



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1244/18)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Amani Khalifa

in the arbitration proceedings between

Mr. Milko Bjelica

represented by Mr. Nenad Stojic, attorney at law,
Marka Oreskovica 9, 11000 Belgrade, Serbia

- Claimant -

vs.

Basketball club Crvena Zvezda
Mali Kalemegdan 2
11000 Belgrade, Serbia

- Respondent -

represented by Mr. Rajko Ignjacevic, attorney at law,
Starine Novaka 3, 11060 Belgrade, Serbia

1. The Parties

1.1 The Claimant

1. The claimant is Mr. Milko Bjelica, a professional basketball player from Belgrade, Serbia ("Claimant").

1.2 The Respondent

2. The respondent is Crvena Zvezda, a basketball club in Belgrade, Serbia ("Respondent").

2. The Arbitrator

3. On 27 September 2018, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Richard H. McLaren OC, appointed Ms. Amani Khalifa as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 6 September 2016, the Respondent and the Claimant entered into a contract to engage the Claimant's services as a player for the 2016/2017 and the 2017/2018 playing seasons ("Contract").

5. Article 3 of the Contract provides that it “*shall be with no rights of termination and fully guaranteed*”.
6. Article 4 of the Contract provides that the Respondent shall pay the player EUR 350,000 and EUR 400,000 for the 2016/2017 and 2017/2018 seasons respectively.
7. Article 4 of Contract sets out the terms of payment of the Claimant’s salary and requires the Respondent to pay in 10 equal monthly instalments on the 25th of every month from September to June.
8. Article 7 of the Contract sets out the circumstances in which the Claimant may terminate the Contract for non-payment of his salary or of bonuses as follows:

“The contracting parties shall agree that, providing the club being late with meeting monetary obligations assumed under this contract, referred to in articles 4 and 5 herein, for more than 30 days, the player shall have the right to unilaterally terminate the contract. On the date of issuance of the letter of termination to the club, the contract shall be deemed terminated and the player shall have the right to instantly move to another club without paying indemnification, and with the obligation of the club to effect payment of all outstanding amounts for the competition season when the contract termination has been declared.”
9. On 10 April 2018, the Respondent met with the Claimant to discuss concerns regarding his performance.
10. On 15 April 2018, the Respondent initiated disciplinary proceedings against the Claimant for poor performance.
11. On 16 April 2018, the Respondent met with the Claimant again regarding his performance and informed him of the disciplinary proceedings against him.
12. Also on 16 April 2018, the Claimant terminated the contract with the Respondent pursuant to Article 7 of the Contract for non-payment of his salary (“Termination Letter”)

as follows:

“Please be informed that by this occasion I terminate the contract, concluded on 06-09-2016 with BC Crvena zvezda Telekom, for following reasons:

The contract has stipulated the following monetary amounts for my remuneration:

25 December 2017 40,000 Euro (received 20.000 Euro)

25 January 2018, February 2018, 25 March 2018 - each month 40,000 Euro, which makes total amount of 120,000 Euro (received 0.00 Euro)

At this moment the Club owes me the amount of 140,000 Euro.

Pursuant to the contract and in accordance to article 7 thereof, I have the right to terminate the contract within 30 days after delay with payment, accordingly I acquired such right for termination even on 25 January 2018. From that date, I have patiently waited for the payment, but in this moment I am not any more able to wait.

Therefore I do terminate the contract with the Club, and please, immediately, and in accordance to article 7 of the engagement contract for the player, issue the release letter.”

13. On 17 April 2018, the Claimant signed a contract with Basket Zaragoza 2002 (a basketball club in Spain), for the rest of the 2017/2018 season and for 2018/2019 season.
14. On 20 April 2018, FIBA rendered a decision confirming that the Claimant validly terminated the Contract on 16 April 2018 for non-payment of salaries under Article 7. In its decision, FIBA set out the salary payments owed to the Claimant as follows:

Date	Obligation (EURO)	Paid
25 September 2017	40,000	40,000
25 October 2017	40,000	40,000
25 November 2017	40,000	40,000

<i>25 December 2017</i>	<i>40,000</i>	<i>20,000</i>
<i>25 January 2018</i>	<i>40,000</i>	<i>0</i>
<i>25 February 2018</i>	<i>40,000</i>	<i>0</i>
<i>25 March 2018</i>	<i>40,000</i>	<i>0</i>
<i>Total</i>	<i>280,000</i>	<i>140,000</i>

FIBA noted that it is undisputed between the Claimant and the Respondent that the Claimant sent a notice of termination in accordance with the Contract. FIBA also noted that due to the delay in payment of the Claimant's salary, the Claimant's right to terminate arose long before he was suspended by the Respondent from the team. FIBA therefore instructed the Respondent to issue a letter of clearance for the Claimant's transfer to Spain.

