Arbitration CAS 2006/A/1125 Hertha BSC Berlin v. Stade Lavallois Mayenne FC, award of 1 December 2006

Panel: Mr Peter Leaver QC (United Kingdom), President; Mr Goetz Eilers, (Germany); Mr François Klein (France)

Football
Compensation for training
Interpretation of a FIFA Circular in case of conflict with Regulation's provision
Application field of the FIFA's Regulations on the transfers within the EU/EEA

1. **Where the terms of an article of a FIFA Regulation and the terms of a Circular do not precisely coincide, because the Circular appears to go further than the article, they should be read in such a way as to make them workable together. In this respect, the Panel should ignore the Circular insofar as the latter appears to go further than the provision. Regulations cannot be amended or expanded by circular unless the express power to act in that way is given. FIFA's statutes do not give that power. The Regulations are, in effect, acts of FIFA passed in its legislative capacity. According to the CAS case law, the Circular is a purely administrative act of FIFA's executive.**

2. **Pursuant to the Transfer Regulations and the Application Regulations, the compensation is due by the new club to the training club. The status of the player affects neither the existence of the entitlement nor the amount of the compensation. It is only the behaviour of the training club that can have an impact on the amount of the compensation, for example, if no contract is offered to the player, irrespective of his nationality. It, therefore, would appear to be irrelevant if the Player is not an EU/EEA citizen, so long as the Player is lawfully within the EU/EEA, and is entitled to move freely and to be employed within the EU/EEA.**

The Appellants, Hertha BSC Berlin ("Hertha"), are a professional football club, which competes in the 1. Bundesliga (the first National League) in Germany.

The Respondents, Stade Lavallois Mayenne FC ("Stade Lavallois"), are also a football club. Stade Lavallois currently competes in the French Third Division.

T. is a Cameroonian football player. T. was born in 1982, and at the time of the events which give rise to this arbitration was 22 years old. T. entered into his first training contract with Hertha on 19 March 1999, when he was nearly 17 years old.

On 25 October 2001 Hertha and T. entered into an employment contract pursuant to which T. agreed to play football for Hertha, and Hertha agreed to employ T. as a professional footballer from 1 July 2002 to 30 June 2005. The employment contract was registered with the German Football Federation and the German Football League. This was T.'s first professional (non-amateur) contract, and at the time of making it he was 19 years old.

During Season 2002/2003 T. was in Hertha's first team squad. However, he was never selected for the first team, and made only one appearance as a substitute. At the end of that season, Hertha decided that T. should not be in the first team squad for the Season 2003/2004. He was demoted to the reserve team squad. Hertha's reserve team played in the Regionalliga (the third division).

T. was unhappy at being demoted, and his agent, Mr K. of Pro Profi GmbH ("Mr K."), approached Hertha on T.'s behalf to discuss the early termination of T.'s contract with Hertha so that T. could join another club.

On 12 July 2004 Mr Ingo Schiller, Hertha's Managing Director, wrote to Mr K. to

> *"confirm that [Mr] T. who holds a contract as contracted amateur with Hertha BSC valid until 30 June 2005 has the possibility to change to another club until 31 August 2004 and that Hertha BSC will agree to the termination of the employment contract without payment of a transfer compensation".*

Although T.'s status is described as *"contracted amateur"*, it is common ground that at all material times T. was what is described by FIFA as a *"non-amateur"*, that is, a professional, footballer.

On 22 July 2004 Hertha and T. entered into a *"Termination Agreement"*. The Preamble to the Termination Agreement was in the following terms:

> *"Between Hertha BSC and the player T., born on 25 March 1982, there exists an employment relationship as non-amateur without licence with a term ending on 30 June 2005. Hertha BSC and T. intend to cancel the running Contract with immediate effect".*

It will be noted that in the Termination Agreement T.'s status is described as *"non-amateur"*. Articles 1 and 2 of the Termination Agreement were in the following terms:

> *"Art. 1 Upon signing this Agreement, Hertha BSC grants the player T. immediate release for a change of clubs*
>
> *Art. 2 Hertha BSC and T. agree by common consent that the Contract as non-amateur without licence dated 22 August 2002 having a term ending on 30 June 2005 shall be cancelled early upon signing this Agreement".*

The Termination Agreement contained other provisions which it is not necessary to recite for the purpose of disposing of this appeal. It was registered with the German Football Federation and the German Football League.

