FÉDÉRATION INTERNATIONALE
DE VOLLEYBALL

The

FIVB TRIBUNAL

herewith issues the following

DECISION

on the Request for Review of CF 57/2016 filed by

Club Jeunesse Bauchrieh ("Claimant")
represented by Mr. Caesar Bakhos, President, and Mr. Auguste Bakhos, Legal Counsel
Auguste Bakhos Street Bakhos Blg., 1st floor, Bauchrieh, Lebanon

vs.

Jenry Bell Cisnero ("First Respondent")
Nisse Huttunen ("Second Respondent")
jointly represented by Mr. Nisse Huttunen,
FIVB Licensed Agent

1. The Parties

1. The Claimant (also hereinafter the "Club") is a professional volleyball club with its legal seat in Bauchrieh, Lebanon.

2. The First Respondent (also hereinafter the "Player") is a professional volleyball player from Cuba.

3. The Second Respondent is an FIVB-Licensed Agent from Finland.

2. The FIVB Tribunal Panel

4. Article 19.1.5. of the FIVB Sports Regulations (hereinafter the "Regulations") provides as follows:

"Cases before the FIVB Tribunal shall be heard by the Chairperson, provided that the amount in dispute does not exceed CHF 200'000 (two hundred thousand Swiss Francs). All other cases shall be heard by the Chairperson and two (2) other members of the FIVB Tribunal, appointed by the Chairperson. If one or more of the members is unavailable or ineligible due to reasons of conflict (see Article 20.4), the Chairperson shall appoint another member of the FIVB Tribunal. If the Chairperson is unavailable or ineligible due to reasons of conflict (see Article 20.4), he/she shall be replaced by the Vice-Chairperson."

5. As the present dispute involves a claim for payment of USD 27,700 and a claim for damages of USD 80,000, the FIVB Tribunal's Chairperson shall decide the case pursuant to Article 19.1.5. of the Regulations. Because the Chairperson of the FIVB Tribunal was no longer sitting on the FIVB Tribunal when this case was initiated, the Vice-Chairperson of the FIVB Tribunal, Mr. Liu Chi from China, is acting Chairperson (hereinafter "Chairperson") on the present case.

6. Accordingly, on 31 August 2016, Mr. Liu Chi was appointed by the FIVB Tribunal as the single judge (hereinafter "FIVB Tribunal Judge") in the present case.

3. Facts and Proceedings

3.1 Background Facts

7. The following facts are undisputed by the Parties:

8. Before playing for the Claimant, the First Respondent suffered … (injury) and had … (treatment) in December 2013.

9. As from 25 January 2015, the First Respondent practiced and played for the Claimant's team.

10. On 28 January 2015, the Claimant's doctor conducted a medical examination of the First Respondent and found, based on her notes dated 29 January 2015, that he was *"As mention above about Mr. Bell, he is not ready to play in the Lebanese Championship as a professional foreigner and he needs to be followed by a physical treatment for a long periode to be completely healed"* (sic).

11. On 11 February 2015, the Claimant paid CHF 5,000 to the FIVB in order to finalise the First Respondent's International Transfer Certificate ("ITC").

12. On 13 February 2015, the Claimant and the First Respondent signed a labour contract (hereinafter the "Contract"), pursuant to which the First Respondent was to play for the Claimant during the remainder of the 2014/15 season. The term of the Contract ran from 25 January 2015 to 15 May 2015.

13. The Contract contained *inter alia* the following provisions:

> *"4. Before being employed, the employee has to undergo a medical examination which shall determine whether or not he is declared fit for all kind of sporting activities. This medical examination is to be made before the employee starts his training with Club Jeunesse Bauchrieh. If the medical check is not organized and made by the club inside 1 week period after players arrival, then it's counted as made and players contract is automatically valid.*
>
> […]
>
> *6. The salary fixed at a monthly net remuneration of 10.000 USD, from 1st of February 2015 till 15th of may 2015 (3,5 salaries). The salaries are payable on the bank account number of the employee, by the end of each month. The employer pays all the possible taxes.*

