ARBITRAL AWARD

(BAT 1545/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Clifford J. Hendel

in the arbitration proceedings between

Ms. Ziomara Esket Morrison Jara

- Claimant -

represented by Mr. David Ioan-Vlad, attorney at law,
Sector 5, Zarii Street no. 14, 3rd Floor, Bucharest, Romania

vs.

DVTK Kosarlabda KFT
Görgey Artur u.19, 3530 Miskolc, Hungary

- Respondent -

represented by Dr. Mátyás Imre, attorney at law,
Damjanich u.33 FSZ/4, 1071 Budapest, Hungary

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 Claimant

1. Ms. Ziomara Esket Morrison Jara (the “Player”) is a Chilean professional basketball player.

1.2 Respondent

2. DVTK Kosarlabda KFT (the “Club”) is a professional basketball club from Miskolc, Hungary. It is currently competing in the first Hungarian Women’s Basketball League and it has participated in the Euroleague Qualifiers 2019 and the EuroCup Women 2019-2020.

2. The Arbitrator

3. On 13 May 2020, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Clifford J. Hendel as arbitrator (the “Arbitrator”) pursuant to Article 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 the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. As of 6 September 2019, the Player and the Club entered into an employment agreement (signed by the Player and her Agent on that day and by the Club on

8 September 2019) whereby the latter engaged the Player for the 2019/2020 season (the "Employment Agreement").

5. Clause 1 of the Employment Agreement provides as follows:

> *"The Club hereby engages the Player as a skilled basketball player from the date of Player's arrival to Hungary according to Paragraph 1a until the last official team event of the 2019 - 2020* [season]*".*

6. Exhibit 1 of the Employment Agreement provides for the Player to receive an annual fully guaranteed base salary of USD 70,400.00 as well as certain bonuses (all payments under the Employment Agreement to be made in HUF, at an agreed, fixed USD-HUF exchange rate, being the official exchange rate at or around the date of signature of the Employment Agreement). According to clause 3g ("Taxes") of the Employment Agreement, the Club "*shall make all payments of Hungarian taxes on behalf of the Player and her representatives*" and such payments shall be made "*in addition to the net payments to the Player set forth in Exhibit 1*".

7. In addition to the above salary and bonus, the Player is entitled to other benefits (transportation, housing, meals, medical and dental expenses, equipment, etc.). In particular, regarding transportation, clause 3a of the Employment Agreement establishes the following:

> *"During the term of the present Agreement the Club shall provide the Player with two (2) round-trip economy class tickets under Player's name, from the Valdiva*[sic] *Airport (Chile) to Hungary. The Club will also provide transportation from the airport to Miskolc as well as pay for two (2) extra pieces of luggage (up to 20 kgs).*
>
> *c.*[sic] *Club is fully responsible to fly Player to Valdiva*[sic] *in Chile, within 72 hours from the last official team event of the season but no longer than 5 days after last official game, including all possible airline change fees".*

8. On 13 March 2020, due to the COVID-19 situation, the Player and the rest of her teammates attended a meeting with the Club's representatives in which it was

announced that the Club's facilities were going to be closed on the following day until further notice and that the 2019/2020 season was going to be suspended or at least postponed.

9. The very next day, 14 March 2020, an employee (technical manager) of the Club drove the Player to the Vienna International Airport – a trip of more than 400 kilometres – where the Player boarded a plane to Poland, where she had family. The Player asserts that this shows that the Club did not object to her departure and did not condition her departure on the prior execution of a termination agreement. The Club, on the other hand, asserts that this facilitation of the Player's departure in the hours before the lockdown was undertaken as a charitable "*rescue mission*" by an employee of the Club on his own initiative and without the permission or consent of management, and that the employee was in fact subsequently subjected to discipline by the Club for his actions.

10. On 16 March 2020, the Hungarian Basketball Federation decided to cancel the 2019/2020 season without an official final result.

