BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1787/21)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Martin Christian Schiller

- Claimant -

represented by Mr. Guillermo López Arana, Mr. Antonio García-Aranda Stai and Mr. Javier Resa Ramos, attorneys at law

vs.

Vsl "Zalgirio Krepsinio Centras" (Zalgiris Kaunas BC)
Karaliaus Mindaugo pr. 50 44334 Kaunas, Lithuania

- Respondent -

represented by Ms. Jolanta Spakauskaite, attorney at law

1. The Parties

1.1 Claimant

1. Mr. Martin Christian Schiller (the "Coach") is a German professional basketball coach.

1.2 Respondent

2. Zalgiris Kaunas BC (the "Club") is a professional basketball club from Kaunas, Lithuania, competing domestically in the LKL Lithuanian Basketball League, and also one of the oldest teams in the EuroLeague.

2. The Arbitrator

3. On 25 February 2022, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Clifford J. Hendel as arbitrator pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of Mr. Clifford J. Hendel or to his declaration of independence.

4. By letter of 28 July 2022, the BAT Secretariat notified the Parties that Mr. Clifford J. Hendel was unable to continue as Arbitrator and had to resign from the case. The BAT Vice-President appointed Mr. Stephan Netzle as substitute ("the Arbitrator"). Neither Party objected to the appointment of the Arbitrator or to his declaration of independence. The Arbitrator assumed the case in the state at the time of his appointment. No procedural act therefore had to be repeated.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 13 July 2020, the Coach and the Club entered into an agreement whereby the latter engaged the former for the 2020/2021 and 2021/2022 seasons (albeit clause 1.1 of the said agreement states that it "*is not employment agreement*" but "*an agreement of sports activities as it is set out in Article 10 of Law on Physical Culture and Sports of the Republic of Lithuania*", in light of its content and the Parties' treatment of the same, it will be hereinafter referred to as the "Employment Agreement").

6. As per the literal wording of the Employment Agreement, the Coach was hired as "*head coach*" and it is understood that the object of the Employment Agreement was to provide his services for the first team of the Club (among others, Article 1.5 provides for the basketball competitions to be "*Lithuanian basketball league (LKL); EuroLeague; Lithuanian basketball Cup; and/or other official competittions in which Zalgiris Kaunas basketball team will participate during the period of the Agreement's validity*").

7. Article 3 of Annex 1 to the Employment Agreement provides for the Coach to receive an annual base salary of EUR 224,193.00 (excluding VAT) for the 2020/2021 season and EUR 255,817.00 (excluding VAT) for the 2021/2022 season, as well as certain benefits.

8. On 8 October 2021, the Club hired a new head coach.

9. On that same day, the Coach was informed personally by the Club's representatives that Respondent had decided to "*relieve him of the head coaching duties"*, and the Club presented a notice to the Coach. After the Coach asked that said notice be addressed to his agents, the Coach's agents received an e-mail later the same day, attaching a document styled "notice on termination of agreement of sporting activity",

which read as follows in relevant part.

> *"In accordance with paragraph 9.1.1 the Agreement may be terminated by a mutual agreement between the Parties.*
>
> *Therefore the Club offers you to terminate the Agreement from October 8th, 2021 by signing the mutual termination agreement. Accordingly, we ask you not to perform any services connected with coaching of "Zalgiris" Kaunas team in any form from the date of receiving of this notice, i.e. October 8th 2021."*

10. On 9 October 2021, the Coach replied via e-mail as follows:

> *"This notice of termination does not reflect what your club and your president communicated in person to our client, Mr. Schiller. He was unlawfully and unilaterally terminated by Mr. Motejunas yesterday. Mr. Schiller has complied with all his obligations and has performed all his duties. In light of the recent events we expect your club to keep complying with theirs".*

11. On 21 October 2021, the Coach's representative e-mailed the Club to request permission from Respondent for the Coach to travel to Germany due to an important family matter.