Payments 2015

15.02.2015	*5,000 USD*
15.03.2015	*10,000 USD*
15.04.2015	*10,000 USD*
10.05.2015	*10,000 USD*
Totally	*35,000 USD*

8. When ill or by circumstances beyond his control, the employee has the obligation to inform the trainer. A medical certificate should be presented when absent for reasons of illness. The doctor of the club should be consulted for reasons of illness or accident. Only with his permission, another doctor or consulting physician can be seen. When injured, the employee, if possible, should be present during training sessions, matches and other activities organised by the club. The club guarantees the payment of a net salary in the case of an occupational accident during the term of the agreement. All holiday periods will take place outside the competition."

14. After a match in Cairo in late February 2015, the First Respondent's … (body part) became … (symptom).

15. On 27 February 2015, the Claimant remitted a payment of USD 1,500 to the First Respondent. Additionally, the Claimant also remitted a cash payment[1] to the First Respondent

16. On 2 March 2015, the Second Respondent sent an email to the Claimant stating the following:

"Dear Caesar,
How are you?
I have a quick question:
Henry's … (body part) *was a* … (symptom) *in Cairo. The floor was like stone, and not perfect.*
He is not feeling pain or something. But still, do you have a good doctor who can check the … (body part) *if Henry feels that it is necessary?"* (sic)

[1] The Parties disagree on the amount of the cash payment. The First Respondent claims that he received USD 800 while the Claimant contended that it paid USD 1,000.

17. The First Respondent trained and played for the Claimant in March 2015[2].

18. On 15 April 2015, the Claimant remitted a payment of USD 5,000 to the First Respondent.

19. On 7 May 2015, the Claimant's President sent the following response to an email from the Second Respondent dates 5 April 2015:

> *"Hello dear*
> *I hope u got a nice flight*
> *I know it was too long one*
> *As per our letter*
> *5000 usd for bell this is what we agreed with bell and we are ready to get him back if he is ok hr told us that in august he will be back as before*
> *Concerning Pedro*
> *he played 4 month as per contract*
> *for ur commission it is 10 percent for what the players get*
> *regards Caesar"* (sic)

3.2 The proceedings before the FIVB Tribunal

20. On 30 June 2016, the FIVB issued a decision in the present manner in accordance with Article 18.1.e. of the FIVB Sports Regulations (hereinafter the "Decision"), finding that the Claimant had to pay outstanding salaries in the amount of USD 27,700 net and CHF 500 to the First Respondent but dismissed the claim brought by the Second Respondent for agent fees due to lack of competence.

21. On 14 July 2016, the Claimant filed his Request for Review with the FIVB and paid part of the handling fee (CHF 1,000).

22. On 18 July 2016, the FIVB Tribunal Secretariat acknowledged receipt of the Claimant's Request for Review but informed it that, due to the Claimant's counterclaim, the amount in dispute,

[2] The Parties disagree on the date that the First Respondent stopped playing for the Claimant. The Claimant says he stopped playing in March whereas the Respondents contend that he played through the conclusion of the regular season.

and, thus, the handling fee, was actually higher (CHF 3,000) than the amount sent by the Claimant (CHF 1,000). The FIVB Tribunal set a deadline of 22 July 2016 to pay the remaining amount or the Request for Review would be deemed withdrawn.

23. On 21 July 2016, the Claimant paid the remaining portion of the handling fee.

24. On 4 August 2016, the FIVB Tribunal Secretariat acknowledged receipt of the Request for Review to the Parties and invited the Respondents to submit their Answer by no later than 25 August 2016.

25. At 12:02 AM on 26 August 2016, the Respondents filed their Answer to the Request for Review.

26. On the same day, the FIVB Tribunal acknowledged receipt of the Respondents' Answer and stated that no further submissions would be accepted unless otherwise requested by the FIVB Tribunal.

4. The Parties' submissions

27. The following section provides a brief summary of the Parties' submissions and does not purport to include every contention put forth by them. However, the FIVB Tribunal Judge has thoroughly considered all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to those arguments in this section.

