports Regulations (hereinafter the “Decision”) ruling that the Respondent owed the Applicant the amount of USD 5,000 net plus 5 percent interest per annum as payment for the bonus earned by the Applicant for the qualification to the “Playoff 12” of the CEV Champions League, which the Respondent subsequently paid to the Applicant. The Decision dismissed the Applicant’s claims for salary payments for the months of April and May 2013 and the reimbursement of medical expenses incurred by the Applicant due to her (treatment).
16. On 31 October 2013, the Applicant filed a Request for Review of the Decision with accompanying exhibits.
17. On 11 November 2013, the FIVB Tribunal acknowledged receipt of the Applicant’s Request for Review and invited the Respondent to file an Answer by no later than 16 December 2013.
18. On 17 December 2013, the FIVB Tribunal noted that the Respondent had failed to file an Answer within the given time limit and provided a final deadline of 20 December 2013 for the Respondent to file an Answer.
19. On 19 December 2013, the Respondent filed its Answer with accompanying exhibits.
20. On 5 February 2014, the FIVB Tribunal acknowledged receipt of the Respondent’s Answer.
21. On 5 March 2014, the FIVB Tribunal informed the Parties that Mr. Rubert had been replaced by the Judge in the present proceedings.

4. The Parties’ Submissions

4.1 The Applicant’s Request for Review

22. The Applicant submits that the Respondent failed to pay her salary and other benefits under the Contract for the months of April and May 2013.
23. The Applicant argues that her trip to Barcelona to receive medical care, even if done so without the Respondent’s authorization, cannot be treated as a breach of the Contract or just cause to terminate said Contract.

24. The Applicant claims that her decision to travel to get medical care was reasonable and justified under the circumstances. Article 6 of the Contract does not require the Applicant to blindly follow every directive of the Respondent, especially considered this directive related to the Applicant's personal health matters and did not have a reasonable justification. Moreover, not every diversion from the Respondent's directive can constitute a fundamental breach of the Contract allowing the Respondent to cease its obligations under the Contract, especially considering the fact that this particular breach did not cause any damage to the Respondent.
25. The Applicant asserts that the Respondent failed to provide any justification for its revocation of its permission to seek a second opinion. The Respondent's reasons for revoking permission are extremely relevant in order to determine whether they are reasonable or merely a pretext.
26. The Applicant argues that the language of Article 6 limits the Applicant's obligation to follow the Respondent's directives to "*protecting the interest of the club and avoid harming the Club's name and reputation.*" By traveling to Barcelona to seek a second opinion, the Applicant did not harm the Club's interest because there is no causation between her trip and her inability to play. The Applicant asserts that she would not have been able to play even if she did not go to Barcelona.
27. The Applicant stresses that she did not travel for the purpose of going on vacation but in order to treat her injury in the best possible way so as to allow her to play again as quickly as possible.
28. The Applicant argues that the injury itself, not the (treatment) as stated in the Decision, was season-ending because the conservative treatment prescribed by the Respondent's doctors had been ineffective.
29. The Applicant claims that her actions of not informing the Respondent before having (treatment) or returning to Baku upon the Club's request do not constitute just cause to completely disregard the financial obligations owed by the Respondent. She argues that her decision to stay in Barcelona and get healthy as compared to the sanction of complete and total denial of all of her financial rights, the most basic and fundamental obligation owed by a club, is completely disproportionate.
30. The Applicant states that her decision to receive a second opinion from a doctor she trusted should not be held against her. She claims any reasonable professional athlete would have

acted in the same way, especially as it relates to a health issue that affects her ability to perform on the court.

31. As it relates to the issue of reimbursement of medical expenses, the Applicant asserts that the Respondent has a general obligation to bear medical costs suffered during and due to the player's engagement with the club.
32. The Applicant contends that the existence of an insurance policy only relates to the means of coverage but does not effect this obligation. She states that it was not her responsibility, but rather the Respondent's, to inform the insurance company of her surgery because the Respondent purchased the policy on her behalf.
33. The Applicant maintains that the Respondent has failed to provide any documentation of its insurance policy and has failed to demonstrate how its right to receive reimbursement from the insurance company has been compromised due to the Applicant's trip to Barcelona.
34. The Applicant argues that it was not aware of which insurance provider the Respondent had contracted with regarding her policy. She claims that the Club's disapproval of her course of action and treatment should not impair her ability to seek reimbursement because the policy, whether or not it existed, was designed to cover this exact situation. Thus, she concludes that the existence of an insurance policy only reinforces her argument that the Respondent was responsible for her medical expenses because the insurance policy was meant to cover her medical expenses.
35. The Applicant highlights FIFA Dispute Resolution Chamber's (FIFA DRC) jurisprudence to support her argument that the Respondent lacked just cause to terminate the Contract. Specifically, under FIFA DRC jurisprudence, she states that if a player had just cause for an absence, then said absence cannot be considered an unjustified breach of the contract. The Applicant then contends that she had just cause for her absence due to her need to obtain medical care.
36. The Applicant requests the following relief:

"Therefore, the Club should pay the Player's salaries as well as all of her out pocket expenses due to her injury, all of which were reasonable under the circumstances, all as stipulated in the Player's complaint to the CEV/FIVB dated August 29th, 2013."