11. Although the Parties had been negotiating a possible amicable termination of the Employment Agreement in the second half of March 2020 (broadly consistent in its terms, asserts Respondent, with settlements reached with the Club's three other foreign players, with certain details of the negotiations forming part of the record of this proceeding), on 1 April 2020, the Club sent a notice to the Player by virtue of which it unilaterally terminated the Employment Agreement, citing as grounds the Player's departure without written permission and the consequences of the COVID-19 situation.

12. After the Club's unilateral termination, on 29 April 2020, the Player filed a Request for Arbitration with the BAT, claiming: (i) HUF 886,460.00 net, as overdue payables until 14 March 2020; (ii) HUF 3,087,776.00 net, as compensation for the Club's unilateral termination of the Employment Agreement without just cause; (iii) USD 219.77, as

reimbursement for a flight ticket Santiago-Valdivia; and (iv) an undetermined amount as compensation for a flight ticket Hungary-Valdivia (which was later calculated at USD 800.00 taking into account the price of an average ticket). The amounts in (i) and (ii) above correspond to USD 2,953.19 and USD 10,286.38, respectively, at the contractually-established exchange rate identified in paragraph 46 below.

13. In light of the issues raised in the case, and the public interest in having a sufficient body of published awards with reasons, the BAT President has determined pursuant to Article 16.3(b) of the BAT Rules that this proceeding shall be resolved by an award with reasons despite involving a monetary amount falling well below the threshold for the same provided in Article 16.2 of the BAT Rules.

3.2 The Proceedings before the BAT

14. As already mentioned, on 29 April 2020, Claimant filed the Request for Arbitration giving rise to this proceeding. She also duly paid the non-reimbursable handling fee of EUR 1,500.00, which was received by the BAT the day before, i.e. on 28 April 2020.

15. On 15 May 2020, the BAT informed the Parties that Mr. Clifford J. Hendel had been appointed on 13 May 2020 as the Arbitrator in this matter, invited Respondent to submit its Answer by 29 May 2020 and fixed the advance on costs to be paid by the Parties on or before 22 May 2020 as follows:

"Claimant (Ms. Ziomara Esket Morrison Jara)	*€ 2,500.00*
Respondent (DVTK – Kosarlabda KFT)	*€ 2,500.00"*

16. By Procedural Order of 2 June 2020, the BAT confirmed Claimant's payment of her part of the foregoing advance on costs on 18 May 2020. In light of Respondent's failure to timely pay its share and as communicated by the BAT on that same date, Claimant made such payment in substitution, which was received by the BAT on 8 June 2020. On the same date, Claimant requested the right to reply to Respondent's Answer,

which was submitted on 29 May 2020.

17. On 10 June 2020, the Arbitrator invited Claimant to comment on the Answer no later than 15 June 2020.

18. As correspondence dated 10 June 2020 could not be successfully delivered to the Parties, by Procedural Order dated 16 June 2020, a new time-limit of 24 June 2020 was established for Claimant to comment on the Answer.

19. By email of 23 June 2020, Claimant filed her comments (dated 22 June 2020) on Respondent's Answer. On that same date, the BAT invited Respondent to file its comments to Claimant's reply by 2 July 2020.

20. On 2 July 2020, Respondent filed its rejoinder.

21. On 10 July 2020, 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 17 July 2020) 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. In so doing, the Arbitrator also took notice of Claimant's proposal that team captain Ms. Maya Skoric be heard as a witness, but in light of her written statement being on file and the limited relevance of the testimony in question, the Arbitrator decided that no hearing need be held.

22. Claimant filed her costs submission (dated 13 July 2020) on 14 July 2020. Respondent filed its costs submission (dated 16 July 2020) on 17 July 2020.

4. The Positions of the Parties

4.1 Claimant's Position

23. Claimant alleges that due to the COVID-19 restrictions and the information received from the Club that the Hungarian league was going to be suspended / postponed, the Club orally authorised her and her foreign teammates (one of whom, team captain Maya Skoric, submitted a short witness statement to this effect as mentioned above) to leave the city / country at a meeting held on 13 March 2020 at the Club's facilities.