4.1. The Claimant's Request for Review

28. The First Respondent was found to be unfit to play after his initial medical examination but he asked the Claimant to give him a chance to play because he would get better with time. The Claimant begrudgingly agreed because it was stuck with him given its investment and the imminent start of the Arab League.

29. In February 2015, the First Respondent reinjured the same … (body part) that he had had … (treatment) on during an Arab League match in Cairo. It became … (symptom), preventing him from being able to play at his usual level and was directly responsible for the Claimant's poor results in the Arab League.

30. The Claimant expressed its shock by the Decision in that it did not demonstrate the actual circumstances of the case and displayed major flaws regarding the facts of the dispute. The substance of the Decision demonstrated bias against the Claimant and a lack of proper legal justification. The Claimant has never been attacked by agents or players due to its positive relationship with them and it urged the FIVB Tribunal to reconsider the Decision rendered, especially because the Claimant did not have the means to cover its costs.

31. The Claimant then stated that it rejected the Decision and highlighted several factual errors in the Decision. The Decision incorrectly stated that the Contract signed on 14 February 2015 instead of 13 February 2015.

32. Additionally, the Decision stated that the First Respondent was injured during a match in Cairo in February 2016 and that the Claimant was unable to meet its burden of proof that the First Respondent's injury was due to a pre-existing condition. First, the date of the match was February 2015, not 2016. Second, regarding the burden of proof, the Claimant failed to understand why it had the burden of proving this issue when the FIVB accepted the fact that the match was played on a stone floor without any evidence from the Respondents to that effect. The Arab League floor conformed to international standards and was approved by the head of the FIVB Refereeing Commission, Mr. Hassan Ahmad. Additionally, the Claimant's doctor confirmed that the First Respondent's … (body part) would … (symptom) … (previous treatment) due to water retention in the … (body part), and this was irrefutable. The Claimant did not understand the high burden of proof unjustly put on the Claimant. The First Respondent's injury was due to a pre-existing condition and not an occupational injury for which the Claimant could be held responsible.

33. Furthermore, the FIVB accepted that the First Respondent played with the Claimant until the end of the season based on the fact that the Second Respondent sent an email on 5 April 2015 announcing that the First Respondent would stop playing if he did not receive his outstanding salaries. Failing to respond to the Second Respondent's email did not imply that the First Respondent was still playing with Claimant. The wording of the Claimant's President's response clearly highlights that the First Respondent did not fulfil his contract (as compared to the language used regarding … (another player)) and clearly defined the total amount still owed to the First Respondent, i.e. USD 5,000, in order to ensure that all Parties were aware of the amount owed to him. The First Respondent also left Lebanon without submitting his claim to the Lebanese Volleyball Federation, which would have been the right step to take in order

to secure his rights. If the First Respondent was playing as usual, the Claimant would not have had to hire two foreign players for the Final Six, which the Claimant would not have done because of its budget and financial commitment to the First Respondent. The Second Respondent's website also states in the First Respondent's profile that he played until March 2015, which shows that the First Respondent did not play until the end of the season in May. The First Respondent only played for the Claimant for two months and during that time, the Claimant incurred a lot of expenses related to his physiotherapy. It would be unfair to hold the Claimant responsible for the Contract as a whole as well.

34. The Decision also incorrectly found that the Claimant and the First Respondent did not come to an alternative arrangement regarding his remaining salaries. The receipts demonstrated that he received two payments, one on 27 February 2015 for USD 1,500, which stated it was "on account" and one on 15 April 2015 for USD 5,000, which did not contain such language. If the Respondent did not agree to an alternative arrangement, then why would it pay USD 5,000 to the First Respondent when he was not playing? Also, why would the receipt not contain the words "on account" like the previous payment did? The reason this was the case is because the Claimant and the First Respondent agreed to an alternative arrangement in which he would receive USD 7,500 for the entire season.

35. In conclusion, the Claimant proved that 1) the First Respondent's … (body part) was … (symptom) due to a pre-existing injury and did not constitute occupational damage covered under the Contract; 2) the First Respondent did not complete his season with the Claimant; and 3) the Claimant and the First Respondent reached an agreement in which he accepted USD 7,500 for the entire season.