On 23 July 2004 T. and Stade Lavallois entered into an employment contract. The contract, which commenced on 1 August 2004, was for two seasons, and expired at the end of season 2005/2006.

T.'s basic salary at Stade Lavallois was EUR 3,700 per month, EUR 44,400 per annum. His basic salary at Hertha had been over EUR 90,000 per annum.

By letter dated 1 September 2004 Hertha wrote to Stade Lavallois requesting compensation for T.'s training and development. Hertha assessed the compensation at EUR 320,000, and set out the method of calculation of that sum in the letter.

Stade Lavallois resisted Hertha's claim, and eventually Hertha applied to the FIFA Dispute Resolution Chamber (DRC). On 21 February 2006 the DRC rejected Hertha's claim ("the DRC's Decision").

Hertha appeals to the CAS in accordance with Art. 59ff of the FIFA Statutes.

On 20 September 2006, the CAS Court Office issued, on behalf of the Chairman of the Panel, an Order of Procedure, which the parties signed and returned to the CAS Court Office. The Order of Procedure confirmed the parties' acceptance of CAS's jurisdiction, and that the applicable law would be determined in accordance with Art. 58 of the Code of Sports-related Arbitration (the "Code").

LAW

CAS Jurisdiction

1. There is no dispute as to the jurisdiction of the CAS, which, as has been stated, is based on Art. 59ff of the FIFA Statutes as well as on the Order of Procedure signed by the parties.

2. Art. R57 of the Code provides that the Panel has full power to review the facts and the law. The Panel has exercised that power in the present case.

Applicable law

3. Art. R58 of the Code provides:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

4. Art. 59 para. 2 of the FIFA Statutes further provides for the application of the various regulations of FIFA, and, additionally, of Swiss law.

5. In the present matter, the Parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FIFA apply in the first instance, and Swiss law applies insofar as may be necessary.

The decision of the DRC

6. The DRC decided that *"so as to transfer [T.] to [Stade Lavallois, Hertha] terminated the employment contract with the player by mutual agreement"*. The Panel is unclear as to the evidence which the DRC received which supported the statement that the Termination Agreement was entered into for the purpose of enabling the transfer to Stade Lavallois to take place, although, in the circumstances outlined above, it is clear that it was made so as to enable T. to join another club without that club having to pay a transfer fee.

7. The DRC stated that when players are transferred within the EU/EEA, FIFA had put into place specific provisions which are designed to satisfy the requirement for free movement of workers required by EU/EEA legislation. In relation to the transfer of players, the relevant provisions are to be found in Art. 5 of the *Regulations governing the Application of the Regulations for the Status and Transfer of Players (2001 edition)* (*"the Application Regulations"*). The Application Regulations are appended to the *FIFA Regulations for the Status and Transfer of Players* ("the Transfer Regulations").

8. Art. 5 is the first article in Chapter III of the Application Regulations. Chapter III is entitled *"Training compensation for young players"*. Art. 5 para. 5 is in the following terms:

   "In the EU/EEA, if the training club does not offer the player a contract, this shall be taken into account in determining the training compensation payable by the new club, without prejudice to the rights to compensation of the previous training clubs".

9. No previous training clubs are concerned in this appeal.

10. The DRC also referred to the FIFA Circular No. 769, dated 24 August 2001, which was sent to all of FIFA's member associations ("the Circular"). The Circular was stated to *"summarise and explain the main points of the new regulations"*, that is, of the Transfer Regulations and of the Application Regulations. Paragraph 2a of the Circular is entitled *"When is training compensation due?"*. It contains the following passage:

    "Furthermore, within the EU/EEA, in case a player younger than 23 years does not receive a contract from the club where he has trained, and this player moves to another non-amateur club, this factor must be taken into account when deciding whether any training compensation shall be due, and what the amount of this compensation should be. As a matter of principle, the player's training club will not be entitled to receive training compensation unless this training club can demonstrate to the Dispute Resolution Chamber that it is entitled to training compensation in derogation of this principle. This possibility to derogate is not applicable where national collective bargaining agreements do not envisage it.

In case a player younger than 23 having come to the end of his contract does not receive a new contract from a non-amateur club which is equivalent in remuneration to his previous contract with the club, this club will be deemed not to have offered a contract to the player for the purposes of calculating training compensation".

