BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1610/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Clifford J. Hendel

in the arbitration proceedings between

Mr. Tomas Rinkevicius

- Claimant -

represented by Ms. Jolanta Spakauskaite, attorney at law

vs.

BC Neptunas Klaipeda
Taikos pr. 61A 91182 Klaipeda, Lithuania

- Respondent -

represented by Mr. Marius Devyzis and Mr. Martynas Kalvelis, attorneys at law

1. The Parties

1.1 Claimant

1. Mr. Tomas Rinkevicius (the “Coach”) is a Lithuanian professional basketball coach.

1.2 Respondent

2. BC Neptunas Klaipeda (the “Club”) is a professional basketball club from Klaipeda, Lithuania, which is currently competing in the first Lithuanian Men’s Basketball League (*Lietuvos Krepsinio Lyga*).

2. The Arbitrator

3. On 3 November 2020, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Clifford J. Hendel as arbitrator (the “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 the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. As of 18 June 2019, the Coach and the Club entered into an employment agreement whereby the latter engaged the Coach for the 2019/2020 and 2020/2021 seasons (the “Employment Agreement”).

5. Paragraph 2 of Article 1 of the Employment Agreement provides as follows:

> *"The Club hereby employs the Coach as the head coach of the Club's first senior team (hereinafter referred to as: the Team) to perform his exclusive services for the Club during the term of this Contract".*

6. Article 6 of the Employment Agreement provides for the Coach to receive an annual fully guaranteed base salary of EUR 45,000.00 net for the 2019/2020 season and EUR 50,000.00 net for the 2020/2021 season, as well as certain bonuses (which however are not under discussion in the present proceeding). Further to the above, as per an Annex to the Employment Agreement attached as Exhibit 18 to the Request for Arbitration, the Parties agreed for the monthly instalments of the 2019/2020 season to be made in the amount of EUR 4,900.00 each (instead of the initially agreed sum of EUR 3,750.00 net) in order for the Coach to cover the corresponding taxes, given that pursuant to Lithuanian law, it seems that the obligation to directly pay these taxes lies with the employee.

7. On 5 February 2020, the Club's representatives informed Claimant that he was fired from the head coach position.

8. On that same day, the Club publicly announced on its official website the change in the role due to the senior team's poor performance and Claimant's agency received an e-mail from the Club "*sending the contract termination with Tomas Rinkevicius*" and including an attachment which stated the following:

> *"Public institution Basketball Club Neptunas hereby confirms that the sports activity contract was terminated with Tomas Rinkevicius (born on 1978-01-04) on 5 February 2020 by mutual agreement".*

9. A few hours later, still on 5 February 2020, Claimant's agent replied to the Club's communication as follows:

> *"Your letter on the termination of contract of Tomas Rinkevicius has no legal basis and the contract remains valid to full extent. Termination of contract at the initiative of the Club is only possible in two cases that are listed in paragraph 11 of the contract. We also emphasise that Tomas Rinkevicius has not agreed neither in writing or orally to terminate the Contract at mutual agreement.*
>
> *The amounts for the basketball season 2019/2020 indicated in the Contract are guaranteed. The amounts for the basketball season 2020/2021 indicated in the Contract are currently also guaranteed".*

10. On 14 February 2020, Claimant's counsel sent a letter to the Club claiming the payment of the outstanding amounts for the remaining term of the Employment Agreement, and basing such claim on the unilateral termination of the Employment Agreement by the Club on 5 February 2020 "*without any legal basis*".

11. On 19 February 2020, the Club announced on its official website the appointment of a new head coach (different from the one referred to in its previous publication dated 5 February 2020).

12. On 26 February 2020, the Club replied to Claimant's counsel letter dated 14 February 2020 arguing that "*the contract with Tomas Rinkevicius has not been terminated unilaterally*" and that, therefore, "*the Contract is valid and binding on both parties*".