36. The Claimant's Request for Relief reads as follows:

> *"Wherefore, for the reasons stated in this RfR, the reasons presented by evidence, the reasons presented by irrefragable presumption the club requests the following relief:*
>
> *1. That the Tribunal, dismiss the charge against Club Jeunesse Bauchrieh to pay the amount of USD 27,700 net and CHF to Mr. Yenry Bell Cisnero*
>
> *2. Thereafter, the tribunal annuls or dismisses the compliance of the decision by no later than 30 July 2016*
>
> *3. That the tribunal in its own accord suspends the effected of the present*

decision and Club Jeunesse Bauchrieh obligation to comply with it.

In addition the club asks that:

I. The club asks to annul the contract due to fraud and the use of fraudulent maneuvers.

II. The club asks for an indemnification from the player and the agent jointly and severally for no less than USD 80.000 (eighty thousand US dollars).

III. Disbursement of all expenses and fees relating to attorneys of law.

IV. To revoke the agent Mr. Nisse Huttunen permanently from the FIVB

V. To ban the player Yenry Ben Cisnero from playing

VI. The cub preserves its rights to peruse the agent for defamation and false allegations.

VII. The club preserves its right to raise other claims in the future and add any proofs to the file in addition to the request to interrogate witnesses." (sic)

4.2. The Respondents' Answer

37. The Respondents stated that it would respond to each of the Claimant's assertions in turn. Claimant correctly asserted that a routine medical check was conducted on 29 January 2015 and that the payment of the ITC occurred on 11 February 2015. The Claimant was never stuck with the First Respondent. The First Respondent was training and playing with the Claimant before the signing of the Contract. It had plenty of time to make a decision before the signing of the Contract and chose to go forward with the agreement. Thus, the conclusion of the employment relationship was not a matter of obligation due to the Claimant's investment but rather the Claimant's desire to have the First Respondent on its team.

38. Regarding Cairo, the floor beneath the Taraflex surface was hard. Thus, it made it tough for any player to jump and land on this surface. The First Respondent's … (body part) was … (symptom) after playing on this surface but he continued to play for the Claimant. The First Respondent was training and playing for the Claimant for more than two weeks before the tournament in Cairo without any issues. The First Respondent played several matches for the Claimant after the injury without getting paid. The Claimant did not ever object to how he performed his services while he was playing for the Claimant's team.

39. It was well known that the Claimant was having serious financial issues during the 2014-15

season and had serious delays in paying even its local players. That is why the First Respondent was not paid his salaries. The First Respondent did not agree to provide his services for free or for less than the USD 35,000 agreed upon by the Parties. The Respondents provided emails and messages from several players and an agent who all worked for or with the Claimant, and submitted that these messages demonstrate that the Claimant has a history of not paying its players.

40. According to the Respondents, the Claimant … (comments on the Claimant's reputation). The FIVB should stop this kind of behaviour. There will be more cases involving this Claimant before the FIVB in the future.

41. Regarding the Claimant's comments about the errors in the Decision, the actual date that the Contract was signed is irrelevant to the present dispute. The relevant point was that the First Respondent fulfilled his duties with the Claimant 100 percent as agreed upon. The Parties always agreed that the Contract was through the Final 4 of the Lebanese Championship and that there would be a separate agreement if the Claimant wanted him to play with them as part of the Final 4. Because the Claimant could not pay the First Respondent his full salary for the season, the First Respondent naturally did not extend his agreement to play for it in the Final 4. The Claimant also never complained about this situation because everyone knew that was what had been agreed upon by the Parties.

42. One other thing forgotten about this situation is that the First Respondent had a … (symptom) in February but continued to play and train with the Claimant until the end of the Contract. After the conclusion of the Contract, the Claimant tried to reduce the First Respondent's salary by sending a commitment letter and saying that it would not pay more to the First Respondent.

43. It is common practice for the clubs in Lebanon to bring on new foreign players to compete in the playoffs. All clubs, including the Claimant do this and, thus, the new players brought on by the Claimant would have been brought on anyway.