11. The principle stated in the Circular was said by the DRC to correspond to the *"constant jurisprudence"* of the DRC.

12. The DRC decided that Hertha was not entitled to any compensation as, by terminating the employment contract, it had put itself outside the ambit of Art. 5 para. 5 of the Application Regulations, as explained by the Circular, and had *"foregone its entitlement to training compensation".*

13. Hertha challenges the DRC's decision on three main grounds. First, Hertha contends that the DRC translated the letter dated 12 July 2004 from Hertha to T.'s agent incorrectly, and concluded, in reliance on the incorrect translation, that the letter entitled T. to move to a new club without payment of any training compensation. Hertha contends that the letter relates only to transfer compensation.

14. Secondly, Hertha contends that Art. 5 para. 5 of the Application Regulations has no application because T. is not an EU citizen, but a Cameroonian national.

15. Thirdly, Hertha contends that the DRC misconstrued the Circular, and, in effect, fettered its discretion by giving the Circular too much weight.

16. It is Hertha's case that it is entitled to an award of training compensation for T.'s training and education in the full amount of its claim, calculated in accordance with the Application Regulations.

The scheme of the transfer regulations and the application regulations

17. In order to understand the parameters of this dispute, it is necessary for the Panel to explain the scheme for training and education compensation contained in the Transfer Regulations and the Application Regulations (to which, where appropriate, the Panel will refer jointly as "the Regulations"). As has been stated, the DRC concluded that the 2001 Edition of the Regulations were the relevant edition.

18. There is no appeal against that conclusion, and the Panel agrees with it and proposes to adopt the same approach. The 2005 Edition were adopted by the FIFA Executive Committee on 18 December 2004 and came into force on 1 July 2005. Art. 26 para. 1 (Transitional Measures) of the 2005 Edition of the Transfer Regulations provides that any case that had been brought to FIFA before those Transfer Regulations came into force was to be *"assessed"* according to the 2001 Transfer Regulations. The present case had been *"brought to FIFA"* on 20 April 2005. It, therefore, has to be *"assessed"* by reference to the Transfer Regulations 2001. References in the remainder of this Award are, unless specifically stated otherwise, references to the 2001 Editions.

19. In summary, Arts. 13 and 14 of the Transfer Regulations provide that a player's training and education takes place between the ages of 12 and 23, and that training compensation is payable, *"as a general rule"*, up to the age of 23 for training incurred up to the age of 21. If it is clear that the training period has come to an end before the player is 21, compensation for training remains payable, but is assessed on the period between the age of 12 years and the date upon which it is demonstrated that training had been completed.

20. Compensation is payable to the club or clubs involved in the training when the player signs his first *"non-amateur"* contract, and is payable each time that a player *"changes from one club to another"* up to the time that his training and education is complete, which, *"as a general rule"*, is when he reaches 23 years of age (Art. 15 of the Transfer Regulations). It is to be noted that Art. 15 of the Transfer Regulations does not provide for the payment of compensation on the *"transfer"* of a player from one club to another, but of a *"change"* of club.

21. The amount of compensation is calculated in accordance with the parameters set out in the Application Regulations (Art. 16 of the Application Regulations). It is by reference to those parameters that Hertha has calculated its claim. Stade Lavallois does not dispute the calculation as matter of arithmetic.

22. Art. 17 of the Transfer Regulations provides that when a player signs his first contract as a non-amateur, or when he moves as a non-amateur at the end of his contract before he reaches the age of 23, the amount of compensation is limited to compensation for training and education calculated in accordance with the parameters set out in the Application Regulations. As has been stated, T. signed his first contract as a non-amateur on 25 October 2001, although his employment under that contract did not commence until 1 July 2002.

23. No compensation is payable when a player is over the age of 23 years.

24. As has been stated, the DRC decided that by entering into the Termination Agreement Hertha had *"failed to meet the requirements of"* Art. 5 para. 5 of the Application Regulations, as *"clarified"* by the Circular. In short, that paragraph makes it clear that, when a player changes club within the EU/EEA, the failure to *"offer"* a contract is a factor to be *"taken into account"* when calculating the compensation payable for training and education. The Article does not explain how that factor is to be *"taken into account"*, or what weight it should be given. FIFA appears to have been content to leave those matters to the discretion of the DRC or the CAS, as the case may be.

25. However, the principle behind Art. 5 para. 5 of the Application Regulations is clear: the free movement of workers within the EU/EEA must not be restricted by the imposition of a requirement for the payment of sums by way of compensation for training and education in respect of a player to whom the training club does not offer a contract. In such a case, the failure to offer a contract is an important factor in the assessment of compensation. The compensation payable should not be of such an amount as would impede the player's ability to move to a new club.