13. On 3 March 2020, Claimant's counsel sent a response to the Club's communication mentioned above, emphasising that the Club's conduct confirmed the termination of the Employment Agrement (public announcement, contract termination sent by e-mail, appointment of a new head coach, non-payment of salary…).

14. On 6 March 2020, the Club's counsel replied to Claimant's counsel by insisting on the validity of the Employment Agreement, arguing that the Coach had not accepted the Club's proposal to mutually terminate it and also alleging that the Employment Agreement was still being performed (the Coach continued using the car provided by the Club and the salary was still being paid) and had a wider scope of obligations than

usually attributed to a coach, since it was the Coach's first appointment as such, and thus his being fired as coach of the first team did not constitute an automatic termination of the Employment Agreement.

15. After an unsuccessful attempt to reach a settlement agreement and having elapsed the first few months of the pandemic, on 15 August 2020, the Club sent a new letter to the Coach in the following terms:

> *"The Club hereby notifies the Coach about the start of the Club's preparation for the 2020/2021 basketball season process.*
>
> *In accordance with the Contract, the Club hereby requests the Coach to report to the location of the Club's preparation for the 2020/2021 basketball season process. The preparation of the Club for the 2020/2021 basketball season shall start on 17/08/2020 at 10:30 am, at Klaipeda Summer Open-Air Stage, address Liepojos g. 1, Klaipeda.*
>
> *The Club hereby notifies that the Coach will perform obligations established in the Contract on the coaching staff of the Club's Youth Team".*

16. On 16 August 2020, Claimant's counsel replied to said communication by indicating once more that the Coach was dismissed from his position as head coach of the Club on 5 February 2020 and that, in any case, he had not been hired to perform his obligations as a member of the coaching staff of the youth team.

17. On 20 August 2020, the Club's counsel sent a further notice informing the Coach of his non-appearance at the Club's preparation for the 2020/2021 season, which the Club deemed to be a material breach of the Employment Agreement. The letter further informed of the Club's "*right to terminate the Contract unilaterally, if the Coach has committed a material breach of the Contract and failed to eliminate such breach within 5 (five) days from the date of receipt of written notice about the breach*".

18. The very next day, Claimant's counsel replied by reinforcing the Coach's position, which led to the Club "suspending" the performance of the Employment Agrement on 31 August 2020 (on the understanding that it remained in force at that time), reserving

its right to unilaterally terminate the Employment Agreement (something that apparently never happened on the basis of the documentation within the file).

19. Therefore, while Claimant considers that the Employment Agreement was terminated without just cause by the Club in February 2020, Respondent considers that it is still in force at the present date and that it is the Coach who has failed to fulfil his obligations by not providing his services for the Club's youth team at the beginning of the 2020/2021 season.

3.2 The Proceedings before the BAT

20. As already mentioned, on 5 October 2020, Claimant filed the Request for Arbitration giving rise to this proceeding. He also duly paid the non-reimbursable handling fee of EUR 3,000.00, which was received by the BAT on 28 September 2020.

21. On 3 November 2020, the BAT informed the Parties that Mr. Clifford J. Hendel had been appointed on that same date as the Arbitrator in this matter, invited Respondent to submit its Answer by 24 November 2020 and fixed the advance on costs to be paid by the Parties on or before 16 November 2020 as follows:

"Claimant (Mr. Tomas Rinkevicius)	*€ 4,000.00*
Respondent (BC Neptunas Klaipeda)	*€ 4,000.00"*

22. On 13 November 2020, the Club requested by e-mail a 10-day extension in order to submit its Answer, extension which was granted by the BAT on 16 November 2020, setting the new deadline on 4 December 2020.

23. On 1 December 2020, Respondent informed the BAT that some of the evidence it was willing to rely on contained confidential data and asked the institution how to proceed. One day later, the Arbitrator informed Respondent that it may redact any confidential information in the documentation in question.

24. By Procedural Order of 7 December 2020, the BAT confirmed receipt of the Respondent's Answer and of Claimant's payment of his part of the foregoing advance on costs on 16 November 2020. However, in light of Respondent's failure to timely pay its share (it actually informed the BAT on 16 November 2020 that it was not going to do so), Claimant was invited to pay Respondent's share by 17 December 2020.