24. The Player affirms (and the Club does not deny) that an employee of Respondent helped make her travel arrangements in the confusing hours before Hungary was locked-down and the Hungarian league's suspension was formally announced, and indeed drove her the more than 400 kilometres to the Vienna International Airport the following day (i.e. on 14 March 2020) in order to board a plane for Poland.

25. Therefore, Claimant submits that the conditions mentioned in clause 7b of the Employment Agreement (set out below in para 53) were not fulfilled in order to trigger the right of the Club to terminate the Employment Agreement with just cause, as the Player did not commit any "*major breach*" or "*serious misconduct*" under the Employment Agreement and the COVID-19 crisis was not sufficient reason in order to permit the Club to unilaterally terminate the Employment Agreement.[1]

26. In light of the foregoing, in her Request for Arbitration, Claimant requested the following

[1] Claimant also submits that the Guidelines are not applicable inasmuch as the Employment Agreement, she asserts, was "***effective*** *before the lockdown period*" (emphasis added). The Arbitrator is aware that the Employment Agreement was indeed applicable before the Lockdown Period, but understands that since its termination occurred during the Lockdown Period, the consequences of termination need to be assessed taking into account the pandemic situation and thus in the light of the Guidelines. Therefore, Claimant's argument in this regard is rejected.

relief:

a. *"An amount of eight hundred eighty-six thousand four hundred sixty Hungarian Forint **(886.460 HUF)** net as overdue payables till 14th of March 2020;*

b. *Firstly, an amount of three million eighty-seven thousand seven hundred seventy-six Hungarian Forint **(3.087.776 HUF) net** representing Claimant full unpaid salary as termination indemnity; Secondly, an amount of two million four hundred sixty-seven thousand three hundred thirty-seven point four Hungarian Forint **(2.467.337,4**[sic] **HUF) net** as termination indemnity reduced according to BAT COVID-19 Guidelines;*

c. *An amount of two hundred nineteen point seventy-seven dollars (**219.77 USD**) representing reimbursement for Santiago to Valdivia round-trip flight ticket;*

d. *An economy class flight ticket from Hungary to Valdivia (Chile) or the money equivalent of a Hungary - Valdivia economy class flight ticket, which will be determinate*[sic] *at a later stage in the proceedings;*

e. *Interest at a rate of five percent (**5%**) per annum on the amounts as following:*

Amount	***Start Date***	***Date of submitting the RfA***	***Quantum***
886.460 HUF	*14th of March 2020*	*till 28th of April 2020*	***5.585,91 HUF***
3.087.776 HUF	*14th of March 2020*	*till 28th of April 2020*	***19.457,21 HUF***

f. *Provide Claimant Ziomara Morrison with a tax certificate indicating the net nature of all past and future payments (to be) made under the Agreement according art. 1 point g) of Contract;*

g. *Reimburse the Claimant Ziomara Morrison all BAT expenses and procedure costs; and*

h. *indemnify*[sic] *Claimant Ziomara Morrison for all incurred legal and expenses up to an amount to be determinate*[sic] *during the BAT proceedings."*

4.2 Respondent's Position

27. Respondent submits that the Player breached the Employment Agreement as she left the country unreasonably and without the prior written consent of the Club being, in fact, the only foreign player to do so without having previously agreed to a mutual

termination of her labour relationship with the Club, so the Club's unilateral termination was just and lawful (Rejoinder, paragraph 8: *"It is clear and unambiguous that Claimant was not entitled to leave without reaching an agreement with the Club to terminate the agreement bilaterally. This statement is proven by the undisputable fact that each and every player of the team left exclusively after the bilateral termination of their agreement"*).

28. Respondent also argues that the fact that the term of the Employment Agreement coincided with the "*last official team event*" of the season, means that the calculation of the amount claimed by the Player is not acceptable.