26. Thus, the scheme is fairly simple, and can be broadly summarised in the following way: compensation is payable for the training and education of a player between the ages of 12 and 21 years. The compensation is payable on each change of club that occurs up to the time when training and education has been completed, which at the latest will be when the player reaches the age of 21 years, but which may be earlier. The training clubs may claim for such compensation at the latest until the player reaches the age of 23 years. In calculating the amount of compensation payable to a club, the fact that that club has not offered the player a contract is an important factor to be taken into account.

27. The relevant terms of the Circular have also been set out earlier in this Award. The terms of Art. 5 para.5 and of the Circular do not precisely coincide, and, on one reading of it, the Circular appears to go further than the Article. However, it appears to the Panel that the Circular and the Article can be read in such a way as to make them workable together. Insofar as the Circular appears to go further than Art. 5 para.5, the Panel will ignore it. Regulations cannot be amended or expanded by circular unless the express power to act in that way is given. FIFA's statutes do not give that power. The Regulations are, in effect, acts of FIFA passed in its legislative capacity. The Circular is a purely administrative act of FIFA's executive. This view is consistent with the decision in CAS 2003/O/506:

"the FIFA Circulars are administrative measures which are – as sources of law within the FIFA legal system – hierarchically subordinate to the FIFA Regulations. Accordingly, although FIFA Circulars usefully and legitimately serve the purposes of implementing, detailing and interpreting the FIFA Regulations, they may not amend them. As a result, if a provision contained in a FIFA Circular is incompatible with a provision contained in FIFA Regulations, the former should yield to the latter (lex superior derogat inferiori). In addition, if different FIFA Circulars contain incompatible provisions, the later in time must prevail (lex posterior derogat priori)".

28. However, in the Panel's opinion, all that the Circular is doing is to explain how the failure to offer a contract should normally be *"taken into account"*. Art. 5 para. 5 of the Application Regulations makes clear that the failure to offer a new contract is an important factor to be taken into account, and the Circular emphasises its importance by stating the general principle that no compensation will be awarded unless the training club can establish its entitlement. For the reasons stated above, insofar as the Circular attempts, or appears, to go further than attempting to explain how the failure to offer a contract should be taken into account, the Panel rejects that attempt.

29. One of the difficulties that arises from the wording of the Circular is that no attempt is made to explain what is meant by *"receive"* a contract. The Panel understands that word to mean, and to be intended to mean, *"receive the offer"* of a contract. It will be recalled that it is the failure to *"offer"* a contract which is the factor to be taken into account when assessing compensation. So, if an offer is made, the club will generally be entitled to full compensation, calculated in accordance with the parameters, for the education and training it has provided. It is only if no offer is made that the provisions of Art. 5 para. 5 of the Application Regulations are engaged.

30. It follows, therefore that if the training club can explain why no contract has been offered to the satisfaction of the person assessing compensation, then compensation may be payable, albeit not necessarily the full amount calculated in accordance with the parameters laid down in the Application Regulations.

31. Finally, the Panel notes that Art. 42 para 1(c)(iv) of the Transfer Regulations gives the DRC the right to *"review disputes concerning training compensation fees and shall have the discretion to adjust the training fee if it is clearly disproportionate to the case under review"*. The Panel clearly has the same right.

Discussion

32. As has been stated, Hertha's appeal is based upon the three main grounds identified above. The Panel will consider those grounds in the order in which they appear in Hertha's appeal brief, namely, (A.) the meaning of the letter dated 12 July 2004; (B.) the applicability of the Regulations to a non-EU citizen, such as T.; and (C.) the impact of the Circular. The Panel will then consider (D.) the application of the Regulations on the facts of the present case.

33. Before considering the grounds of appeal, however, there is one important matter which the Panel wishes to emphasise. The documents relating to the relationship between Herha and T. are in German. Hertha is, of course, a German club, and it is to be expected that its contractual documents would be in German. Stade Lavallois, however, is a French club. As Hertha claims that its letter to T.'s agent should be given a specific meaning, which would mean that it was entitled to recover training compensation from Stade Lavallois, it is essential that there should be no dispute as to the meaning of the documents.

34. Accordingly, the Panel directed Hertha to provide translations into English, which is the language of the arbitration, of four specific documents. Those translations were to be made by a certified interpreter. Throughout this Award, the Panel has used those certified translations when setting out the terms of the various agreements between Hertha and T.