25. As a consequence of Claimant's failure to pay Respondent's share before the abovementioned date, the BAT sent a final communication on 21 December 2020 by virtue of which Claimant finally made such payment in substitution, which was received by the BAT on 4 January 2021.

26. On 4 January 2021, Respondent filed an unsolicited submission requesting the Arbitrator to order Claimant to pay Respondent's share of the Advance on Costs (which actually had already been paid by Claimant on that date).

27. On 7 January 2021, the Arbitrator invited Claimant to submit a response to the Answer no later than 21 January 2021. However, as a result of Claimant's request for an extension of his time-limit on 14 January 2021, said deadline was later extended by the BAT until 8 February 2021.

28. By email of 9 February 2021, the BAT acknowledged receipt of Claimant's reply filed the day before. On that same date, the BAT invited Respondent to file its comments to Claimant's reply by 23 February 2021.

29. On 22 February 2021, Respondent filed its rejoinder.

30. On 25 February 2021, 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 8 March 2021) 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.

31. Respondent filed its costs submission on 5 March 2021. Claimant filed his costs submission on 8 March 2021.

4. The Positions of the Parties

4.1 Claimant's Position

32. Claimant alleges that the Club unilaterally removed him from the position as head coach of the Club's senior team without just cause, as the team's poor performance (in the opinion of the Club's representatives) was not one of the termination conditions contemplated in Article 11 of the Employment Agreement.

33. Claimant emphasises that he was specifically hired for the role of head coach of the Club's senior team, so the Club's request "*to step down from the position of head coach*" in order to start providing his services as a coach for the Club's youth team, implied an automatic termination of the Employment Agreement.

34. Therefore, Claimant submits that the conditions mentioned in Article 11 of the Employment Agreement (set out below in para 57) were not fulfilled in order to trigger the right of the Club to terminate the Employment Agreement with just cause, as the Coach did not commit any "*major breach*" under the Employment Agreement.

35. In light of the foregoing and of the "*fully guaranteed*" nature of the Employment Agreement, in his Request for Arbitration Claimant requested the following relief:

> *"1) BC Neptunas Klaipeda must pay Mr. Tomas Rinkevicius:*
>
> *a) EUR 22.050 (including taxes) as compensation for outstanding salary for 2019-*

2020 season, plus EUR 730,97 interest (i.e. 5% per annum from 06 February 2020 until 05 October 2020).

b) EUR 65.720 (i.e. EUR 50.000 plus taxes) as compensation for outstanding salary for 2020-2021 season, plus EUR 2.178,66 interest (i.e. 5% per annum from 06 February 2020 until 05 October 2020).

2) BC Neptunas Klaipeda must pay Mr. Tomas Rinkevicius interest of 5% p.a. on all outstanding salary amounts (i.e. on EUR 87.770) from 06 October 2020 until full payment.

3) BC Neptunas Klaipeda must reimburse Mr. Tomas Rinkevicius all his arbitration costs.

4) BC Neptunas Klaipeda must pay Mr. Tomas Rinkevicius EUR 7.500 as a contribution to his legal fees and expenses"

4.2 Respondent's Position

36. Respondent submits that Claimant misinterpreted the facts that occurred in February 2020 and that the Club never terminated the Employment Agreement (insisting on the fact that *"the acts and conduct of the Coach himself also confirmed the validity of the Contract* [the Employment Agreement]") but only demoted him by removing him as coach of the first team. In this respect, Respondent affirms that it continued paying Claimant's salary and that the Club never submitted any written notice for the unilateral termination of the Employment Agreement to Claimant, but rather a mere proposal for the mutual termination of the same, which however was never signed by the Parties.