12. On that same day, the Club replied to the Coach's petition as follows:

> *"We inform you that this is not a proper time for Martin Schiller to leave the club: a) Because after rejecting by him the offer of termination of the Agreement mutually, we have to discuss with Martin Schiller the further tasks of providing his services under the Agreement, "which are understood as training of professional players of the Club preparing them for basketball matches, sports events and to participate in them following the Club"s internal regulations, rules and bylaws of, LKF, LKL, FIBA, EuroLeague and WADA, to fulfill other conditions set forth" (clause 2.1. of the Agreement); b) also in your letter there are not clearly expressed what is an "important family matter" which would amount to sufficient, material reason for leaving the club.*
>
> *Having in mind all these circumstances and as Martin Schiller will not be able to perform his duties and services in accordance to the Agreement during the aforementioned period on his own intent, thus we could grant Martin Schiller the permission to travel to Germany from October 22nd 2021 until November 1st 2021 subject to that the period of his absence will be deducted from the period for which the club has an obligation to fulfill his duties (included but not limited to remuneration obligations) towards Martin Schiller".*

13. A few hours later, still on 21 October 2021, Claimant's counsel replied to the Club's message, stating in pertinent part as follows:

> *"Thank you for your email. As per its content, Mr. Schiller has decided that he will not be travelling to Germany and will stay in Kaunas in order to keep complying with his contract. In this sense I would like to mention that, as of today, Mr. Schiller has not received the salary payment scheduled for October 15th, 2021 (last Friday), please proceed to correct this situation and pay to Mr. Schiller his overdue salary payment without delay".*

14. The overdue salary payment was paid the following day.

15. On 15 November 2021, after some back and forth during the settlement discussions, the Club sent an e-mail to the Coach's representatives as follows:

> *"I confirm that your last proposal regarding payment amount and terms: i.e. 188.500 € in 8 equal consecutive monthly installments and following the payment calendar already established in Martin's contract with condition that in the event of finding a coaching job before the end of this season additional amount of 10,000 € gross would be deducted from 8th and final payment – is acceptable for Zalgiris".*

16. The Coach's representative sent a draft termination agreement the following day.

17. However, the Parties could not reach a final agreement due to the fact that Respondent's comments and proposed corrections sent by e-mail dated 23 November 2021 were not accepted by Claimant alleging that it implied a "*fundamental change to the financial terms*" which had already been agreed in writing.

18. On 29 November 2021, the Club sent a new e-mail in which, among other things, it stated the following:

> *"Given that the termination of Mr. Martin Schiller's agreement is still under negotiations, I would like to inform you that Zalgiris is ready to make the payment of 20750 EUR to Martin according to original schedule".*

19. During December 2021, the negotiations continued between the Parties with clear discrepancies as to whether the Employment Agreement was still in force or not at the time.

20. In this context, on 21 December 2021, the Coach informed the Club that he had not received "*his salary payment scheduled for December 15th, 2021*".

21. Finally, on 30 January 2022, the Coach communicated the following to the Club:

> *"As a follow up to my previous communication dated January 16th, 2022 (below). This email is to officially inform the club on behalf of Martin that, as of today, January 30th, 2022, he has still not received his salary payment scheduled for December 15th, 2021, of which Zalgiris has been informed repeatedly. Despite having given the club the required period of fifteen calendar days to correct this contractual breach, it has not. Please be advised that Martin will make use of his contractual rights and, as per clause 5.5 of his contract with Zalgiris, will be suspending performance of sports activities as of tomorrow Monday January 31st, 2022, without renouncing to any contractual and legal rights he may have.*
>
> *Due to the above Martin is willing to return the vehicle provided by the Club, in this sense, please let us know how he should proceed".*

22. Therefore, while Respondent considers that the Employment Agreement was terminated by it on 8 October 2021 upon the substitution of the head coach, Claimant considers that it was still in force until 30 January 2022, when it was suspended by the Coach due to the Club failing to fulfil its payment obligations.

3.2 The Proceedings before the BAT

23. On 4 February 2022, Claimant filed the Request for Arbitration giving rise to this proceeding. He also duly paid the non-reimbursable handling fee of EUR 4,000.00, which was received by the BAT on 9 February 2022.