29. In addition to the above, Respondent states that the pandemic situation has caused an extraordinary and unexpected circumstance in which the Parties should have cooperated in the modification of the terms of their contractual relationship in pursuance of the principle "*rebus sic stantibus*".

30. Therefore, in summary, Respondent requested the following in its Answer (and which it reiterated in its rejoinder):

> *"- to find that the termination of the Agreement was just and lawful,*
>
> *- to declare that Respondent has fulfilled its contractual obligations, or, potentially*
>
> *- to order to share the risk between the Parties as deducted in para 35 above. Namely that Claimant is entitled to 61.494,28 USD on a yearly basis, thus Respondent shall pay 4.334,7*[sic] *USD*
>
> *- to order Claimant to bear all the costs arising from this arbitration"*

5. The jurisdiction of the BAT

31. 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).

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

33. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA[2].

34. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under clause 9 of the Employment Agreement ("Dispute Resolution"), which reads as follows:

> *"Any dispute arising from or related to the present contract 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 (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono".*

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

36. 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).

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

---

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

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

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

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

39. 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".*

40. 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."*

41. Clause 9 of the Employment Agreement provides that: *"*[t]*he arbitrator shall decide the*

dispute ex aequo et bono".

42. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

43. 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]

44. 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".

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

6.2 Findings

6.2.1 Unpaid amounts pre-termination of the Employment Agreement

46. The Parties agreed that the amount of USD 70,400.00 contemplated in Exhibit 1 of the Employment Agreement would be paid in one instalment of USD 1,100.00 "*after*

---

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).

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

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

passing the medical exam" and eleven equal instalments of USD 6,300.00 to be paid on the 15th day of each month between October 2019 and August 2020 (i.e., the last three instalments falling due after the contemplated end of the 2019/2020 season) in the HUF equivalent as of 10 September 2019 (i.e. USD 1.00 = HUF 300.17 according to the Hungarian National Bank), with the initial payment to be in the amount of HUF 330,187.00 and the eleven monthly payments to be in the amount of HUF 1,891,071.00 each, i.e., HUF 21,131,968.00 in all (USD 70,400.00 at the stipulated exchange rate).

47. Claimant acknowledges that she received the total amount of HUF 11,664,066.00 (i.e. USD 38,858.20) in payments made by Respondent from September 2019 until 1 April 2020 (the date on which Respondent decided to unilaterally terminate the Employment Agreement).

48. In accordance with the Employment Agreement (Exhibit 1), until 1 April 2020, Claimant was technically entitled to the HUF equivalent of USD 38,900.00 (i.e. HUF 11,676,613.00), that is, the first instalment plus six equal monthly instalments.

49. Therefore, notwithstanding Claimant's creative but contractually-unsupported calculation of her salary on a daily basis (and disregarding that some payments accrued after the end of the season), and notwithstanding Respondent's apparent agreement that a daily salary should be applied, the only overdue payables pre-termination of the Employment Agreement amount to USD 41.80 net of Hungarian taxes (i.e. HUF 12,547.11), which seems to be a consequence of rounding errors in the application of the agreed exchange rate, rather than an actual default of payment. In any event, this amount was due to the Player and not received by her; thus, the Club is liable for its payment.

6.2.2 Unilateral termination of the Employment Agreement

50. That said, and as mentioned above, on 1 April 2020, after some negotiations in order to reach a possible amicable solution to the situation occurred as a consequence of the COVID-19 pandemic, the Club decided to unilaterally terminate the Employment Agreement. Shortly after doing so, on 7 April 2020, the Club paid an amount equivalent to three months' salary to the Player, identified on the applicable bank extract as constituting the March salary plus "*exit costs*", i.e., an apparent termination indemnity payment equivalent to two months' salary.