A. The meaning of the letter dated 12 July 2004

35. Hertha contends that the DRC misconstrued the letter and wrongly concluded that it stated Hertha's willingness to forego all compensation, rather than just a transfer fee. Hertha contends that the letter should, therefore, not be given the weight given to it by the DRC.

36. Stade Lavallois dispute Hertha's construction of the terms of the letter as being *"totally unfounded"*, although it puts forward no alternative construction. Stade Lavallois' case is that as, in the circumstances, Hertha was not entitled to any compensation by way of transfer fee, the letter is immaterial. To that extent, therefore, the parties are in agreement. However, the Panel will briefly state its conclusion as to the effect of, and the weight to be given to, the letter.

37. The material part of the letter is in the following terms:

"We hereby confirm that the player T. who holds a contract as contracted amateur with Hertha BSC valid until 31 June 2005 has the possibility to change to another club until 31 August 2004 and that Hertha BSC will agree to the termination of the employment contract without payment of a transfer compensation".

38. On its face, the letter states only Hertha's willingness to forego a transfer fee if T. entered into an employment contract with another club prior to 31 August 2004. The Panel must, however, consider whether there is any evidence which would demonstrate that the letter should bear the meaning attributed to it by the DRC.

39. The letter must be read in context. It is clear that in the summer of 2004 Hertha was content to bring to an end its contractual relationship with T. because 10 days after it had written the letter to T.'s agent, on 22 July 2004, Hertha entered into a further agreement with him. This agreement is the *"Termination Agreement"*, and by its express terms Hertha agreed to forego a transfer fee if T. entered into an employment contract with another club before 31 August 2004.

40. In the Panel's opinion, the letter says no more than the Termination Agreement in regard to compensation. It says nothing about Hertha's willingness to forego its entitlement to any type of compensation other than a transfer fee.

41. To that extent, therefore, the Panel agrees with Hertha. However, the Panel rejects Hertha's subsidiary submission that as the letter was written to T.'s agent it would, in any event, have no effect. That submission flies in the face of the law of agency. If the letter had stated Hertha's willingness to forego all types of compensation, the fact that it was written to the player's agent would be irrelevant.

42. The Panel, therefore, accepts, the letter does not deal with any compensation other than compensation by way of transfer fee.

B. The applicability of Art. 5 para. 5 of the Application Regulations to non-EU/EEA citizens

43. Here, again, the rival contentions are clear. Hertha contends that Art. 5 para. 5 of the Application Regulations applies only to the transfer of EU/EEA citizens within the EU/EEA. Stade Lavallois' case is that the Article applies to any transfer within the EU/EEA.

44. The Panel can, again, deal with this point briefly. The Article was made, at least in part, in order to satisfy the European Commission's insistence on freedom of movement of workers within the EU/EEA, and was a consequence of the decision in the *Bosman* case.

45. The Panel is satisfied that Hertha's contentions as to the Article's applicability to a non-EU/EEA citizen are wrong and misconceived for three reasons. First, on its face, the Article is not restricted to EU/EEA citizens, and, given its genesis, it would be strange if it were. Secondly, the Panel accepts Stade Lavallois' submission that the *Cotonou Partnership Agreement*

between the European Community and its Member States and the members of the African, Caribbean and Pacific Group of States ("the ACP") (OJ L 317, 15 December 2000) requires non-discriminatory treatment of workers who are nationals of the ACP. Thirdly, the requirement for non-discriminatory treatment has been reinforced by decisions of the European Court of Justice in *Deutscher Handballbund eV and Maros Kolpak (Case C-438/00)* and *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Español de Fútbol (Case C-265/03).*

46. T. is a Cameroonian citizen. Cameroon is a member of the ACP. Accordingly, the Article applies to him in the same way as if he were a citizen of a Member State. Any other construction would be discriminatory. It is common ground that, at all material times, T. has been lawfully in the EU/EEA. It follows that, whether he is a footballer or not, he is entitled to move freely within the EU/EEA. Accordingly, the Panel rejects this ground of appeal.

47. In any event, the Panel doubts that the nationality of the player is relevant in deciding on the principle and on the amount of training compensation. Pursuant to the Transfer Regulations and the Application Regulations, the compensation is due by the new club to the training club. The status of the player affects neither the existence of the entitlement nor the amount of the compensation. It is only the behaviour of the training club that can have an impact on the amount of the compensation, for example, if no contract is offered to the player, irrespective of his nationality. It, therefore, would appear to be irrelevant that T. was a Cameroonian national and not a national of any Member State of the EU/EEA. He was lawfully within the EU/EEA, and was entitled to move freely and to be employed within the EU/EEA.