24. On 2 March 2022, the BAT informed the Parties that Mr. Clifford J. Hendel had been appointed on 25 February 2022 as the Arbitrator in this matter, invited Respondent to

submit its Answer by 25 March 2022 and fixed the advance on costs to be paid by the Parties on or before 14 March 2022 as follows:

"Claimant (Martin Christian Schiller) € 5,000.00
Respondent (Vsl "Zalgirio Krepsinio Centras") € 5,000.00"

25. By e-mail dated 7 March 2022, Respondent's counsel provided a copy of her Power of Attorney and she also took the opportunity to request a 12-day extension of the time limit to submit Respondent's Answer. By e-mail dated 9 March 2022, the BAT granted the said extension until 6 April 2022.

26. On 6 April 2022, Respondent submitted its Answer.

27. By Procedural Order of 7 April 2022, the BAT confirmed receipt of Respondent's Answer and also of Claimant's payment of his part of the abovementioned advance on costs on 8 March 2022. However, in light of Respondent's failure to timely pay its share, Claimant was invited to pay Respondent's share by 21 April 2022.

28. Claimant made such payment in substitution on 11 April 2022.

29. By Procedural Order of 27 April 2022, the BAT confirmed receipt of the full amount of the advance on costs and invited Claimant to comment on the Answer by 11 May 2022, particularly addressing in his submission the question of mitigation (i.e. any steps taken in order to find alternative employment for the remainder of the contract period).

30. On 10 May 2022, Claimant submitted his Reply. However, by e-mail dated 11 May 2022, Respondent's counsel informed the BAT that some of the exhibits provided by Claimant with his Reply were not in English nor accompanied by a certified translation, reason why by e-mail dated 12 May 2022, the BAT invited Claimant to provide those translations by 16 May 2022.

31. On 16 May 2022, the BAT confirmed receipt of the referred translations and invited Respondent to file its Rejoinder by no later than 30 May 2022.

32. On 27 May 2022, Respondent's counsel e-mailed the BAT requesting a 4-day extension to file the Rejoinder, extension which was granted on 30 May 2022 until 3 June 2022.

33. On 3 June 2022, Respondent submitted its Rejoinder.

34. On 9 June 2022, the Arbitrator declared the exchange of documents completed in accordance with Article 12.1 of the BAT Rules and invited the Parties to indicate (by no later than 14 June 2022) how much of the applicable maximum contribution to costs should be awarded to them and why, including a detailed account of their costs and any supporting documentation in relation thereto.

35. Claimant filed his costs submission on that same date (i.e. 9 June 2022), while Respondent filed its costs submission on 14 June 2022.

36. On 29 June 2022, Respondent's counsel informed the BAT of the address of her new office, which was duly noted.

37. By letter of 28 July 2022, the BAT informed the Parties of the appointment of Mr. Stephan Netzle substituting Mr. Clifford J. Hendel as the Arbitrator (see also para. 4 above).

4. The Positions of the Parties

4.1 Claimant's Position

38. Claimant considers that he was entitled to suspend his performance under the Employment Agreement on 30 January 2022 due to the Club's failure to fulfill its payment obligations.

39. The Claimant asserts that he is entitled to all monies owed under the Employment Agreement.

40. Claimant believes that Respondent's conduct within the period which lasted between early October 2021 and January 2022 is sufficient evidence that the Employment Agreement remained in force during that period.

41. Further to the above, Claimant considers that he has complied with his duty to mitigate damages and, as such, the amount of compensation claimed shall not be subject to any reduction.

42. In light of the foregoing, both in his Request for Arbitration and in his Reply, Claimant requested the following relief:

> *"a) To award Claimant with the amount of THIRTY-THREE THOUSAND THREE HUNDRED AND SEVENTY FIVE EUROS (33,375 €), plus any payments accrued and owed on the date of issuance of the Award in this BAT procedure. (For purposes of clarity on the date of filing of the present request for arbitration aside from the aforementioned amount, the total amount remaining to be paid, but not yet accrued is ONE HUNDRED AND SIXTY THOUSAND ONE HUNDRED AND NINETY-TWO EUROS (160,192 €).*
>
> *b) To expressly declare Claimant's right to receive and the Respondent's obligation to pay the rest of the payments on the dates established in the contract signed between the parties, in the event said payments have not been accrued on the date of issuance of the Award in this BAT procedure.*
>
> *c) To declare the Respondent's obligation to reimburse any expenses incurred by The*

Claimant, due to the Respondent's contractual breaches, such as travel and vehicle expenses, plus the amount of 3.405,19 € of flight ticket allowance not paid by the Respondent.

d) To apply interest at the applicable Swiss statutory rate to any payment not paid on the scheduled due date as per the Annex to the contract.

e) To award the Claimant with the full covered the costs of this arbitration."