37. Respondent also argues that Claimant's withdrawal from the position as head coach of the Club's senior team cannot cause the automatic termination of the Employment Agreement, as it illustrated "*that BC Neptunas* [the Club] *has a discretion to issue the Claimant instructions which had to be fully implemented, including discretion to ask the Claimant to perform duties clearly provided by the Contract* [the Employment Agreement] *and which are related to responsibilities outside the scope of the head coach role*". Therefore, the absence of a cause for termination, in Respondent's view, led it to conclude that no compensation of any kind is payable.

38. In addition to the above, on a subsidiary basis, Respondent states that both Claimant's failure to comply with his duty to mitigate damages (i.e. to find a new club in which to provide his services as a coach) and the pandemic must be taken into consideration in order to reduce any potential compensation to be paid by the Club.

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

> *"1) To dismiss the request of arbitration filed by the claimant, Mr Tomas Rinkevicius, in its entirety;*
>
> *2) Subsidiarily, to reduce the amount of compensation payable by the respondent, BC Neptunas, to the claimant, Mr Tomas Rinkevicius, by at least 50 (fifty) percent;*
>
> *3) To grant the respondent, BC Neptunas, a contribution towards its legal fees and other expenses incurred in connection with the proceedings in the amount of EUR 7,500 from the claimant, Mr Tomas Rinkevicius"*

5. The jurisdiction of the BAT

40. 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).

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

42. 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[1].

43. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Article 19 of the Employment Agreement, which reads as follows:

> *"Any dispute arising from or related to the present Contract shall be submitted to the Basketball Arbitral Tribunal (BAT), created by FIBA, 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 language of the arbitration shall be English. The arbitrator shall decide the dispute "ex aequo et bono". The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile".*

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

45. 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).

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

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

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

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

48. 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".*

49. 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."*

50. Article 19 of the Employment Agreement provides that: *"*[t]*he arbitrator shall decide the dispute ex aequo et bono*".

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

52. 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[2] (Concordat)[3], 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."*[4]

53. 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*".

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

6.2 Findings

6.2.1 Termination of the Employment Agreement in early February 2020

55. The first issue under discussion is whether the Employment Agreement was in fact terminated by the Club in February 2020. On the one hand, Claimant understands that his removal as head coach of the senior team, which was announced on the Club's website and followed by an e-mail to his agents sending a "*contract termination*" has to be interpreted as such; however, on the other hand, the Club believes that Claimant's interpretation of Respondent's request to "*step down*" from the position of head coach is incorrect, as it did not result in the automatic termination of the Employment Agreement.

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2 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).

56. In this regard, termination of the Employment Agreement on the initiative of Claimant was contemplated in Article 10 of the same, which provided as follows:

> *"The Coach shall be entitled to terminate this Contract:*
>
> *a) If the Club commits any material breach of any of the provisions of this Contract, and in the case of a breach capable of remedy, fails to remedy the same within 45 days after receipt of a written notice giving full particulars of the breach and requiring it to be remedied. Such termination shall be effective as set forth in the notice letter from Coach to Club specifying the breach.*
>
> *If the Coach terminates this Contract pursuant to this Article then neither party shall have any further obligation or liability to the other party. However, Club must pay Coach all salary that was due and earned up to and through the effective date of termination of this Contract. Such monies must be paid to Coach within thirty (30) days of Coach's termination of this Contract".*

57. At the same time, Article 11 reflected the Club's right to unilaterally terminate the Employment Agreement as follows:

> *"The Club shall be entitled to terminate this Contract:*
>
> *a) If Coach commits a material breach of this Contract or Internal rules and regulations, or the disciplinary rules or other regulations of the Lithuanian Federation, and in the case of a breach capable of remedy, fails to remedy the same within 5 days after receipt of written notice giving the full particulars of the breach and requiring it to be remedied. Such termination shall be effective as set forth in the notice letter from Club to Coach specifying the breach.*
>
> *b) Upon written notice to the Coach, after the end of the 2019/20 season, which is given to the Coach no later than 15th June, 2020, if the Club did not make it to the semi-finals of the 2019/20 LKL season (the Club's Early Termination).*
>
> *If the Club terminates this Contract pursuant to this Article then neither party shall have any further obligation or liability to the other party. However, Club must pay Coach all salary that was due and earned up to and through the effective date of termination of this Contract. Such monies must be paid to Coach within thirty (30) days of Club's termination of this Contract".*

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

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

58. Thus, both Parties were entitled to early terminate the Employment Agreement in case of a material breach of the same by the other party and the Club was also entitled to freely do so at the end of the 2019/2020 season in case a sporting objective was not achieved.