15. On 27 April 2018, the Respondent issued a disciplinary decision following the complaint made by the Respondent's sports director, Mr. Nebojša Ilić on 15 April 2018. Specifically, the Respondent decided to exclude the Claimant from the first team, to terminate his contracts and to fine him EUR 144,000 for poor performance pursuant to its disciplinary regulations. The disciplinary decision is based on the Claimant's poor performance in games on the 9th, 10th, 13th and 14th of April 2018 and his failure to attend training on 26th and 27th April 2018.
16. On 20 May 2018, Basket Zaragoza 2002 terminated its agreement with the Claimant. During his tenure with Basket Zaragoza 2002, the Claimant was paid EUR 35,000.
17. On 3 September 2018, the Claimant initiated arbitration proceedings against the Respondent before the Basketball Arbitral Tribunal (BAT).

3.2 The Proceedings before the BAT

18. On 3 September 2018, the Claimant filed his Request for Arbitration. The non-reimbursable handling fee of EUR 3,000 was received in the BAT bank account on 4 September 2018.
19. On 1 October 2018, the BAT Secretariat confirmed receipt of the Request for Arbitration and fixed a time limit for the payment of the Advance on Costs as 11 October 2018 and the deadline for the Respondent to file its response to the Request for Arbitration as 22 October 2018.
20. On 10 October 2018, the Claimant paid EUR 4,500.00 in respect of his share of the Advance on Costs.
21. On 23 October 2018, the Respondent submitted an Answer to the Request for Arbitration without exhibits.
22. On 24 October 2018, the Respondent submitted the exhibits to its Answer to the Request for Arbitration.
23. On 24 October 2018, the Claimant paid EUR 4,500.00 in respect of the Respondent's share of the Advance on Costs.
24. On 1 November 2018, the Arbitrator invited the Respondent to submit a translation of pages 8/9 (Exhibit 2) of the Answer to the Request for Arbitration into English, by no later than 9 November 2018.
25. On 1 November 2018, the Arbitrator invited the Claimant to file his comments on the Respondent's Answer to the Request for Arbitration by no later than 19 November 2018.

26. On 7 November 2018, the Respondent submitted the translation of pages 8/9 (Exhibit 2) of the Answer to the Request for Arbitration.
27. On 7 November 2018, the Claimant filed Comments on the Respondent's Answer to the Request for Arbitration.
28. On 8 November 2018, the Arbitrator invited the Respondent to submit a Rejoinder to the Claimant's Reply to the Answer to the Request for Arbitration by no later than 22 November 2018.
29. On 22 November 2018, the Respondent submitted its Rejoinder.
30. On 29 November 2018, the Arbitrator closed proceedings and invited the parties to file submissions on costs by no later than 6 December 2018.
31. On 29 November 2018, the Claimant filed its submission on costs.
32. On 6 December 2018, the Respondent filed its submission on costs.

4. The Positions of the Parties

4.1 The Claimants' Position

33. The Claimant claims that EUR 224,000 of his agreed salary under the Contract remains unpaid. On 16 April 2018, when he sent the Termination Letter, EUR 140,000 of this sum was already outstanding, putting the Respondent in breach of Article 4 of the Contract. The Claimant subsequently earned EUR 35,000 in salary at Basket Zaragoza 2002, which he deducts from his claim by way of mitigation yielding a total claim value of EUR 189,000.
34. The Claimant cites Article 7 of the Contract to establish his right to terminate the Contract. The Claimant argues that because the Respondent failed to pay EUR 20,000 of his December salary on 25 December 2017 that, pursuant to Article 7, he was entitled to terminate the Contract with immediate effect beginning 25 January 2018

(31 days after the Respondent's failure to pay).

35. The Claimant argues that, as determined by FIBA in its decision, he validly terminated the Contract on 16 April 2018 (the day the Respondent received the Termination Letter) with immediate effect and that on that date, he became entitled to the sums outstanding under the Contract for the remainder of the 2017/2018 season.
36. The Claimant contends that the Respondent's disciplinary decision of 27 April 2018 terminating the Contract and fining him EUR 144,000 has no legal effect because he had already terminated the Contract on 16 April 2018.
37. The Claimant claims that despite his repeated efforts to contact the club to obtain payment of his salary, the Respondent has failed to pay it.
38. In his Reply dated 7 November 2018, the Claimant characterises the fine imposed by the Respondent as an "*attempt of Respondent to avoid due payment to the Claimant*".
39. The Claimant refuses to engage in the substance of the Respondent's allegations of poor performance and describes them as "*tasteless*".