4.2 Respondent's Position

43. Respondent considers that the Employment Agreement was terminated by the Club effecting and announcing a change in the head coach position on 8 October 2021.

44. Respondent acknowledges that the termination of the Employment Agreement was not supported by any just cause.

45. However, Respondent argues that the Coach failed to comply with his duty to mitigate damages, such that the amount of final compensation should be only EUR 54,572.50 (that amount having already been covered by Respondent by virtue of the payments made after 8 October 2021 – when Respondent considers that the Employment Agreement was terminated due to the substitution in the position of head coach), instead of the amount sought by Claimant.

46. Therefore, in summary, Respondent requested the following both in its Answer and its Rejoinder:

"It should be decided by the BAT that all Claimant's requests for relief are fully dismissed.

Respondent also asks BAT to award contribution to Respondent's legal fees and other expenses as per Art. 17.4 of BAT rules."

5. The jurisdiction of the BAT

47. Pursuant to Article 2.1 of the BAT Rules, "*[t]he seat of the BAT and of each arbitral*

proceeding before the Arbitrator shall be Geneva, Switzerland". Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

48. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

49. The dispute is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA[1].

50. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under clause 13.4 of the Employment Agreement, which reads as follows:

> *"Any dispute arising from or related to the present Agreement shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland, and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono".*

51. The Employment Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

52. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

53. The jurisdiction of the BAT over Claimant's claim arises from the Employment Agreement. The wording "[a]*ny dispute arising from or related to the present*

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[1] Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

Agreement […]" clearly covers the present dispute. Moreover, the Club has fully participated in the proceeding and has expressly accepted the jurisdiction of the BAT.

54. For the above reasons, the Arbitrator has jurisdiction to adjudicate Claimant's claim.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

55. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide "en équité" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

> *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

56. Under the heading "Law Applicable to the Merits", Article 15 of the BAT Rules reads as follows:

> *"15.1 The Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.*
>
> *15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."*

57. Even though clause 31.1 of the Employment Agreement refers to the fact that the

Employment Agreement "*must be interpreted in accordance with the laws of the Republic of Lithuania*", paragraph 4 of this same clause then provides that: "[t]*he arbitrator shall decide the dispute ex aequo et bono*".

58. In line with BAT jurisprudence, the Arbitrator considers that paragraph 4 of the Employment Agreement constitutes *lex specialis* with respect to arbitral proceedings before BAT, whereas national law is meant to apply only in proceedings other than BAT arbitration.[2] In addition, the Arbitrator notes that neither of the Parties referred in its submissions to Lithuanian law. Instead, the Respondent expressly submitted that "[t]*he Arbitrator shall decide the dispute ex aequo et bono*" (para. 2.3 of the Answer) and the Claimant likewise argued based on *ex aequo et bono* (see pages 5 et seq. of the Reply). Therefore, the Arbitrator finds that the issues submitted to him in this proceeding shall be decided *ex aequo et bono*.

59. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage[3] (Concordat)[4], under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[5]

60. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*".

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2 See, *ex multis*, BAT 0875/16, para. 161.

3 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

61. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

6.2.1 Termination of the Employment Agreement

62. The main issue under discussion in the present matter is whether the Employment Agreement was in fact terminated by the Club in October 2021 as a consequence of the hiring of a new head coach for the Club's first team *in lieu* of Claimant, or if it continued to run its course thereafter, with the Claimant merely suspending his performance in January 2022 due to the Club's failure to fulfill its payment obligations.

63. Irrespective of the above, it is undisputed that the Club had no valid reason to terminate the Employment Agreement on 8 October 2021, as it expressly acknowledged that the head coach's replacement was only supported by the sporting results of the Club by that time.

64. Thus, it is not a question of whether Respondent's termination of the Employment Agreement was lawful or not, but just whether or not the conduct of the Parties after Claimant's replacement merits considering that the Employment Agreement was still alive after the said replacement.