44. The First Respondent never agreed to a reduced salary as argued by the Claimant but rather merely wants to obtain the agreed upon salary.

45. In conclusion, the Respondent submit the following:

"Conclusion:

1) *club is trying only to delay this issue with 'wikipedia' and other irrelevant stuff.*

2) *player was able to play, also after Cairo and played for the club. Price what he got for it, was not get paid and long FIVB-complaint case. Player waited his money as club had serious financial problems, and this is the reward.*

3) *player completed his season fully, like agreed with the club. Can be confirmed from Pedro Rangel, who was working as Bell's translator there. Also, from John Abi Chedid, player for Bauchrieh, who actually was involving in making this Bell deal.*

4) *no other agreement regarding money was made, expect* (sic) *the contract. Other accusations are lies, 100% (SURE CLUB TRIED IN MAY*

5) *Why we didn't contact Lebanese Volleyball Federation? Makes zero sense. General Secretary of the federation is 'Bauchrieh man'. And one time in the past, I asked help from Lebanese volleyball federation in other case, didn't receive any help. Only thanks to new FIVB-complaint system, is this. I am sure that after this and the following other FIVB cases, clubs in Lebanon, including Bauchrieh, have to start playing by the rules.*

6) *Club's extra demands are absurd and not from this planet."*

5. Jurisdiction

46. The FIVB Tribunal Judge first has to examine whether he has jurisdiction to hear the present dispute. In order to do so, he has to look at the relevant provisions of the Regulations.

47. Article 19.2.1. of the Regulations reads, in relevant part, 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* […]*".*

48. Article 19.2.2. of the Regulations stipulates that the FIVB Tribunal can only resolve disputes:

> *"19.2.2.1. arising between the natural and legal persons/entities mentioned in Article 19.2.1.;*
>
> *and*
>
> *19.2.2.2 decided previously by the FIVB/ a Confederation or referred by the FIVB/ a Confederation to the FIVB Tribunal"*

49. Article 19.2.3. of the Regulations grants the FIVB Tribunal the power to rule on its own jurisdiction.

50. Thus, in order for the FIVB Tribunal Judge to have jurisdiction over the dispute, he shall examine whether the conditions of both Articles 19.2.1. and 19.2.2. are satisfied.

51. The main dispute presently before the FIVB Tribunal involves a claim for payment by a Cuban volleyball player against his former Lebanese club. The FIVB Tribunal finds that this portion of the dispute clearly qualifies as a financial dispute of an international dimension between a player and a club in accordance with the abovementioned Articles 19.2.1. and 19.2.2.1. of the Regulations.

52. Furthermore, the Request for Review at hand is made against the Decision, which was rendered by the FIVB. Therefore, the present Request for Review stems from a decision of the FIVB, and the Panel holds that Article 19.2.2.2. of the Regulations is also satisfied.

53. Additionally, the Claimant also counterclaims for financial damages against it based on the actions of the Respondents as well as a declaration annulling the Contract due to fraud, the revocation of the Second Respondent's FIVB License and a ban against the First Respondent. The FIVB found that it had no jurisdiction over the above Requests for Relief because the Claimant failed to pay the handling fee. Thus, this counterclaim was not *"previously decided"* by the FIVB as required by Article 19.2.2.2. If the FIVB Tribunal were to hear this counterclaim, it would deny the Respondents the right to defend itself in one instance. Moreover, Article 20.5 of the Regulations is no help to the Claimant as it only foresees the filing of a counterclaim by the Respondent, not the introduction of new claims before FIVB Tribunal.

Consequently, the FIVB Tribunal Judge finds that he does not have jurisdiction to grant the Requests for Relief in the counterclaim, and they must be dismissed.

54. Regarding the Second Respondent's claim from the first instance for agent fees, the FIVB Tribunal Judge notes that the Second Respondent did not file a Request for Review. Consequently, the FIVB Tribunal Judge cannot examine this claim as part of the present proceedings (*see also* Article 20.5(2) of the Regulations).