4.2 Claimant's Request for Relief

40. In his Request for Arbitration dated 3 September 2018, the Claimant requested the following relief:

" a) To award claimant Milko Bjelica with amount of 189.000 EUR (one hundred eighty nine thousand) and additionally to award claimant's interest at the applicable Swiss statutory rate, starting from 26th of June 2018.

b) To award claimant with the full covered costs of this Arbitration. Having in mind that in case of dispute each Agreement set the authority of Basketball Arbitration Tribunal (BAT), therefore, the claimant demand arbitrage of BAT."

4.3 Respondent's Position

41. In the Respondent's Answer to the Request for Arbitration, it states that the quantification of the Claimant's claim is confusing.

42. It avers that, during the 2017/2018 season, the Claimant played well for the first half of the season and was one of the Club's best players, but that by the end of January 2018, the Claimant was playing poorly.

43. The Respondent asserts that its disciplinary decision, including the EUR 144,000 fine, is valid. It argues that because it suspended the Claimant on 15 April 2018, the Claimant's Termination Letter of 16 April 2018 was ineffective according to the general principle of law that *"the first in time prevails"*.

44. The Respondent requested a hearing at which it requested that the Claimant and several witnesses from the Respondent should testify.

4.4 Respondent's Request for Relief

45. In his answer to the Request for Arbitration dated 24 October 2018, the Respondent requested the following relief:

"In any event the Respondent suggests that the Claimant claims should be entirely rejected as ungrounded and the Claimant to be obligated to pay all costs of this arbitral proceedings."

5. The Jurisdiction of the BAT

46. Article 10 of the Contract contains a BAT arbitration clause. It provides:

“In case of dispute, the BAT in Geneva shall be competent, which will resolve the dispute by a sole arbitrator selected by the President of the Tribunal, and the application of the principle ex aequo et bono, and in accordance with the BAT Rulebook”

47. The relevant clause fulfils all formal and substantive requirements for a valid arbitration agreement under Swiss law.

48. The arbitrator’s jurisdiction to decide the Claimant’s claims is uncontested by the Respondent.

49. The Sole Arbitrator therefore finds that she has jurisdiction to decide the Claimant’s claim.

6. Applicable Law

50. The Parties have expressly authorised the Arbitrator to decide the dispute *ex aequo et bono* in the agreement to arbitrate in Article 10 of the Contract.

7. Findings

7.1 The Claimant’s Claim for Unpaid Salaries

51. The Claimant claims unpaid salaries of EUR 189,000.00. The Claimant calculates this sum as follows:

<i>Description</i>	<i>Amount (EUR)</i>
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<i>Unpaid Salary until 16 April 2018</i>	<i>140,000</i>
<i>Remaining Salary under the Contract for the 2017/2018 season</i>	<i>84,000</i>
<i>Sums Received from Basket Zaragoza 2002</i>	<i>(35,000)</i>
<i>Total</i>	<i>189,000</i>

52. The Respondent argues that the Claimant's quantification of its claim is confusing, but does not contest the figures submitted by the Claimant in respect of sums owed to him, the sums already paid to him under the Contract or the sums he received from Basket Zaragoza 2002, which the Claimant deducted from his claim.
53. In the Arbitrator's view, the calculation of the Claimant's claim is clear; as are the facts he relies on to establish his claim.
54. There is sufficient evidence on record to confirm that, at the time of the Termination Letter, the Respondent owed the Claimant EUR 140,000 in unpaid salaries. This evidence includes the Termination Letter itself, which includes a breakdown of this sum, which the Respondent does not contest. The Arbitrator also notes that, in reaching its decision that the Claimant's termination of the Contract was valid, FIBA relied on the Claimant's bank statements. According to FIBA's decision, these bank statements, which the Claimant did not submit in these proceedings, show the total payments made to the Claimant under the Contract and verify his claim that the Respondent underpaid him by EUR 140,000 as of 16 April 2018. While the Arbitrator is

not bound by FIBA's decision,¹ she sees no reason to doubt FIBA's assessment that the bank statements available to it corroborated the Claimant's assertion of the outstanding debt as of 16 April 2018.