59. In addition to the above, Article 12 of the Employment Agreement reflects that "*[a]ny notice of termination or other communication to either Party hereto required or permitted hereunder shall be in writing* […]".

60. With that in mind, it is key to analyse what happened between 5 and 26 February 2020 (para. 7-12 above) in order to determine if there was an effective termination of the Employment Agreement or not (and in the affirmative, if said termination had a just cause).

61. In this regard, it is undisputed that on 5 February 2020, the Club removed Claimant from his role as head coach of the Club's senior team[5].

62. It is also undisputed that Claimant neither decided to terminate the Employment Agreement at any time nor sent any communication suggesting his intention to terminate it.

63. It is, in turn, undisputed that on 5 February 2020, the Club also sent by e-mail a document "confirming" that the Employment Agreement was terminated on that day, even though there are discrepancies between the Parties in relation to the way in which it was terminated: while the Club contends it was orally terminated by mutual agreement, this is something which Claimant denies, alleging that it was the Club's sole decision to terminate it.

64. In spite of the fact that the Club presumes to have adopted a consistent position since then, certain gaps in its narrative can be easily identified. The most illustrative one is that in the letter sent by the Club to Claimant on 26 February 2020, Respondent acknowledges that during the conversation held with Claimant on 5 February 2020, Claimant was told of the Club's position regarding his work, which was causing "*reasonable doubts*" to the ownership; rather than a mutual agreement, this tends to suggest that the initiative to "*part ways*" was of the Club and not mutually reached.

65. The fact that Claimant could have consented to the Club's decision (what Respondent erroneously construes as a mutual agreement), in no way means that the Coach accepted a free termination. Actually, in this regard, in the abovementioned letter dated 26 February 2020, the Club also recognises that "*the position expressed by Tomas Rinkevicius himself suggested that the Contract* [the Employment Agreement] *with him, as the Head Coach, was terminated by mutual agreement of the parties,* ***further arranging the amount of compensation to be paid***" (emphasis added). In other words, the Club itself appears to acknowledge that the Club's obligation to pay Claimant's salary was transformed into an obligation to pay a compensation after the termination of the Employment Agreement had occurred (notwithstanding the fact that the Parties had not reached an agreement regarding the exact amount of compensation, the consequences of which are analysed in greater depth below).

66. Moreover, even though on 6 March 2020 , the Club insisted on the validity of the Employment Agreement and on Claimant's duty to perform his obligations under the same, there is little evidence (and neither clear nor convincing enough) supporting the existence of an ongoing contractual relationship between said date and 15 August 2020, when Respondent appointed Claimant to serve as a coach of the Club's youth team (which Claimant did not accept and which the Club could have done on 5

[5] Exhibit No 2 to the RfA and para. 29 of the Answer.

February 2020 if that had been its true intention). In this regard, the Arbitrator is not convinced that the three partial payments made between 6 March and 16 April 2020 can be understood as salary payments, nor that Claimant's failure to return of the rental car provided by the Club before late March has material bearing on this issue (taking into account the exchange of correspondence that took place during said weeks). Further, the Arbitrator is also not at all persuaded by Respondent's allegations as to the breadth of Claimant's role, and considers that the clarity of paragraph 2 of Article 1 of the Employment Agreement leaves no room for interpretation ("*The Club hereby employs the Coach* ***as the head coach of the Club's first senior team***…" – emphasis supplied); similarly, the detailed obligations set out in Article 3 focus almost exclusively on duties as coach of the first team, all of which is borne out by the very title of the Employment Agreement ("Professional Head Coach Contract"). The Club's argument that it was entitled to demote Claimant, removing him from the post of coach of the first team and moving him to coach or assist the coaching staff of the youth team, is accordingly rejected.