51. The reasons given by Respondent for its unilateral termination were the following:

> *"- COVID-19 health crisis heavily affecting Hungary, including travel restrictions, quarantines and curfew*
>
> *- official prohibition of all professional sport related activities (including trainings, matches, etc) and closing of all sports facilities by the Hungarian Government and the Municipality of Miskolc*
>
> *- the Player left Miskolc on the 14th of March 2020 without the written permission of the Club, which is according to the 8.b. paragraph of the Player-Club Agreement is*[sic] *by definition a serious breach of contract*
>
> *- on 16th of March 2020 the Hungarian Basketball Federation (MKOSZ) terminated the Hungarian Women's First Basketball League 2019-2020 season without official final result"*

52. Thus, the Club based its decision to unilaterally terminate the Employment Agreement on: (a) the COVID-19 crisis and its consequences; and (b) the Player's departure without prior written permission.

53. Clause 7b of the Employment Agreement provides for the ground which would entitle the Club to unilaterally terminate the Employment Agreement:

> *"b. Should the Club decide to unilaterally terminate the hereby agreement* ***due to a major***

> ***breach of contract or serious misconduct by the Player (e.g. the Player is arrested by the police, the Player uses illegal drugs, the Player injured outside of official team events and not able to perform her duties as professional basketball player, become pregnant, etc****.) any time during the term of this Agreement, then the Player hereby accepts that club has no further obligations to pay salary to the Player after the termination date".* (emphasis added)

54. As per the agreed terms of the Employment Agreement, neither the pandemic (or its consequences) nor the Player's departure without prior written permission are sufficient causes for the Club to unilaterally terminate the Employment Agreement.

55. Regarding the COVID-19 crisis, and bearing in mind paragraph 2 of the COVID-19 Guidelines issued on 20 April 2020 by the BAT President, Vice-President and Arbitrators (the "BAT Guidelines"), "*[a]micable settlements are the preferred means of resolving disputes arising out of the COVID-19 crisis*". Actually, "*[p]arties are under a duty to renegotiate in good faith the terms of their contract in order to resolve on an amicable basis contractual issues arising from the pandemic*".

56. While there is substantial evidence on record that the Parties endeavoured to resolve the dispute amicably (and indeed were very close to reaching a settlement), the BAT Guidelines make perfectly clear that COVID-19 cannot be the basis for a unilateral termination of a professional basketballer's contract, which is in accordance with general considerations of justice and fairness that the Arbitrator shall use when deciding the case.

57. As indicated in paragraph 9 of the BAT Guidelines, "…*[A] contract is not automatically terminated because of the pandemic. Neither does the COVID-19 crisis give either party just cause to unilaterally terminate the contract".* On the basis of the foregoing, the Arbitrator cannot condone the Club's conduct in connection with the negotiations, in particular the termination of the negotiations after the issuance of an infelicitous 23 March 2020 ultimatum, Annex 4 to the Request for Arbitration *("….I would like to ask you again if you will accept our proposal to mutual termination or I should send you*

the unilateral cancellation due to vis maior events? I would of course prefer the first version…."), pursuant to which the Club manifestly sought to gain a tactical advantage from the pandemic.

58. In this regard, the Arbitrator of course recognizes the indicative / illustrative and non-binding nature of the Guidelines (which, as stated in the preamble, "*merely reflect a consensus reached by the BAT president, Vice-President and Arbitrators…..are not binding rules of mandatory application and…do not affect each BAT Arbitrator's liberty of decision in deciding an individual BAT case")*. Cognizant, as well, of the fact that the Guidelines reflect the "*shared views [of the BAT President, Vice-President and Arbitrators] on what they perceive to be just and fair solutions, under the ex aequo et bono standard, to [the] substantive issues*" raised by the pandemic, the Arbitrator finds just and fair the application of the spirit of the Guidelines to the circumstances of this case.

59. In short, the pandemic is not and cannot be considered to be a valid or just cause for the unilateral termination of the Employment Agreement, should not be used by one Party or the other for tactical advantage, and its consequences should be shared between the Parties in a manner deemed equitable under the circumstances.