55. The Respondent contests the Claimant's claim on the ground that, because the Respondent suspended him the day before he sent it, the Termination Letter is invalid and, based on the disciplinary decision, the Claimant is liable to pay a fine of EUR 144,000.
56. It therefore falls to the Arbitrator to decide whether the Termination Letter was valid and effective.
57. According to the clear language of Article 7 of the Contract, the Claimant is entitled to terminate *with immediate effect* if the Club delays payment of his salary for more than 30 days, in which case, the Respondent must pay all outstanding amounts for that season.
58. As established in paragraphs 51 to 54 above, on the date the Claimant sent the Termination Letter, the Respondent owed him EUR 140,000, EUR 20,000 of which had been outstanding since 25 December 2017. The Claimant's right to terminate therefore vested on 25 January 2018, 31 days after the Respondent failed to pay his December salary.
59. The Respondent's contention that the Claimant's suspension from the team renders the Termination Letter ineffective is at odds with the clear wording of Article 7 which does not place any conditions on the Claimant's right to terminate in case of delayed

¹ See, e.g., BAT 0136/10, para. 57; BAT 0343/12, para. 42; BAT 0416/13, para. 72. See also the decision itself which provides that it "*is not binding on the BAT or on any other tribunals, should they be called to decide a dispute among the parties*".

payment. The Arbitrator considers that the question as to whether or not the Claimant was suspended from the team is separate from the question whether the Contract was in force and that the principle that “the first in time prevails” does not apply in the present case and does not affect the validity or effectiveness of the Termination Letter.

60. Although the Respondent commenced disciplinary proceedings and suspended the Claimant on 15 April 2018, the day before the Claimant sent the Termination Letter, the Respondent did not seek to terminate the Contract on that date. In fact, the Respondent first notified the Claimant of its intention to terminate the Contract on 27 April 2018 in its disciplinary decision, which was rendered 11 days after it received the Termination Letter. Because the Claimant’s suspension from the team and the initiation of disciplinary proceedings did not impact the validity of the Contract, and because the Respondent’s purported termination was sent well after the Claimant’s Termination Letter, the Arbitrator dismisses the Respondent’s contention that, by initiating disciplinary proceedings on 15 April 2018, it should be held to have terminated the Contract first.
61. Based on the clear wording of Article 7 of the Contract and considering the non-payment of the Claimant’s salary, which was more than 30 days overdue at that date, the Arbitrator considers that the Claimant’s Termination Letter was effective. The Respondent cannot validly rely the issuance of the disciplinary decision after the Contract was terminated to evade its obligation to pay the Claimant’s salary under the Contract. Therefore, the question as to whether or not the Respondent properly imposed the fine under the Contract does not fall to be decided because at the time the decision was issued, the Claimant had already terminated the Contract in accordance with its terms.
62. Under Article 7 of the Contract, the Respondent therefore became liable to pay the Claimant his salary for the rest of the 2017/2018 season.

63. It is a settled principle of BAT case law that Claimants have a duty to mitigate their losses by deducting sums earned for the same period following contract termination. In BAT Case 0416, the Arbitrator held that *“According to generally accepted principles of the law of damages and also of labor law, any amounts which the Player earned or might earn by exercising reasonable care during the remaining term of the Player Contract must be deducted”*. To mitigate their losses, players are required to *“undertake reasonable efforts to find a new assignment”*².
64. The Claimant claims EUR 84,000 for the months of April, May and June 2018, which is less than the EUR 120,000 the Claimant would have been entitled to receive under Article 4 of the Contract had he collected his salary for these three months which was payable in equal instalments of EUR 40,000.
65. The Claimant has deducted EUR 35,000 from his EUR 84,000 claim for the remainder of the 2017/2018 season on account of sums paid to him by Basket Zaragoza. Although the Claimant does not provide a breakdown of this sum, based on the provisions of his contract, it is likely to be made up of salary payments of EUR 5,000 and EUR 15,000 for April 2018 and May 2018 under article 3 A.1., and a compensation payment of EUR 15,000 due to early termination by the Club on 20 May 2018 under article 6 (3) A.E.
66. The Arbitrator notes that the Claimant’s salary for April 2018 at Basket Zaragoza may well have been reduced from EUR 15,000 (his salary for May 2018) to EUR 5,000 because the contract was not signed until 17 April 2018, leaving less than half of the month of April remaining with a Letter of Clearance from the Respondent still pending. The Arbitrator also notes that whilst a monthly salary of EUR 15,000 is 37.5% of Claimant’s salary at the Respondent club of EUR 40,000, BAT case-law recognises

² See BAT Case 0254/12 at paragraph 78.

that alternative employment at a higher salary is harder to obtain late in the season when certain markets may be closed.³ The Arbitrator notes that, even though the Claimant's contract with Basket Zaragoza did not provide for a June salary payment whilst his contract with the Respondent did, the Claimant has, in any event, reduced his claim by a further EUR 15,000 which he likely earned as compensation for early termination by Basket Zaragoza of his contract at the end of the season.