67. Therefore, it is fair and reasonable to conclude from the above that:

i. Respondent was interested in Calimant's removal as head coach of the senior team and communicated said decision to Claimant on 5 February 2020;

ii. said decision was not based on any of the conditions contemplated in Article 11 of the Employment Agreement, but solely on the poor performance of the team as viewed by the Club;

iii. Claimant understood the Club's decision to remove him as Coach to be tantamount to a unilateral termination of the Employment Agreement, which he consented even though he reserved his right to a compensation;

iv. Claimant immediately opposed through his agent the Club's proposal for the free mutual termination of the Employment Agreement and actually sent a letter shortly after claiming the remaining amounts to which he was entitled due to their "*fully guaranteed*" nature; and

v. there is no conclusive evidence on file (that described in paragraph 66 above being understood to be insufficient) on which to conclude that during the period from February 2020 through the submission of the Request for Arbitration in October 2020, a valid and binding contractual relationship between the Parties existed.

68. In light of the foregoing, the fact that Respondent has not counterclaimed is further evidence that Claimant was neither in breach of his obligations during the time the Employment Agreement was truly in force (i.e. prior to 5 February 2020), nor after said date in which Respondent argues that it was still valid and binding (the 31 August 2020 "suspension" of the Employment Agreement by the Club not constituting a termination of the same or a claim for indemnification on account thereof; in fact, by Exhibit 16 of the RfA, the Club expressly "*reserves the right to terminate the Contract* [Employment Agreement] *unilaterally by a separate notice*", something which however it never did) .

69. Consequently, the Arbitrator considers that the Employment Agreement was in fact terminated on 5 February 2020 on the Club's initiative and that said termination was not supported by any just cause in accordance with Article 11.

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

70. Having established that the Employment Agreement was in fact terminated by the Club and having declared the wrongful nature of said termination, the next step implies to determine the economic consequences of the Club's wrongful termination.

71. In this regard, Article 6 of the Employment Agreement provides that "*[a]ll salary to Coach is fully guaranteed and Club agrees it will be paid subject only to a material breach set forth in Article 11 below, or either Coach's or Club's early termination of this Agreement as set forth in Article 10 and Article 11 below. Club agrees that the salary and agent fee will be paid without consideration for Team performance, Coach's health, and injury to Coach or any other factors (except as specifically set forth in Article 10 and Article 11)*".

72. Thus, according to the abovementioned clause and in spite of Respondent's unfruitful arguments as to an alleged lack of "*further obligation or liability to the other party*" post-termination, 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 EUR 95,000.00 net).

73. As established in para. 22 of the Request for Arbitration, Claimant acknowledges having already received the total amount of EUR 36,750.00 on payments made until April 2020, which means that only the amount of EUR 58,250.00 net was pending in respect of his "*guaranteed salary*" on the date on which the Request for Arbitration was submitted (subject to some particulars addressed in the following paragraphs).

6.2.3 Net amounts

74. As explained in para. 6 above, as per an Annex to the Employment Agreement attached as Exhibit 18 to the Request for Arbitration, it seems that pursuant to Lithuanian law, the obligation to pay taxes lies with the employee (i.e. the Club does not withhold these amounts before paying the salary).

75. However, said Annex only contemplates a gross-up in respect of the monthly instalments of the 2019/2020 season and it is completely silent with regards to the following season, notwithstanding the fact that it clearly indicates that "*[w]ith regard to unforeseen tax reforms of the Republic of Lithuania and the resulting additional taxes*

payable, the Club undertakes to compensate the difference".

76. In para. 25 of the Request for Arbitration Claimant himself acknowledges that "*Lithuanian tax system changes from time to time*" and he makes an informal calculation of the supposed amounts for the 2020/2021 season including taxes, which is however not supported by any evidence or objective data for the Arbitrator to contrast.