65. In this regard, Claimant bases his case, essentially, on two elements: first, that Respondent kept regularly paying Claimant's salary on the months following the alleged termination and second, that Claimant was denied permission to travel back to Germany for a personal matter after the said date.

[4] P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

66. Regarding the first fact, Respondent acknowledges in para. 3.8 of the Answer that "[a]*fter announcing the change of the head coach on 8 October 2021, Respondent kept paying the Claimant (on 22/10/2021 EUR 20750 was paid to the Claimant (Exhibit No 2); 2/12/2021 EUR 20750 was paid to the Claimant (Exhibit No 3) and 2/12/2021 EUR 13072,50 taxes were paid on behalf of the Claimant (Exhibit No 4)…*".

67. In relation to the second fact, as already mentioned in paras. 10 – 12 above, when the Coach's representative e-mailed the Club to request permission from Respondent for the Coach to travel to Germany due to an important family matter, only some days after the Coach's replacement, the Club replied to the Coach's petition by informing that it was not "*a proper time for Martin Schiller to leave the club*", among other reasons, because the Club considered that the Parties had to discuss "*the further tasks of providing his services under the Agreement*".

68. Therefore, not only did the Club impliedly acknowledge its authority to deny the Coach's petition to leave the country, but it also expressly confirmed in writing that there were other tasks that the Coach would have to perform until the Parties were able to reach an agreement regarding the termination of the Employment Agreement.

69. Moreover, by that same communication, the Club also confirmed that it also had "*an obligation to fulfill his* [sic] *duties (included but not limited to remuneration obligations) towards Martin Schiller*", reason why, if the Coach wanted to leave the country between 22 October 2021 and 1 November 2021, he could do so but the Club would deduct the corresponding salary amounts during his absence.

70. As such, the Club acknowledged that payments made after 8 October 2021 (see para. 64 above) were made in compliance with the Club's remuneration obligation

[5] JdT 1981 III, p. 93 (free translation).

under the Employment Agreement.

71. The Club's communication was replied by Claimant declaring that he had decided "*that he will not be traveling to Germany and will stay in Kaunas in order to keep complying with his contract*".

72. Therefore, even though on 9 October 2021, Claimant's representatives stated that Claimant "*was unlawfully and unilaterally terminated by Mr. Motejunas* (the Club's representative)" on the previous day, the subsequent conduct of the Parties leads the Arbitrator to conclude that both Parties continued to give validity to the Employment Agreement thereafter (Claimant by accepting the Club's denial regarding his departure to his home country for a personal matter, and Respondent by regularly paying Claimant's salary and by reiterating Claimant his obligation to provide any services that were requested by the Club even after 8 October 2022).

73. The Employment Agreement continuing to be in force after 8 October is further confirmed by the fact that Respondent's "termination notice" of 8 October 2021, which it first presented in person to Claimant and then sent by e-mail to his agents, is not in fact a notice of unilateral termination. By contrast, by its express terms, that notice "***offers*** [Claimant] *to terminate the Agreement from October 8th, 2021 by signing the* ***mutual*** *termination agreement*". Indeed, the Parties subsequently exchanged drafts of such mutual termination agreement, but did not eventually sign any such agreement. It follows that despite of what Mr. Motejunas may have verbally communicated to Claimant on 8 October 2021, both Parties treated the Employment Agreement as valid beyond that date.

74. With that in mind, Claimant's suspension of the Employment Agreement on January 2022 is based on Respondent's lack of payment of the December salary instalment.

75. In this regard, clause 5.5 of the Employment Agreement provides as follows:

> *"In the event if any of Club's payment indicated in Table No. 3 of Annex No. 1 of this Agreement, is delayed by more than 30 (thirty) calendar days, the Head Coach must give written notice to the Club and specify a reasonable (not less than fifteen (15) calendar days) period of time to correct the breach. In a case, if the Club fails to fulfil its payment obligations within the period specified in notification, the Head Coach has a right to suspend performance of sports activities under this Agreement (i.e., participation in training sessions and competitions of the Club) by written notice until the moment when outstanding payments are paid (Agreement will be considered suspended on the next business day after the Club will receive a written notification about the suspension, unless otherwise stated in the written notice of Head Coach. In the event of suspension of the Agreement, the Head Coach does not rescind his rights to the payments in this Agreement."*

76. As such, the Club's lack of payment of the December salary instalment implied that, at least, the Club was not able to order the Coach to fulfil his obligations under the Employment Agreement anymore and as it did back in October 2021 when the Coach requested permission to absent himself from Lithuania.