4.2 The Respondent's Answer

37. The Respondent contends that if either party does not follow any of its obligations under the Contract, then the other party has just cause to terminate the contract.
38. Regarding the actions of the Applicant, the Respondent claims that the Applicant breached several provisions.
39. First, the Respondent asserts that the Applicant sought permission to fly to Barcelona from the Respondent's employee who was not authorized to grant such permission.
40. Second, the Respondent states that the Applicant did not leave her apartment in the same condition it was in when she received it as required by Article 5 of the Contract. Some furniture was found missing that the Respondent was later charged for.
41. Regarding Article 6 of the Contract, the Respondent argues that the Applicant had multiple violations of this provision. Specifically, the Respondent claims that 1) the Player requested to seek a second opinion from the "President" who was a non-official body to grant such request; 2) the Applicant did not wait for a final decision on her request before leaving the country; 3) the President's decision are not covered by Article 6; 4) The Applicant's decisions to purchase airfare to and from Barcelona without confirmation from the Respondent's financial department and to accept the recommendations of the doctors in Barcelona without an official representative and doctor from the Respondent is a serious breach to the interests of the Respondent and 5) Article 6 states that the Respondent would determine the days and hours of work which the Applicant violated several times despite warnings from the Respondent.
42. The Respondent contends that the FIVB Tribunal does not have jurisdiction over the present dispute because the Contract provides that the courts of the Azerbaijan Republic have jurisdiction over the present dispute.
43. The Respondent states that it revoked the Applicant's permission to travel in order to gather its Management Board so that it could make a final decision on the best course of action. The Respondent claims that it requested that the Applicant wait a few days in order to allow the Management Board to meet.

44. The Respondent maintains that it tried to reach out to the Applicant after she had left but was unable to reach her for ten to fifteen days.
45. Upon her return to Baku, the Respondent contends that the Applicant had treatment that was paid for by the Respondent. It states that she went to rehabilitation at the fitness centre in Hotel Europe and had physiotherapy with the Respondent's physiotherapists.

5. Jurisdiction

5.1 In general

46. Article 2.1 of the Regulations reads as follows:

"[t]he FIVB Tribunal is competent to decide financial disputes of an international dimension between clubs, players and coaches from within the world of volleyball".

47. Article 2.2 of the Regulations stipulates that the FIVB Tribunal can only resolve disputes:

"2.2.1 arising between the natural and legal persons/entities mentioned in Article 2.1;

and

2.2.2 decided previously by the FIVB/ a Confederation or referred by the FIVB/ a Confederation to the FIVB Tribunal"

48. Article 2.3 of the Regulations grants the Judge the power to rule on his own jurisdiction.
49. Thus, in order for the FIVB Tribunal to have jurisdiction over the dispute, the Judge shall examine whether the conditions of both Articles 2.1 and 2.2 are satisfied.
50. The present dispute involves a claim for unpaid salaries and reimbursement of medical expenses by an Israeli player against an Azerbaijani club. The Judge finds that this dispute clearly qualifies as a financial dispute of an international dimension between a player and a club in accordance with Articles 2.1 and 2.2.1.
51. Furthermore, the Request for Review at hand is addressed against the Decision, which was rendered by the CEV Mediation Chamber. The CEV Mediation Chamber was created to adjudicate – among others – financial disputes within the Confédération Européenne de Volleyball ("CEV"), a confederation of the FIVB. Indeed, the CEV Mediation Chamber was

competent and decided the case at first instance on the basis of Article 45.11 of the FIVB Sports Regulations and following FIVB's delegation to CEV of the respective power to decide financial disputes among European parties. Therefore, the present Request for Review stems from a decision of a confederation and the Judge holds that Article 2.2.2 is also satisfied.

52. Based on the above, the conditions of Articles 2.1 and 2.2 are satisfied. Therefore, the FIVB Tribunal has jurisdiction over the present Request for Review pursuant to the Regulations.

5.2 Respondent's contention regarding Jurisdiction

53. In its Answer, the Respondent claims that any dispute regarding the terms of the Contract must be referred to the courts of Azerbaijan. In support of this proposition, the Respondent highlights the language of Article 10 which states as follows:

"10. Jurisdiction

The parties hereby agree that in case any dispute arises as to the fulfillment or interpretation of this Contract, they should submit their application translated into English to the jurisdiction of the courts of: Azerbaijan Baku."