77. Therefore, the Arbitrator concludes that the sum of EUR 22,050.00 net is due as compensation with regard to the 2019/2020 season, but, subject to potential reductions, can only award Claimant EUR 50,000.00 net regarding the following season, as this amount was not amended by virtue of the Annex to the Employment Agreement dated 5 August 2019, without prejudice to Claimant's right to claim from Respondent any taxes covered by Claimant and which should have been paid by the Club.

6.2.4 Failure to mitigate damages and COVID-19 crisis

78. Once decided the amount of compensation to be paid by the Club, *a priori*, for the unilateral termination of the Employment Agreement, it remains to consider whether any of the arguments provided by the Club (Claimant's failure to mitigate damages and the COVID-19 crisis) justify a reduction of the amount awarded as compensation.

79. Regarding the alleged failure to mitigate damages, Respondent refers, among others, to BAT 1157/18, arguing that the party that does not use best efforts to mitigate damages by finding an employment with a salary adequate to the sports level, thus contributes to the scale of damage and, therefore, may be deprived of the part of compensation he or she would have been owed otherwise. In said case, it was concluded that the fact that the coach there entered into a new employment agreement in which he earned much less than what the Arbitrator considered to be appropriate for

the coach's value, made the Arbitrator reduce part of the compensation to be paid by the corresponding club.

80. In the present scenario, the defence presented by Claimant is that due to the pandemic, finding a new club in order to provide his services was much more difficult for Claimant. Therefore, in spite of his agent's efforts in this regard (an e-mail of his agent is attached to Claimant's Reply with a breakdown of the clubs allegedly contacted), Claimant was not able to conclude a new agreement for the present season.

81. In view of the minimal evidence submitted by Claimant (significantly, no e-mails, WhatsApps conversations or any formal offer or other exchange between Claimant or his agent and potentially-interested third parties from which one could conclude that he had actually been near to be hired, or exercised diligence in pursuing possible professional opportunities, are attached) and the BAT jurisprudence in similar cases, the Arbitrator concludes that Respondent's improper conduct with respect to the Employment Agreement does not excuse or limit Claimant's obligations to mitigate his damages (or attempt diligently to do so).

82. Therefore, under the circumstances, the Arbitrator considers that Claimant could have shown a bit more diligence and seriousness in his search for new opportunities and perhaps mere sporadic and informal talks with a handful of clubs (which have been corroborated only by his agent through an internal e-mail to Claimant's counsel) is not sufficient to comply with said requirement.

83. Therefore, in accordance with the general principle of fairness, the Arbitrator understands that, despite Claimant's failure to find a new club during the 2019/2020 season seems to be reasonable (bearing in mind the pandemic), Claimant could have limited the damages regarding the 2020/2021 season and this is why the Arbitrator determines that a deduction of EUR 25,000.00 net from the compensation is just

deciding *ex aequo et bono*.

84. That said, Respondent also refers to the pandemic as an excuse for a further reduction of the compensation to be paid to Claimant as a consequence of the unilateral termination of the Employment Agreement.

85. However, as established in BAT 1482/20, an unjust termination which in any way was related to the COVID-19 pandemic cannot benefit the breaching party for the extraordinary and unforeseeable situation that happened after the breach. Therefore, the calculation of the damages or compensation to which Claimant is entitled must be effected at the time of the breach (i.e. 5 February 2020), when still no pandemic was contemplated in Lithuania.