77. Moreover, it is clear (i) that the suspension of the Employment Agreement by the Coach was made with just cause (as the Club has not declared within the context of these proceedings that the December salary instalment was paid); (ii) that clause 5.5 of the Employment Agreement entitles the Coach to receive all pending payments under the Employment Agreement; and (iii) that the Coach did not provide any services nor receive any further amounts from that moment.

6.2.2 Consequences of the Coach's suspension of the Employment Agreement with just cause

78. As set out above, clause 5.5 of the Employment Agreement provides that "*[i]n the event of suspension of the Agreement, the Head Coach does not rescind his rights to the payments in this Agreement*".

79. Thus, the main consequence of the Coach's suspension of the Employment Agreement with just cause was his entitlement not only to the outstanding salary as of January 2022 (i.e. EUR 33,375.00), but also to all further salaries for the remainder of the

Employment Agreement (i.e. EUR 160,192.00, all of the relevant instalments having fallen due in the course of this arbitration).

6.2.3 Coach's duty to mitigate damages

80. Having decided the amount of compensation to be paid by the Club, *a priori*, for breach of the Employment Agreement, it remains to consider whether Claimant had the obligation to mitigate pursuant to well-settled BAT jurisprudence (e.g. FAT 0024/08, FAT 0014/08) establishing as a matter of principle a duty on the party seeking damages for breach to mitigate such damages. Concretely, in order to avoid that such party be in a better position as a consequence of the breach, his or her earnings for providing services elsewhere (including what he or she could and should reasonably have earned) are to be deducted from the damages claimed.

81. In this regard, Coach's position is that, as the Employment Agreement was still valid and in force after October 2021, he was not under any obligation to mitigate any damages and that, in spite of the above, he offered to mitigate Respondent's losses by accepting to enter into a termination agreement that then was never signed by the Parties due to further misunderstandings during negotiations.

82. Moreover, he affirms that the fact that Respondent rejected the agreed termination terms implied that the Employment Agreement was still in force, leading Claimant to receive less employment opportunities, as no basketball club could or would make an official offer of employment to a coach that was under contract with another club.

83. In addition to the above, Claimant assures that he never received any offers from Burgos, Hapoel Jerusalem or Oldenburg basketball clubs, as stated by Respondent in its submissions, and he provides three respective affidavits from these clubs' representatives with his Reply in order to prove the above. Furthermore, he also refers

to the fact that these three clubs were lower tier clubs that would represent a step backward in his professional career.

84. Notwithstanding the above, Claimant also defends that, through his agents, he was actively trying to find a new employment opportunity as soon as possible. In this regard, Claimant provides communications with representatives of basketball clubs such as Zaragoza BC, Maccabi Tel Aviv BC, Monaco BC, Lokomotiv Kuban, or Bayern München Basketball GmbH. However, as per Claimant's allegations, these were not the only contacts that Claimant's representatives made, but the only ones that he could provide to the procedure, due to the express approval from those third parties in order to do so.

85. The defence presented by Respondent is that, as Claimant was not able to find a new employment opportunity before the natural expiration of the Employment Agreement, he had to demonstrate that he actively looked for the said new source of income and did not remain passive after the alleged termination of his contract.

86. Moreover, Respondent considers that, from the evidence provided, it can be inferred that there were in fact clubs seeking to hire Claimant and it was Claimant who denied or rejected those potential employment offers.

87. With the above in mind, the Arbitrator notes that the different interpretation of the Parties as to whether the Employment Agreement was in fact terminated, affects the assessment of Claimant's compliance with his duty to mitigate. In particular, as the Employment Agreement was not in fact terminated, Claimant's claim is not a claim for damages but rather for payment of salaries under a valid contract. This raises the question of whether the duty to mitigate applies at all in a situation in which Claimant possibly could, but did not, terminate the Employment Agreement due to Respondent's breach of contract (failure to pay due salaries), instead making use of his contractual right to merely suspend his performance. However, this question does not fall to be

decided in this case because, as will become clear in the following paragraphs, the Arbitrator anyway finds that the principle of mitigation would not justify any moderation of the claimed amount in this case.