54. The Judge notes that this language clearly grants a party the option to file a claim with the courts of Azerbaijan.
55. However, the present dispute involves parties falling under the jurisdiction of the FIVB. As such, both parties are subject to the regulatory framework enacted and implemented by the FIVB, including the FIVB Sports Regulations and the Regulations.
56. As correctly noted in the Decision, the FIVB Sports Regulations grant the FIVB the power to delegate to a Confederation (here: to the CEV) the competence to decide the dispute in the first instance (see Section 4.1 of the Decision). Likewise, as stated above, the Regulations grant the FIVB Tribunal jurisdiction over a Request for Review of said Decision.
57. Thus, two potential paths are provided to resolve the present dispute: 1) through the Azerbaijani courts pursuant to Article 10 of the Contract and 2) through the CEV Mediation Chamber and the FIVB Tribunal on second instance – and potentially before the Court of Arbitration for Sport – pursuant to FIVB's Regulations. The Applicant had the option to choose either path and chose the latter. Therefore, the Judge holds that Respondent's contention, that the FIVB Tribunal does not have jurisdiction due to the language of Article 10 in the Contract, must be dismissed.

6. Discussion

6.1 Applicable Law

58. Under the heading “Law Applicable to the Merits”, Article 13 of the Regulations reads as follows:

“Unless otherwise agreed by the parties, the Tribunal shall apply general considerations of justice and fairness without reference to any particular national or international law (ex aequo et bono).”

59. Neither of the parties have suggested that there was an agreement as to the law applicable to the merits in the present dispute nor have they based their arguments on any national law. In light of the above, the Judge will decide the issues submitted to him in this proceeding *ex aequo et bono*.

60. In substance, it is generally considered that an arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case”.¹

61. In light of the foregoing matters, the Judge makes the following findings.

6.2 Findings

62. Generally speaking, the Judge finds that the Parties agree on the following facts, which are therefore uncontested:

- 1) the conclusion of the Contract on 1 August 2012 and the contractual content and obligations for both the Applicant and the Respondent arising from the Contract;
- 2) the circumstances of the Applicant’s injury on 15 February 2013;
- 3) the medical treatment provided by the Respondent;
- 4) the Respondent’s original acquiescence to Applicant’s request to fly to Barcelona for a second opinion;

¹ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

5) the Respondent's withdrawal of its consent to the Applicant's request to fly to Barcelona for a second opinion;

6) the Applicant's trip to Barcelona on 2 March 2013 without authorization from the Respondent;

7) the Applicant's (treatment) on 5 March 2013 and subsequent rehabilitation in Barcelona; and

8) the Applicant's return to Baku on 9 April 2013.

63. Thus, the crux of the present dispute is based on whether the Applicant's decision to obtain a second opinion, have (treatment) in Barcelona was in accordance with the provisions of the Contract based on the application of *ex aequo et bono* principles.

64. As will be described in further detail *infra*, the Judge finds that the Applicant's actions were not in accordance with the provisions of the Contract and, thus, constituted a breach of the Contract. Specifically, the Judge finds that the Applicant's decision to leave the Respondent to travel to Barcelona and undergo (treatment) without the permission of the Respondent constituted a wilful abandonment of her duties under Article 6 of the Contract.

65. Rather than leaving the country and having surgery without permission, the Applicant, who was apparently not fully satisfied with the medical treatment she was receiving from the Respondent, could have gone for an independent consultation at her own expense and with the agreement of the Respondent. If that independent consultation determined that (different treatment) was necessary, the Applicant could have presented that determination to the Respondent and requested to go through with the surgery at the Respondent's expense. If the Respondent refused, the Applicant could have stated that such refusal was a violation of its obligations under Article 7 of the Contract and potentially terminated the agreement. The Applicant would have given the Respondent the opportunity to evaluate whether to allow the (different treatment) as requested or risk a potential termination by the Applicant.

66. Instead, the Applicant failed to provide the Respondent with the opportunity to make such a determination as well as plan for the absence of the Applicant from competition. As such, she sufficiently breached Article 6 of the Contract allowing the Respondent to terminate the Contract, to withhold the remaining payments and benefits owed and to refuse to cover the

cost of her medical care and other related expenses involving her trip to Barcelona.

67. Regardless of the above finding, the Applicant was entitled to the bonus under the Contract, which has already been paid by the Respondent.
68. Therefore, based on the record, the Judge rules that the Request for Review is dismissed, and the Decision is upheld in its entirety.

DECISION

69. For the reasons set forth above, the Judge decides as follows:

- 1. The Request for Review filed by Ms. Tatiana Artmenko is dismissed in its entirety.**
- 2. The decision rendered by the CEV Mediation Chamber dated 23 October 2013 is upheld in its entirety.**
- 3. Each party shall bear its own costs.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Lausanne, seat of the arbitration, 31 March 2014.

Piotr Stolarski
Single Judge