55. Based on the above, the conditions of Articles 19.2.1. and 19.2.2. are satisfied only for the claims related to the First Respondent's salaries. Moreover, neither party contested the FIVB Tribunal's jurisdiction to hear this case. Therefore, the FIVB Tribunal has jurisdiction over the abovementioned claims from the present Request for Review pursuant to the Regulations.

6. Admissibility

56. Before turning to the merits, the Panel would like to discuss the admissibility of the Respondents' Answer in a little more detail in light of the fact that the Respondents filed their Answer two minutes after the deadline to file their Answer had expired.

57. First, the FIVB Tribunal Judge would like to note that the application of *ex aequo et bono* principles is limited to the decision on the merits based on the plain language of Article 13 of the Regulations, which is titled "Law Applicable to the Merits", and is, thus, not applicable to procedural matters. However, the Regulations fail to mention what law is applicable to procedural matters before the FIVB Tribunal. As a body with its seat in Lausanne, Switzerland (*see* Article 3 of the Regulations), the FIVB Tribunal must, therefore, interpret the procedural provisions of the Regulations bearing in mind the principles of Swiss procedural law in civil matters.

58. It is common practice in sports arbitration in Switzerland that, with the exception of the initial deadline to file an appeal, a tribunal can extend deadlines to file a submission before a body. This practice is reflected in Article R32 of the Code for Sports-related Arbitration. Moreover, within the first instance proceedings before the FIVB, it will set a second – final – deadline in the event that party fails to file its submission within the given deadline.

59. In line with this practice, the FIVB Tribunal Judge finds that the FIVB Tribunal Secretariat could

have (and in light of the FIVB's practice would have) set a second – final – deadline *ex officio* to file their Answer to the Respondents and, thus, it would be unduly harsh to not take into account the Respondents' Answer merely because he filed it two minutes after the deadline had expired. Moreover, the Claimant did not object to the Answer despite its late filing. Hence, the FIVB Tribunal Judge finds that the Respondents' Answer is admissible even though it was filed two minutes late.

7. Discussion

7.1 Applicable Law

60. Under the heading "Law Applicable to the Merits", Article 20.8 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)."*

61. Neither of the parties has contested the applicability of *ex aequo et bono* to the present dispute nor based their arguments on any national law. In light of the above, the FIVB Tribunal Judge will decide the issues submitted to it in this proceeding *ex aequo et bono*.

62. 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*".[3]

63. In light of the foregoing matters, the Panel makes the following findings.

7.2 Admissibility

64. Pursuant to Article 18.2 of the Regulations, any appeal against a decision of the FIVB must be filed within 14 days from notification of such decision. The Decision was notified to both parties on 30 June 2016. Hence, the time limit for appeal expired on 14 July 2016. Consequently, the Player's Request for Review was timely filed, on 14 July 2016.

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[3] POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

7.3 Findings

65. Having examined the evidence, the FIVB Tribunal Judge notes that neither party has contested that they validly concluded the Contract, and that they both signed the Contract. Consequently, there are essentially three legal issues to be resolved in the present case: First, whether the Claimant was not required to pay the full salaries due to the First Respondent's injury. Second, whether the Claimant and the Respondent reached a subsequent agreement to the Contract reducing the salaries owed. Third, the amount of damages owed to the First Respondent if any. The FIVB Tribunal Judge will address each of these issues in turn.

7.3.1 First Respondent's Injury and its impact on the contractual relationship

66. The first issue for the FIVB Tribunal Judge to discuss is what impact, if any, the First Respondent's injury had in the contractual relationship. The Claimant claimed that it should not be held responsible for the First Respondent's injury because it was a pre-existing condition.

67. Turning to the language of the Contract, Article 4 of the Contract stated that the First Respondent had "*to undergo a medical examination which shall determine whether or not he is declared fit for all kind of sporting activities"*. Additionally, Article 8 of the Contract provides that *"The club guarantees the payment of a net salary in the case of an occupational accident during the term of the agreement."*

68. Based on the above, the FIVB Tribunal Judge finds that the Contract requires the First Respondent to pass an initial medical examination, i.e. be deemed fit to play, and, in the event that he is deemed fit to play, he is guaranteed his salary in the event that an injury occurs while performing his services. In essence, the Claimant had the right to examine the First Respondent and if it decided to let him play, then it would assume the financial risk of injury that occurred during the performance of his services while under the Contract.