C. The impact of the Circular

48. As the Panel has stated earlier in this Award, it proposes to construe the Circular in a manner which is consistent with the Regulations.

49. The Panel's approach is itself consistent with the approach of the Panel in *CAS 2004/A/794*. In that case the Panel declined to construe the Circular as *"overriding"* the Regulations, but construed it in a manner that was consistent with them. For the reasons stated above, the Panel agrees with that approach to the construction and relevance of the Circular.

50. Accordingly, the Panel rejects the submission that the Circular was ultra vires FIFA. It was, as it said on its face, an administrative summary and explanation of the Regulations.

D. The application of the Regulations on the facts of the present case

51. This is the substantive issue on the appeal. Hertha's case is that it only agreed to forego transfer compensation, and is entitled to training compensation in respect of T. Stade Lavallois contends that Hertha was not, in any event, entitled to training compensation because it had not made an *"offer"* of a contract to T.

52. Stade Lavallois relies, principally, on what it contends is the true construction of Art. 5 para. 5 of the Application Regulations. It further contends that a consistent line of DRC decisions supports its construction. In order to assess Stade Lavallois' contentions it is necessary, first, to consider the terms of the Termination Agreement.

53. Arts. 1 and 2 of the Termination Agreement have been set out above. In addition, the Termination Agreement provided that T. would receive a *"compensation payment"* for the *"cancellation of the Employment Contract"*, which would settle all of T.'s claims against Hertha. The Panel assumes that those claims would have been, principally, in respect of the salary that T. would have received up to the expiry of the Employment Contract on 30 June 2005. In fact, T. received EUR 60,000, a sum equivalent to almost two-thirds of his annual salary.

54. The issue, therefore, that the Panel must decide is whether, in the light of the termination of the Employment Contract by mutual consent, it can be said that Hertha, as the *"training club"*, did not offer T. a contract, so as to engage the compensation provisions of Art.5 para. 5 of the Application Regulations.

55. Issues of construction are frequently shaped by one's first impression of the words used. But that first impression must be judged against the relevant background facts. In the present case it is important to remember that Art. 5 para. 5 of the Application Regulations is limited to movement within the EU/EEA. It must, therefore, be construed in a purposive way consistent with the approach of the European Court of Justice to issues of construction.

56. As a matter of first impression and of language, the Panel finds it difficult to understand how it could be said that Hertha had not offered T. a contract. Not only had Hertha offered T. a contract, but T. had accepted that contract. Subsequently, that contract was terminated by mutual consent, originally at T.'s instigation. In addition, Hertha paid to T. a substantial sum in settlement of his claims against it. The Panel does not see how it can be said that the termination by mutual consent, in the circumstances of this case, can be translated into a failure to offer a contract.

57. Next, the Panel has to consider whether there is anything in the relevant background facts that would demonstrates that the Panel's first impression is not correct. These facts have been briefly mentioned above, but in this context it is necessary to give more facts. T. had been a member of Hertha's first team squad during season 2002/2003, but he was never chosen to appear in the starting line-up, and only played one match as a substitute.

58. In season 2003/2004 T. was dropped from the first team squad, and played for Hertha in the Regionalliga (the third division). That league is not generally considered a professional league. T. was unsurprisingly dissatisfied, and, through his agent, Mr K., approached Hertha to investigate the possibility of agreeing early termination of his employment contract to enable him to move to a new club without transfer fee. Eventually, the Termination Agreement was made.

59. It is, therefore, clear that the reasons for the Termination Agreement were a mixture of sporting and economic. T. wanted an opportunity to play first team football, which Hertha was unwilling to give him, and Hertha was content to terminate T.'s employment contract and pay up a part of the salary which he would have earned in the outstanding term of the contract so as to enable T. to join another club and to save it having to pay T. the whole of his salary up to the end of the contract.

60. In support of its contention that Art. 5 para. 5 of the Application Regulations applies, Stade Lavallois relies upon the decision of the DRC in a case decided by the DRC on 12 January 2006 and entitled *Club A v. Club B*. The facts of that case were as follows: the player's contract of employment with *Club A* ran from January 2002 to October 2003. However, for much of that period (August 2002 to June 2003) the player was loaned to a third club. At the expiry of the loan period the player was not asked by *Club A* to return to it. He had trials with two other clubs, and attended a training camp with his national team. In January 2004 the player entered into a contract with *Club B*.