88. Irrespective of the Parties' disagreement on whether the Employment Agreement was terminated early, what is not under discussion is that the Employment Agreement was either terminated or suspended during the season and after a period running from October 2021 until January 2022, in which, at least, the Coach's contractual position was not 100% clear.

89. The obligation of an employee to mitigate the salary claim during suspension is not equally compulsory as after an early termination. At most, one may consider an obligation to mitigate the salary claim in a situation where an employment agreement was suspended but a return to work was no longer an option.

90. Even if a return was not very likely in the present case since the Claimant's job was now executed by someone else, Claimant was doubtless in a more difficult position to find a new club for the rest of the 2021/2022 season than if this had happened before the start of the season (as even though there are changes in the coach's position in the middle of the seasons, the chances of getting one of those vacancies are probably less than for those who have been a free agent from a longer period and that could have initiated those conversations / negotiations with the relevant clubs much earlier than that).[6]

91. Moreover, the Arbitrator considers that the evidence does establish that Claimant, through his agents, was actively looking for employment opportunities, but with no success, mainly because other clubs did not seek to formally offer a contract to a

[6] See also BAT 0383/13, para. 110; BAT 1715/21, para. 67(i).

coach who was still under contract with another club. Respondent argues that due to its public announcement on 8 October 2021 that Claimant was replaced as head coach, other clubs would have had no problem hiring Claimant if it were not for Claimant himself creating the false impression towards those clubs that he was still under contract. However, the Arbitrator is unable to follow this line of argument: As set out above, the Employment Agreement was not in fact terminated on 8 October 2021. Instead, after both Parties treated the Employment Contract as valid until January 2022, Claimant merely suspended his performance because Respondent stopped paying Claimant. The Arbitrator finds it plausible that in such situation, based on the objective course of events (rather than some sort of misimpression created by Claimant) it is entirely plausible that other clubs were reluctant to extend any offers to Claimant. Hence, even if Coach was under a duty to mitigate despite the Employment Agreement still being valid, the Arbitrator finds that he discharged that duty by way of his attempts to solicit offers from other clubs.

92. Therefore, under the circumstances the Arbitrator considers that there is no reasoned basis on which to moderate the amount of compensation payable to the Coach regarding the 2021/2022 season.

6.2.4 Flight expenses

93. In addition to the principal claim of outstanding salaries and compensation for the remaining months of the 2021/2022 season after termination, item c) of Claimant's request for relief also refers to Respondent's alleged obligation to reimburse any expenses incurred by Claimant due to Respondent's contractual breaches (such as travel and vehicle expenses), plus the amount of EUR 3,405.19 of flight ticket allowance apparently not paid by Respondent.

94. In respect of unspecified expenses "*such as travel and vehicle expenses*", the Arbitrator finds that Claimant has failed to particularize and substantiate in its submissions any expenses in relation to which he would be entitled to reimbursement.

95. As far as the flight ticket allowance is concerned, in the Request for Arbitration, Claimant alleges that Respondent agreed to pay him the amount of EUR 4,000.00 as flight expenses for the 2021/2022 season and that only the amount of EUR 594.81 was used by Claimant's family (reason why Claimant claims the difference).

96. In this regard, Annex 1 to the Employment Agreement provides for the benefits granted to the Coach. Among others, it provides for "*not more than 4000 EUR (four thousand euros) in total per one basketball season for all the round-trip airplane tickets Europe – Lithuania*".

97. From the evidence provided by Claimant, it can be inferred that in December 2021, the travel agency working for the Club rejected the booking of some flights for the Coach's family because the relevant person "*didn't get an approval from club for these tickets*". Even though this could constitute a breach of the Employment Agreement, in the Arbitrator's view, the fact that Claimant has not proved that he directly incurred the said cost, does not authorise him to claim for these amounts.

98. Moreover, the amounts requested by Claimant regarding this item are much higher than the options given by the travel agency in that case (ranging from EUR 528.81 to EUR 788.71).