69. Having examined the evidence before it, the FIVB Tribunal Judge finds that the Claimant is estopped from arguing that it does not have to honour its obligations under the Contract due to the First Respondent's pre-existing condition because it assumed the financial risk of any injury that would occur during the term of the Contract.

70. Estoppel is a legal principle that prevents a party from making assertions that are contradictory to its prior position. In essence, a party is bound by its previous representations and cannot merely change its position to benefit it at a later time.

71. Applying this principle to the present case, The FIVB Tribunal Judge notes that it is uncontested that the First Respondent suffered an injury before joining the Claimant's team that required … (treatment). It is also uncontested that the Claimant's doctor found that the First Respondent was "unfit to play" on 29 January 2015. Instead of following the medical examination report, it decided to sign the Contract anyway knowing that the First Respondent was coming off of … (treatment).

72. While the medical examination is conducted by doctors, it is ultimately the club that decides whether or not the player passed his medical examination. If a club decides to sign and field a player against the recommendation of its doctors after an initial medical examination, then it assumes the risk of any re-injury that may occur and cannot later argue that the player failed his medical examination. By not following its medical doctor's recommendation and fielding a player despite the medical examination report, a club *ipso facto* makes the determination that it feels that the player is sufficiently healthy to compete and cannot later contest otherwise.

73. Thus, by signing the Contract despite the recommendation from its doctors, the Claimant is precluded from now claiming the protections of Article 4 of the Contract because it consciously decided to sign the player with the intention of fielding him in its team despite the results of the medical examination. It cannot, on the one hand, sign a contract and field the First Respondent and, then, on the other hand, disregard the contract when he suffers an injury that may have been due to a pre-existing condition. Thus, the FIVB Tribunal Judge finds that Claimant *de facto* deemed the First Respondent *"fit to play"* based on its decision to move forward with the Contract. Consequently, it is estopped from now arguing that it does not have to honour its contractual obligations due to the First Respondent's pre-existing condition. Upon signature of the Contract, the guarantee in Article 8 is binding on the Claimant because it is uncontested that the First Respondent was hurt while playing for the Claimant and must honour its contractual obligations to the First Respondent. For the sake of completeness, based on the above, the FIVB Tribunal Judge finds that he does not have to make a determination as to whether or not the First Respondent's injury in February was due to a pre-existing condition.

74. Even if the FIVB Tribunal Judge did not determine the above, he notes that the First Respondent also trained and played for the Claimant after the injury at least through March. Thus, the injury was not sufficient enough for the First Respondent to not be able to render his services. Given that he rendered his services, the First Respondent is entitled to receive the salaries owed to him for those services. Consequently, the FIVB Tribunal Judge finds that the First Respondent is, in principle, entitled to the remaining salaries owed under the Contract unless he subsequently agreed to a lower salary with the Claimant.

7.3.2 Subsequent Agreement between the Claimant and the First Respondent?

75. Additionally, the Claimant contends that it and the First Respondent executed a subsequent agreement reducing his salary to USD 7,500 for the season in light of his injury.

76. As the party making the assertion that a subsequent agreement was reached, the Claimant bears the burden of proof. It must demonstrate on a balance of probabilities that a subsequent agreement was reached.

77. Turning to the evidence before it, the FIVB Tribunal Judge notes that the Claimant has not submitted an agreement in writing signed by both it and the First Respondent. The only evidence that it offers regarding this agreement is 1) the fact that the bank receipt for the payment on 15 April 2015 did not say "on account" and 2) the Claimant's President's letter that claims that the USD 5,000 payment was what it agreed to with the First Respondent.