61. It was *Club A's* case that it had employed the player only between January 2002 and August 2002, when he was 19 and 20 years old, and that it had offered the player a new contract. *Club A* did not provide the DRC with a copy of the offer. *Club B* contended that *Club A* and the player had signed an agreement by which Club A renounced its right to compensation in the event of a future transfer. No copy of that agreement was provided to the DRC. It is not clear from the DRC's decision when the agreement between the player and *Club A* is said to have been made; nor is it clear whether it is said that the agreement was similar to the Termination Agreement in the present case, and that an existing contract was terminated by mutual consent.

62. The DRC referred to its *"constant jurisprudence"* to the effect that if the training club fails to prove that it offered a new contract upon expiry of the earlier contract, it was not entitled to any training compensation. As *Club A* had failed to prove that it had made an offer, its claim against *Club B* failed.

63. In the Panel's view, that case was decided on its own facts, as this case must be. In *Club A v. Club B* it was *Club A's* case that it had made an offer of a new contract. However, it failed to prove its case.

64. In the present case, the evidence is before the Panel. There was a contract between Hertha and T. That contract was terminated by mutual consent, and T. was paid compensation. The

issue remains whether, on the true construction of Art. 5 para. 5 of the Application Regulations, the consensual termination is to be treated as a failure to make an offer.

65. The DRC Decision gives no indication that the DRC ever gave serious consideration to the fact of the mutual termination of T.'s employment contract with Hertha, or the basis upon which the termination came about. Instead, the DRC proceeded on the basis that T. was a player *"whose contract has come to an end and who has not received a new contract from his club"*. But the Application Regulations do not deal with the case of a player whose contract has come to an end. They are concerned with training and education compensation for a player who is not *offered* a contract, and who joins a new club. In T.'s case it is axiomatic that T. had been *offered* a contract by Hertha in 2001, when he was 19 years old. He had accepted the offer, and had entered into that contract, which was to continue until 30 June 2005, when he would have been just over 23 years old. No compensation would then have been payable to Hertha if and when he moved club, pursuant to Art. 20 of the Training Regulations.

66. In the Panel's view, therefore, the DRC's approach was flawed, and its decision cannot be upheld on the basis relied upon by the DRC. The Panel would just comment that the DRC refers to the *"jurisprudence"*, which it said had been developed by it and which supported its decision. The DRC did not identify that *"jurisprudence"*. As DRC decisions can be appealed to the CAS, it would be helpful if, in future, such decisions were identified, and, in the event of an appeal and a request by either the CAS or any of the parties, copies of those decisions were provided to the CAS or to a requesting party.

67. It follows, therefore, that the Panel has concluded that Art. 5 para. 5 of the Application Regulations has no application in this case. That being so, Hertha is, prima facie, entitled to training compensation calculated in accordance with the parameters set out in the Application Regulations. However, the Panel would then have to consider whether, in the circumstances of the case, such compensation would be *"disproportionate"* (Art. 42. para. 1(b)(iv) of the Transfer Regulations).

68. In the Panel's opinion, the same, or a similar, issue would arise if the Panel had formed the view that the consensual termination of T.'s employment contract should be treated as a failure to *"offer"* a contract to him. In those circumstances, the Panel would have to consider how to take that fact *"into account"*, and what weight to give to it.

69. In either case, the Panel is of the view that the facts that (a) Hertha decided that, after 5 or 6 years training and education of T., he was not of sufficient quality to warrant a place in its first team squad, and (b) agreed to pay him a substantial sum to bring the employment contract to an end, are of themselves sufficient to make this case an exception to *"the general rule"*, or to be an important factor *"to be taken into account in determining the training compensation payable by"* Stade Lavallois (Art. 5 para. 5 of the Application Regulations), or to be relevant in deciding whether the compensation that would otherwise be payable was *"clearly disproportionate"* in accordance with Art.42. para.1(b)(iv) of the Transfer Regulations.

70. Against those facts is to be weighed the fact that T. did receive that training and education from Hertha. The Panel heard no evidence of the cost of such training or education, but is prepared to assume that, in this case, the parameters would produce a fair figure of compensation. It is well known that comparatively few of the young players who are trained by clubs become established players.

71. In this context it must also be borne in mind that, if T.'s contract had not been terminated by mutual consent, Hertha would have had to continue to employ T. and to pay his salary until 30 June 2005. At that date T. would have been over 23 years old. If he had then left Hertha's employment, Hertha would not have been entitled to receive any training compensation in respect of T.