99. As such, the Arbitrator rejects this request.

6.2.5 Interest

100. Although no contractual provision in the Employment Agreement stipulated the obligation to pay interest on overdue amounts to Claimant, he requested in the Request for Arbitration interest "*at the applicable Swiss statutory rate to any payment not paid on the scheduled due date as per the Annex to the contract*".

101. In accordance with consistent BAT jurisprudence, and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award a 5%-interest on all the amounts.

102. As for the time when such interest should accrue, and in order to avoid any potential finding *ultra petita*, the Arbitrator considers it fair and reasonable that interest should commence on the day after the respective dates in which each of the outstanding instalments fell due as per Annex 1 to the Employment Agreement.

7. Costs

103. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

104. On 3 November 2022 – considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*", taking into account all the circumstances of the case, including the

time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 9,150.00.

105. Considering that Claimant was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration, as well as his reasonable costs and expenses, be borne by the Club.

106. Claimant claims legal fees and translation costs in the amount of EUR 14,145.72. He also claims for the expense of the non-reimbursable handling fee in the amount of EUR 4,000.00.

107. Taking into account the factors required by Article 17.3 of the BAT Rules, the provision in the arbitration agreements as regards costs, the maximum awardable amount prescribed under Article 17.4 of the BAT Rules (in this case, EUR 10,000.00), the fact that the non-reimbursable handling fee in this case was EUR 4,000.00, and the specific circumstances of this case, the Arbitrator holds that the amount requested (plus the non-reimbursable handling fee) needs to be slightly moderated. In particular, and even though there were two rounds of submissions, Claimant has requested an amount that exceeds the threshold prescribed under Article 17.4 of the BAT Rules. Also, the Arbitrator does not consider that the volume and complexity of submissions in this case warrants a contribution to legal fees equal to that threshold. Rather, the Arbitrator finds that a contribution of EUR 7,000.00 to Claimant's legal fees and expenses, plus EUR 4,000.00 in respect of the non-reimbursable handling fee, is appropriate in this case.

108. Given that Claimant paid advances on costs of EUR 10,000.00 as well as a non-reimbursable handling fee of EUR 4,000.00 (which will be taken into account when determining Claimant's legal fees and expenses), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

(i) The BAT shall reimburse EUR 850.00 to Claimant, being the difference between the costs advanced by Claimant and the arbitration costs fixed by the BAT President;

(ii) Respondent shall pay EUR 9,150.00 to Claimant, being the difference between the costs advanced by the Claimant and the amount he is going to receive in reimbursement from the BAT;

(iii) Respondent shall pay to Claimant EUR 11,000.00 (EUR 4,000.00 for the non-reimbursable fee + EUR 7,000.00 for legal fees and translation costs), representing the reasonable amount of her legal fees and other expenses.

8. AWARD

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

1. **Zalgiris Kaunas BC shall pay Mr. Martin Schiller a total amount of EUR 193,567.00 as outstanding salaries for the 2021/2022 season, plus interest on such amount at 5% per annum on any outstanding balance (as may be the case from time to time). The interest shall start to accrue as from the following dates:**

    - **16 December 2021 until full payment regarding the December 2021 instalment of EUR 20,750.00;**
    - **16 January 2022 until full payment regarding the January 2022 instalment of EUR 12,625.00;**
    - **16 February 2022 until full payment regarding the February 2022 instalment of EUR 12,625.00;**
    - **16 March 2022 until full payment regarding the March 2022 instalment of EUR 41,500.00;**
    - **16 April 2022 until full payment regarding the April 2022 instalment of EUR 64,567.00;**
    - **16 May 2022 until full payment regarding the May 2022 instalment of EUR 20,750.00; and**
    - **16 June 2022 until full payment regarding the June 2022 instalment of EUR 20,750.00.**

2. **The costs of this arbitration until the present Award, which were determined by the Vice-President of the BAT to be in the amount of EUR 9,150.00, shall be borne by Zalgiris Kaunas BC alone. Accordingly, Zalgiris Kaunas BC shall pay Mr. Martin Schiller an amount of EUR 9,150.00**

as reimbursement for his arbitration costs.

3. **Zalgiris Kaunas BC shall pay Mr. Martin Schiller an amount of EUR 11,000.00 as reimbursement for his legal fees and expenses.**

4. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 15 November 2022

Stephan Netzle
(Arbitrator)