86. The foregoing findings are fully in line with the principles set out on the COVID-19 Guidelines issued on 20 April 2020 by the BAT President, Vice-President and Arbitrators (the "BAT Guidelines"). In particular, point 11 of the BAT Guidelines provides as follows:

> *"When calculating damages for any unlawful termination not related to the COVID-19 crisis, the arbitrators will, in principle,* ***not*** *take into account the hypothetical impact that the COVID-19 crisis would potentially have had on the contract had it run its normal course. In particular, in case of any unlawful termination by a club that is unrelated to the COVID-19 crisis, the Guidelines on reductions of players' and coaches' salaries …. Shall, in principle, not apply to the calculation of damages or outstanding remunerations under the contract. The onus of proof that the Guidelines exceptionally apply for reasons of equity shall be on the respective club. Elements that may be taken into account in this context are, in particular, the nature, the motive and the gravity of the contractual breach committed, the vicinity of the breach to the Lockdown Period and the behaviour of the parties subsequent to the breach. In case there are reasons to deviate from the above principle, i.e. non-application of the Guidelines, preference should be given to deferring the maturity of some of the claims to the beginning of the 2020/21 season…"* (emphasis supplied).

87. The Club's breach occurred one month and a half before the pandemic and its consequences hit. The pandemic and its consequences did not cause or contribute

said breach, so the Arbitrator finds no reason to deviate from the orientation included in point 11 of the BAT Guidelines set out above.

88. For these reasons, the Club shall pay the Coach the amount of EUR 22,050.00 (including taxes) corresponding to the 2019/2020 season and EUR 25,000.00 net (once mitigated) corresponding to the 2020/2021 season.

6.2.5 Interest

89. 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 default rate of 5% per annum from the day following the termination of the Employment Agreement (i.e. 6 February 2020).

90. 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 amount of EUR 22,050.00 (including taxes) corresponding to the 2019/2020 season and EUR 25,000.00 net (once mitigated) corresponding to the 2020/2021 season.

91. As for the time when such interest should accrue, the Arbitrator considers it fair and reasonable that interest should commence on the requested date.

7. Costs

92. 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.

93. On 21 April 2021 – 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 7,050.00.

94. 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 mitigation principle and by failure to prove the calculation of taxes regarding one of the seasons in dispute, the Coach's claim (and the amounts sought) has been largely confirmed. Accordingly, the Arbitrator holds that the fees and costs of the arbitration 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.

95. Claimant claims legal fees in the amount of EUR 7,500.00 (in spite of the fact that his counsel assures to have incurred in longer hours). He also claims for the expense of the non-reimbursable handling fee in the amount of EUR 3,000.00.

96. 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 7,500.00), the fact that the non-reimbursable handling fee in this case was EUR 3,000.00, and the specific circumstances of this case, the Arbitrator holds that a total of EUR 5,000.00 (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.

97. Given that Claimant paid advances on costs of EUR 8,000.00 as well as a non-reimbursable handling fee of EUR 3,000.00 (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 950.00 to the Claimant, being the difference between the costs advanced by the Claimant and the arbitration costs fixed by the BAT President;

(ii) Respondent shall pay EUR 5,287.50 to Claimant, representing 75% of the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;

(iii) Respondent shall pay to Claimant EUR 8,000.00 (EUR 3,000.00 for the non-reimbursable fee + EUR 5,000.00 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. **BC Neptunas Klaipeda shall pay Mr. Tomas Rinkevicius a total amount of EUR 22,050.00, as compensation for the 2019/2020 season, plus interest on such amount from 6 February 2020, until full payment.**

2. **BC Neptunas Klaipeda shall pay Mr. Tomas Rinkevicius a total amount of EUR 25,000.00 net, as compensation for the 2020/2021 season, plus interest on such amount from 6 February 2020, until full payment.**

3. **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 7,000.00, shall be borne by BC Neptunas Klaipeda (75%) and Mr. Tomas Rinkevicius (25%). Accordingly, BC Neptunas Klaipeda shall pay Mr. Tomas Rinkevicius an amount of EUR 5,287.50 as reimbursement for his arbitration costs..**

4. **BC Neptunas Klaipeda shall pay Mr. Tomas Rinkevicius an amount of EUR 8,000.00 as reimbursement for his legal fees and expenses.**

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

Geneva, seat of the arbitration, 27 April 2021

Clifford J. Hendel

(Arbitrator)