72. In the vast majority of cases, the best, and most powerful, evidence of the value to be given to the training and education of a young player is that the training club wants the player to enter into a contract with it, and offers such a contract. In this case, the willingness, and, possibly, desire, of Hertha to bring the relationship to an end is, in the Panel's opinion, the best and most powerful evidence. That evidence indicates that, in Hertha's own view, the training and education had not been very successful, although such training and education had led to the first employment contract on October 2001.

73. The Panel has been assisted in making its decision in the present case by the decision of the CAS Panel in *CAS 2006/A/1027*. In that case, the CAS Panel considered the type of factors that could be taken into account when it is claimed that the amount of training compensation is *"disproportionate"* and should be reduced in accordance with Art. 42 para. 1(b)(iv) of the Transfer Regulations.

74. One of the difficulties faced by the Panel in the present case is that that the DRC decision was that no training compensation was payable because Art. para. 5 of the Application Regulations did not apply. The DRC, therefore, never received evidence of Hertha's training costs, and Stade Lavallois never had an opportunity to challenge those costs on the ground that they were disproportionate. If, in some future case, it is contended that Art. 42 para. 1(b)(iv) of the Transfer Regulations is relevant, the training club should produce its evidence as to the training costs so that the club challenging those costs has an opportunity to prove that the costs claimed are *"disproportionate"*.

75. Weighing the various factors as best it can, the Panel has concluded that the appropriate compensation for T.'s training and education, whether as an exception to *"the general rule"* or because the early termination is an important factor to *"be taken into account in determining the training compensation payable by"* Stade Lavallois or because the standard compensation would be *"clearly disproportionate"*, is EUR 80,000. The Panel has arrived at that figure on the basis that it would be appropriate to take one-quarter of the period that T. was with Hertha as being that part of the training period for which Hertha should be compensated.

76. In coming to the conclusion that the sum claimed by Hertha can, in the circumstances of the present case be reduced on the grond that it is *"disproportionate"*, the Panel is not to be taken as

saying that there is a discretion which can be exercised in every case. The discretion under Art. 42 para. 1(b)(iv) of the Transfer Regulations can only be exercised if the training compensation which results from the calculation made under the Application Regulations is *"clearly disproportionate in the case under review"*. The factors which have led the Panel to conclude that EUR 320,000 would be *"clearly disproportionate"*, in particular, the early mutual termination of the employment contract and the payment to T. of a substantial sum are not likely to be present in many cases.

77. Accordingly, and to the extent stated above, Hertha's appeal is allowed.

Stade Lavallois' Counterclaim

89. Stade Lavallois contends that Hertha's appeal is an abuse of process and made in bad faith, and counterclaims substantial sums which are said to have been suffered by it as a consequence of Hertha making the claim against it. One of the heads of counterclaim is said to be the cost to Stade Lavallois of its relegation to the French Third Division, which, it is said, was itself a consequence of Stade Lavallois being unable to recruit while this claim was hanging over its head.

90. As the appeal is to be allowed in part, it follows that the Panel is satisfied that the appeal was not made in bad faith and was not an abuse of the process. Accordingly, Stade Lavallois' counterclaim will be dismissed.

91. The Panel would only add that it would have started any consideration of the counterclaim from the position that any party was entitled to bring an appeal to the CAS if it felt that the body from which the appeal lay had made the wrong decision. It would have required powerful evidence of bad faith before it was prepared to move from that position. No such evidence was forthcoming in this appeal, and the only fact relied upon as demonstrating bad faith was the bringing of the appeal, and the quantum of the compensation claimed. The Panel very much doubts whether such "evidence" would ever be sufficient to permit a counterclaim to succeed on the basis of abuse of the process or bad faith.

Conclusion

92. For the reasons set out above, Hertha's appeal succeeds in part, and Stade Lavallois' counterclaim fails.

The Court of Arbitration for Sport rules:

1. The appeal by Hertha BSC Berlin against the decision issued on 21 February 2006 by the FIFA Dispute Resolution Chamber is partially allowed.

2. The decision issued on 21 February 2006 by the FIFA Dispute Resolution Chamber is overturned, and Stade Lavallois Mayenne FC is ordered to pay EUR 80,000 (eighty thousand Euros) to Hertha BSC Berlin as compensation for the training and education of T.

3. The counterclaim of Stade Lavallois Mayenne FC is dismissed.

(…).