78. The FIVB Tribunal Judge finds that this evidence is insufficient to meet the Claimant's burden of proof. In essence, the Claimant is arguing that the First Respondent orally waived his outstanding salaries only ten days after his agent, the Second Respondent, sent a letter to the Claimant demanding his full outstanding salaries. The FIVB Tribunal Judge is skeptical that the First Respondent would waive USD 27,500 in salary without doing so in writing, especially so close to his demand for the full salaries, and without any apparent reason for doing so. Such a waiver, which substantially affects the rights of one party, should be and usually is made in writing. Moreover, the evidence offered by the Claimant for the alleged oral waiver is merely circumstantial. The fact that the USD 5,000 payment receipt did not say "on account" in no way demonstrates any kind of agreement between the Claimant and the First Respondent to a reduced salary. Moreover, the Claimant's President's letter is merely a representation from the party that would benefit from a waiver that an agreement was reached. The Claimant has

not demonstrated anything showing that the First Respondent orally (or in writing, for that matter) agreed or admitted that an agreement was reached. Instead, its main contention that there was an agreement was based exclusively on the fact that the Claimant only paid the First Respondent USD 7,500. Therefore, the FIVB Tribunal Judge finds that there is insufficient evidence to demonstrate that the Claimant and the First Respondent reached an agreement regarding a reduced salary.

7.3.3 First Respondent's Damages

79. In light of the above determination, the FIVB Tribunal Judge finds that the First Respondent is entitled to damages in the amount of the outstanding salaries owed to him for the remainder of the 2015 season.

80. Regarding the amount due, the FIVB Tribunal Judge notes that it is uncontested that the First Respondent received USD 7,300 based on a payment of USD 1,500 and a cash payment of USD 800 received on 27 February 2015 and a payment of USD 5,000 received on 15 April 2015. However, the Claimant contends that it made a cash payment of USD 1,000 instead of USD 800.

81. The FIVB Tribunal Judge finds that the burden to prove compliance with the Contract's terms is on the Claimant as it is the Claimant that is asserting that it paid more than the amount admitted by the First Respondent.

82. Reviewing the evidence before, the FIVB Tribunal Judge finds that the Claimant has not submitted sufficient evidence of a cash payment of USD 1,000 to meet its burden of proof. The FIVB Tribunal Judge notes that receipts were provided for the payments of USD 1,500 and USD 5,000. In particular, the payment receipt for the payment of USD 5,000 includes the First Respondent's signature confirming its receipt. No such receipt was presented for the cash payment of USD 1,000. Consequently, the FIVB Tribunal Judge finds that the First Respondent received USD 7,300 in payments. Consequently, the FIVB Tribunal Judge awards the amount of USD 27,700 to the First Respondent as outstanding salaries owed by the Claimant.

7.4 Costs

83. In its Decision, the FIVB ordered the Claimant to pay the full amount of costs of CHF 500 for

the proceedings before the FIVB. Given that the Decision was upheld in full on the merits and the Applicant's Request for Review failed, the FIVB Tribunal orders that the Respondent is entitled to the CHF 500 awarded in the Decision.

84. Regarding the handling fee for the proceedings before the FIVB Tribunal, the Applicant did not succeed on its Request for Review. Consequently, no reimbursement shall be ordered.

85. Regarding the Respondent's request for legal fees in the present proceedings, the Panel notes that Article 20.10.2 of the Regulations allows for the Panel to award a contribution towards reasonable legal fees and expenses in connection with a proceeding before it. When determining the contribution, the Panel must take into account the outcome of the proceedings as well as the conduct and financial resources of the Parties.

86. Neither of the parties requested a reimbursement of fees or expenses. Consequently, the FIVB Tribunal Judge finds that the parties must bear their own fees and expenses, if any.

DECISION

87. For the reasons set forth above, the Panel decides as follows:

1. The Request for Review filed by Club Jeunesse Bauchrieh is dismissed.

2. The decision taken by the FIVB dated 30 June 2016 is upheld in full.

3. Club Jeunesse Bauchrieh bears the costs of the proceedings before the FIVB Tribunal.

4. Any other requests for relief are dismissed.

Lausanne, seat of the proceedings, 28 July 2017.

Liu Chi

FIVB Tribunal Vice-Chairperson