60. In relation to the Player's departure without the Club's prior written permission, notwithstanding the fact that the Club argues in its Answer that "*[a]s far as the Club's regulation is concerned, it is unequivocally declared that the Player is not allowed to leave the City of Miskolc without prior WRITTEN permission of the Club*", this Club's regulation has not been provided in the context of the present proceeding and, as mentioned, the Employment Agreement does not provide for anything in this regard. Moreover, and even if the Club's regulation were in evidence and stated what Respondent asserts that it states, based on the evidence on record, the Arbitrator is unable to conclude that the Player's leaving Hungary after the 13 March 2020 meeting and the unofficial announcement of the impending lockdown (and actually being taken

to the airport by an employee of the Club) could properly be consider to be a "*major breach*" or "*serious misconduct*" such as to permit the Club to terminate the Employment Agreement without consequence to it.

61. This holds true in particular as, in accordance with well-established BAT jurisprudence, termination of an employment contract serves as the *ultima ratio* in solving problems within the parties' contractual relationship.[6] Accordingly, even if the Player's leaving Hungary were considered a "*major breach*" or "*serious misconduct*", the Club at least would have had to warn the Player that it would terminate the Employment Agreement unless she returned to Hungary without undue delay, thus giving the Player a chance to change her behaviour. However, there is no indication of the Club having done so. Instead, the only warning that she may be terminated was extended by the Club in the context of settlement negotiations, nine days after the Player had left Hungary; however, this warning did not refer to her having left Hungary but rather to "*vis major events*", which can only be understood as a reference to the COVID-19 pandemic and the ensuing cancellation of the Hungarian league.

62. As a consequence of the above, the Arbitrator considers that the Club's unilateral termination of the Employment Agreement was not supported by any just cause.

6.2.3 Consequences of the unilateral termination of the Employment Agreement without just cause

63. Clause 7a of the Employment Agreement provides as follows:

> *"**a**. Should the Club decide to unilaterally terminate the hereby agreement without any justified reason at any time during the term of this Agreement, it shall pay the Player her*

---

6 See, e.g., BAT 0357/12, para. 190; BAT 0815/16, para. 94; BAT 0957/16, para. 77.

> *guaranteed salary for the full term of this Agreement.* […] *The Club accepts and agrees that all remaining payments shall immediately become due in such a case.* […]"[7]

64. Thus, *a priori*, according to the abovementioned clause, Claimant would be entitled to receive all the outstanding amounts for the full term of the Employment Agreement (i.e. up to the amount of USD 70,400.00 net).

65. As established in para. 47 above, Claimant acknowledges having already received the total amount of HUF 11,664,066.00 (i.e. USD 38,858.20) on payments made until 1 April 2020, which means that only the amount of HUF 9,467,902.11 (i.e. USD 31,541.80) was pending in respect of her "*guaranteed salary*" on the date on which the Club unilaterally decided to terminate the Employment Agreement.

66. Principle IV of the BAT Guidelines specifically refers to the fact that "*[c]lauses simply providing for a "fully guaranteed" or "no-cut" contract do not allocate economic risks associated with the COVID-19 crisis to any of the parties to the contract*". As such, in spite of the fact that the Club unlawfully terminated the Employment Agreement by its unilateral decision, the consequences of the COVID-19 crisis shall (consistent with the letter and the spirit of the Guidelines and the Arbitrator's conception of fairness within the contemplation of *ex aequo et bono*) be shared by both Parties and, therefore, damages for said termination must be assessed by the Arbitrator taking into account the hypothetical impact that the COVID-19 crisis would potentially have had on the Employment Agreement had it run its normal course.