67. In the circumstances, and deciding *ex aequo et bono*, the Arbitrator finds that the Claimant has made reasonable efforts to mitigate his losses in respect of the remaining part of the 2017/2018 season and accordingly, the Arbitrator finds that the Respondent is liable to pay the Claimant EUR 189,000 in unpaid salaries for this period.

7.2 The Claimant's Claim for Interest

68. The Claimant claims interest "at the Swiss statutory rate" starting from 26 June 2018, the date after the last payment of his salary under the Contract fell due.
69. It is a settled principle of BAT case law interest at a rate of 5% *per annum* starting from the date after the relevant payment falls due compensates claimants adequately for delays in payment.
70. The Arbitrator therefore finds the Respondent liable to pay the Claimant interest on EUR 189,000 at a rate of 5% *per annum* commencing on 26 June 2018 until the date of full payment.

³ See BAT 0396/13, para. 97. In that case, the player's contract was terminated on 14 March 2013.

8. Costs

71. In his cost submissions, the Claimant claims the costs of these proceedings as follows:

<i>Payment to Tribunal by Claimant</i>	<i>EUR</i>
<i>Advance on Costs (Claimants and Respondents share)</i>	<i>9,000</i>
<i>Legal Fees</i>	
<i>Handling Fee</i>	<i>3,000</i>
<i>Legal Fees</i>	<i>10,000</i>
<i>Total</i>	<i>22,000</i>

72. In its cost submissions, the Respondent claims the costs of these proceedings, which consist of its legal fees, as follows:

<i>Analysis of the Request for Arbitration (RFA)</i>	<i>4 hours</i>	<i>€ 800</i>
<i>Preparation and drafting the Answer to RFA</i>	<i>8 hours</i>	<i>€ 1.600</i>
<i>Preparation and drafting Rejoinder</i>	<i>2 hours</i>	<i>€ 400</i>
	<i>Total</i>	<i>€ 2.800</i>

73. On 28 November 2018, considering the circumstances of the case, including the time spent by the Arbitrator, the complexity and the procedural questions raised, the BAT President determined the arbitration costs in the present matter to be EUR 4,725.00.

74. Article 17.3 of the Rules provides that the Award shall determine which party shall bear the arbitration costs and in which proportion and that the arbitrator shall primarily take into account the relief granted compared with the relief sought and, secondarily the conduct and the financial resources of the parties.
75. The Claimant has prevailed with his claim and has obtained the entirety of the relief sought and has conducted these proceedings in an efficient manner.
76. The Arbitrator therefore finds that
- the Respondent is liable to pay the Claimant EUR 4,725.00, being the full amount of the arbitration costs of these proceedings; and
 - BAT shall reimburse EUR 4,275.00 to the Claimant, being the difference between the costs advanced by the Claimant and the arbitration costs fixed by the BAT President.
77. Article 17.3 of the Rules also provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and other expenses incurred in connection with the proceedings. Article 17.4 lays down the maximum contribution (excluding the non-reimbursable handling fee) that can be awarded by the arbitrator in respect of a party's reasonable legal fees and expenses.
78. The Claimant claims legal fees of EUR 10,000, which is the maximum contribution for legal fees under the BAT Rules.
79. He also claims EUR 3,000, the non-reimbursable handling fee as part of his claim for legal expenses under Article 17.4 of the Rules.
80. The Arbitrator considers that although the Claimant conducted these proceedings



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efficiently and although he has succeeded with his claim, legal fees of EUR 10,000 are excessive given the size of the claims, the brevity of the submissions filed and the factual matrix of the case.

81. Deciding *ex aequo et bono*, the Arbitrator considers that the Claimant is entitled to recover EUR 4,000 in legal fees and EUR 3,000 in respect of the non-reimbursable handling fee.

9. AWARD

For the reasons set forth above, the Arbitrator decides as follows:

- 1. Basketball Club Crvena Zvezda shall pay Mr. Milko Bjelica EUR 189,000.00, net of taxes, as compensation for unpaid salary payments plus interest on this sum at a rate of 5% per annum starting from 26 June 2018 until the date of full payment.**
- 2. Basketball Club Crvena Zvezda shall pay EUR 4,725.00 to Mr. Milko Bjelica as reimbursement of the arbitration costs.**
- 3. Basketball Club Crvena Zvezda shall pay EUR 7,000.00 to Mr. Milko Bjelica as contribution to his legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 20 February 2019

Amani Khalifa
(Arbitrator)