67. Principle VI of the BAT Guidelines provides for the "*effects on the contractual obligations of clubs*" and contemplates that the Club's obligation shall be adapted taking into account (a) that during the Lockdown Period, the Players' obligations were

---

7 Cf Article 8b of the Employment Agreement, providing for a USD 20,000.00 penalty as compensation to the Club in the event that the Player should terminate the agreement unilaterally without cause.

largely suspended and (b) that the COVID-19 crisis has disrupted the financial framework and presumptions based on which, in the present case, the Employment Agreement was executed between the Parties.

68. Under these circumstances – involving a unilateral termination without just cause in the absence of clear evidence as to the arrangements which the Club may have reached with its other international players – and in the exercise of the discretion afforded to him by the BAT Guidelines and the principles of *ex aequo et bono*, the Arbitrator finds it fair, proportional and reasonable to equitably reduce by 20%[8] the amount to be paid by the Club to the Player as indemnity and, therefore, Respondent shall compensate Claimant in the amount of HUF 7,574,321.68 net of Hungarian taxes (i.e. USD 25,233.44).

69. Since Claimant also recognises, as referred to in paragraph 50 above, having received the amount of HUF 5,493,665 (i.e. USD 18,301.84 equivalent to three months' salary) on 7 April 2020, this means that only the amount of HUF 2,080,656.68 net of Hungarian taxes (i.e. USD 6,931.59 net) would be pending as of today with regard to said indemnity.

70. In so ruling, the Arbitrator takes note not only of the Club's improper termination of the Employment Agreement on the basis of the pandemic as set out above, but also of its voluntary and prompt payment of an apparent two-months' salary indemnity on 7 April 2020 and its participation in negotiations aimed at sharing the consequences of the pandemic. The Arbitrator can only regret that the settlement discussions did not reach fruition, and this proceeding (and this Award) became necessary.

---

8 When deciding the size of the indemnity reduction, the Arbitrator has taken into account the scale included in Principle VI of the BAT Guidelines, but also the Club's particular conduct in the present case.

6.2.4 Transportation

71. In addition to the above, and as noted in para. 7 above, by virtue of the Employment Agreement, the Club also committed to provide the Player during the term of the Employment Agreement with two (2) round-trip economy class tickets under Player's name from Valdivia (Chile) to Miskolc (Hungary), plus a one-way flight ticket back to Valdivia within seventy two (72) hours from the end of the 2019-2020 season.

72. In this regard, on the one hand, Claimant argues that Respondent still owes Claimant USD 219.77 corresponding to a round-trip ticket she had to purchase from Santiago (Chile) to Valdivia (Chile), as the Club did not cover the cost of this last part of one of these trips.

73. On the other hand, the Player also claims the potential cost of purchasing a flight ticket back to Chile once the season had finished. Due to the fact that airports in Chile were still not open when submitting her comments to Respondent's Answer, the Player claims for the approximate value of an average ticket in the amount of USD 800.00.

74. In relation to the first of these prayers, Claimant provides evidence of the cost of said flight and Respondent does not contradict it; with regard to the second one (which Respondent again does not object), the Arbitrator finds it to be a reasonable request for the trip in question. Consequently, Respondent has to pay the amount of HUF 306,104.36 (equal to USD 1,019.77), as reimbursement of flight tickets.

6.2.5 Interest

75. Although no contractual provision in the Employment Agreement stipulated the obligation to pay interest on overdue amounts to Claimant, she requested in the Request for Arbitration interest at the rate of 5% per annum from 14 March 2020 (only on the salary / compensation, not on the flight tickets).

76. In accordance with consistent BAT jurisprudence, and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award interest on both the HUF 12,547.11 net of Hungarian taxes (overdue payables pre-termination) and the HUF 2,080,656.68 net of Hungarian taxes admitted as compensation for the unilateral termination of the Employment Agreement.

77. As for the time when such interest should accrue, the Arbitrator considers it fair and reasonable that interest should commence on the day after the communication of the unilateral termination of the Employment Agreement (i.e. 2 April 2020).

6.2.6 Tax certificate

78. Lastly, in accordance with clause 1g of the Employment Agreement, "*[t]he Club shall also provide official documents for tax payments to the Player and Player's Representatives upon request at any time*". Thus, Claimant's request in this regard is also upheld.

7. Costs

79. 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.

80. On 20 August 2020 – 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 8,000.00.

81. Moreover, in accordance with Article 18.2 of the BAT Rules in light of the importance of this case for the development of BAT jurisprudence, the BAT President orders that an amount of EUR 3,000.00 of the costs of this arbitration shall be borne by the BAT Fund.

82. In spite of the fact that some of the amounts owed by Respondent and claimed by Claimant in consequence of Respondent's unlawful unilateral termination were deducted because of the application of the BAT Guidelines, and in spite of the Arbitrator's rejection of Claimant's use of a contrived "daily salary" for calculating the overdue payables that she claims, her claim (and the amounts sought) was largely confirmed. Accordingly, the Arbitrator holds that the fees and costs of the arbitration (with the exception of the EUR 3,000.00 to be borne by the BAT Fund) shall be borne by Respondent (75%) and Claimant (25%). In addition to the above, the Arbitrator considers it to be fair and reasonable that a significant portion of Claimant's reasonable costs and expenses shall be borne by Respondent. In addition, Respondent shall fully bear its own costs and expenses.

83. Claimant claims legal fees in the amount of EUR 4,750.00. She also claims for the expense of the non-reimbursable handling fee in the amount of EUR 1,500.00.

84. 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 5,000.00), the fact that the non-reimbursable handling fee in this case was EUR 1,500.00, and the specific

circumstances of this case, the Arbitrator holds that a total of EUR 2,000.00 (plus the non-reimbursable handling fee) represents a fair and equitable contribution by Respondent to Claimant in this regard. In particular, and even though the documents provided in this case were not excessively lengthy, Claimant has had no other alternative but to bring this proceeding as a consequence of Respondent's unilateral termination of the Employment Agreement.

85. Given that Claimant paid advances on costs of EUR 5,000.00 as well as a non-reimbursable handling fee of EUR 1,500.00 (which will be taken into account when determining Claimant's legal fees and expenses), and considering the contribution from the BAT Fund to the arbitration costs in the amount of EUR 3,000.00, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

(i) Respondent shall pay EUR 3,750.00 to Claimant, representing 75% of the arbitration costs fixed by the BAT President (excluding the contribution from the BAT Fund);

(ii) Respondent shall pay to Claimant EUR 3,500.00 (EUR 1,500.00 for the non-reimbursable fee + EUR 2,000.00 for legal fees), 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. **DVTK Kosarlabda KFT shall pay Ms. Ziomara Esket Morrison Jara a total amount of HUF 12,547.11 net of Hungarian taxes, as overdue payables, plus interest on such amount from 2 April 2020, until full payment.**

2. **DVTK Kosarlabda KFT shall pay Ms. Ziomara Esket Morrison Jara a total amount of HUF 2,080,656.68 net of Hungarian taxes, as compensation for the unilateral termination of the Employment Agreement, plus interest on such amount from 2 April 2020, until full payment.**

3. **DVTK Kosarlabda KFT shall pay Ms. Ziomara Esket Morrison Jara a total amount of HUF 306,104.36, as reimbursement of flight tickets.**

4. **DVTK Kosarlabda KFT shall provide Ms. Ziomara Esket Morrison with a tax certificate indicating all the Hungarian tax payments made on behalf of Ms. Ziomara Esket Morrison concerning the Employment Agreement.**

5. **DVTK Kosarlabda KFT shall pay Ms. Ziomara Esket Morrison Jara an amount of EUR 3,750.00 as reimbursement for her arbitration costs.**

6. **DVTK Kosarlabda KFT shall pay Ms. Ziomara Esket Morrison Jara an amount of EUR 3,500.00 as reimbursement for her legal fees and expenses.**

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

Geneva, seat of the arbitration, 28 August 2020

Clifford J. Hendel (Arbitrator)