

Tribunal Arbitral du Sport

Court of Arbitration for Sport

3/A/3240 FC Karpaty v. Kucherov Pavlo Volodymyrovych

ARBITRAL AWARD

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

Sole Arbitrator: Professor Michael Geistlinger, Salzburg, Austria

in the arbitration between

FC Karpaty, Lviv, Ukraine

Represented by Libra Law, Jorge Ibarrola & Claude Ramoni, Attorneys-at-law, Lausanne,
Switzerland

as Appellant

and

Mr. Kucherov Pavlo Volodymyrovych, Vught, the Netherlands

Represented by Brantjesveermanadvocaten, André Brantjes, , Attorney-at-law, Amsterdam,
the Netherlands

as Respondent

I. THE PARTIES

- 1.1. FC Karpaty (hereinafter referred to as “FC Karpaty” or “the Appellant”) is a Ukrainian Premier League football club from the city of Lviv. FC Karpaty is a member of the Ukrainian Football Federation (hereinafter referred to as “FFU”).
- 1.2. Mr. Kucherov Pavlo Volodymyrovych (hereinafter referred to as “Mr Kucherov” or “the Respondent”) is a coach, holding a UEFA licence, valid – as far as of relevance for this case – from March 2008 to March 2013 and employed by FC Karpaty on 3 October 2011. After termination of his contract by FC Karpaty, Mr Kucherov was hired by FC Naftan, Belarus, as from 10 January 2013.

II. FACTS¹

- 2.1. On 3 October 2011, FC Karpaty and Mr Kucherov concluded a “kontrakt”, which is a special employment agreement provided for by art. 21 para. 3 of the Ukrainian Labour Code. Art 21 para 3 of the Ukrainian Labour Code reads as follows:

“The “kontrakt” is a special form of a labour agreement in which its period of validity, the rights and obligations as well as liability of the parties (including material liability), the conditions of the remuneration and organisation of the work of the employee, the conditions of the termination of the “kontrakt”, including before the end of the period of its validity, can be agreed upon by the parties.”

- 2.2. The “kontrakt” between FC Karpaty and Mr Kucherov provides according to number 1.1 that the Club hires the Respondent for a job in the function of coach of the Club’s main football team and binds the Club, respectively, to conditions laid down by the “kontrakt” as to the payment of a salary to Mr Kucherov and as to the guarantee of the working conditions essential for the coach to do his job (fulfil his work function). According to number 1.2 of the “kontrakt”, Mr Kucherov has been obliged on the basis of the “kontrakt” and according to its conditions to execute his work (fulfil his work function) personally, on a high professional level and at a regime, to an extent and according to a schedule as defined by the Club. Art 2.3 of the “kontrakt” provides that Mr Kucherov in his activities shall be directly subordinate to the head coach and to the head of the Club.
- 2.3. By an order n° 175-k dated 17 October 2011 and signed by the Deputy General Director of FC Karpaty, by the Club’s chief accountant and providing also for the signature of the head of the Club’s trade union’s committee, the Club’s then head coach, Mr Kononov Oleg Georgiyevich, who signed having accepted, was stated that the working relationship with him was terminated by mutual agreement and with immediate effect.
- 2.4. On 18 October 2011, by order n° 177-k, signed by the Deputy General Director of FC Karpaty and notification acknowledged by Mr Kucherov, Mr Kucherov was appointed

¹ Due to the fact that the English translation of documents in Ukrainian language submitted by the parties was not always precise to the point, the Sole Arbitrator, reading Ukrainian, based its references in the present award on the English texts submitted by the parties, except when the English translation was not sufficiently accurate and that it was necessary to correct it. However, the Sole Arbitrator consulted the parties whenever the translation discrepancies could have an impact on the substance (see Chapter III below).

as interim head coach of FC Karpaty's main team. On the same day, FC Karpaty concluded an Agreement on Additional Payments to Mr Kucherov for the period he is performing the duties of the head coach of FC Karpaty's main team. For the period until 18 October 2011 personal extras in the amount of 9,500 USD were fixed (number 1 para 2 Agreement). For the period starting from 18 October 2011 a monthly extra payment of 11,500 USD to the basic salary was agreed upon (number 1 para 1 Agreement) *"on condition that the employee properly performs the duties envisaged by the employee's individual "kontrakt" with the Club and the functional obligations of the head coach of the Club's main team."* Number 9 of the Agreement rules that this *"Agreement shall enter into force from the moment of its signature by the Parties and shall stay in force until the first of the following cases will occur: either termination of the fulfilment of the obligations of the head coach of the Club's main team or termination of the individual "kontrakt" of the employee with the Club."*

- 2.5. By letter dated 21 October 2011, FC Karpaty informed the FFU on the appointment of Mr Kucherov as interim head coach of FC Karpaty. On 12 December 2011, the FFU answered that Mr Kucherov did not meet the requirements provided for by the FFU regulations for the function of a head coach. A head coach should hold a valid "Professional UEFA license" or should have started a course for receiving the necessary diploma. Non-compliance with these requirements would make FC Karpaty subject to the risk of sanctions and disciplinary measures.
- 2.6. On 21 January 2012, FC Karpaty introduced to the team Mr Volodymyr Bogdanovich Sharan as new head coach hired for a three-years period and confirmed so by order n° 13-k as of 23 January 2012. The Order was signed by the General Director and chief accountant of FC Karpaty as well as signed as approved by the head of the Club's trade union's committee. Mr Sharan signed having been notified. According to Ukrainian internet information dated 21 January 2013 and visited on 30 July 2013, Mr Kucherov accepted to continue his employment relationship with FC Karpaty in the coaching staff of Mr Sharan. FC Karpaty stopped the payment of personal extras to the salary of Mr Kucherov referring to number 9 of the Agreement about additional payments dated 18 October 2011 due to the termination of his function as head coach of the Club's main team.
- 2.7. On 14 March 2012, FC Karpaty made Mr Kucherov follow a program preparing for the UEFA Pro-Licence and paid the course in the amount of UAH 56,000. On 30 May 2012, when Mr Kucherov met the FFU's requirements, an Additional Agreement to the "kontrakt" of 3 October 2011 was concluded between the parties. The Additional Agreement amended number 6.1 of the "kontrakt" and extended the period of its validity until 31 May 2013 (number 1 of the Additional Agreement). Number 2 of the Additional Agreement laid down that the parties have agreed, that Mr Kucherov shall perform the obligations of the Club's head coach temporarily for the period from 1 June 2012 until 31 May 2013. For the period as long as Mr Kucherov will act as head coach the numbers 2.4 and 3.1.1 of the "kontrakt" shall be amended as provided by numbers 3.1 and 3.2 of the Additional Agreement. Number 3.1.1 of the "kontrakt" shall read, in particular: *"carries out the functions of head coach of the Club's main team within the limits of the powers and responsibilities determined by the Club's leadership. In addition, before or at the beginning of each registration period of a competition season, the employee will submit to the Club's General Director an administrative note with proposals concerning the sportive tasks for the respective period, concerning necessary*

transfer operations, as well as concerning the organization and execution of education and training camps.” Further to that the provision of number 3.1.2 of the “kontrakt” has been set out of force (number 3.3 Additional Agreement) and number 3.2.2 was amended. Number 4 of the Additional Agreement provided explicitly that the “*conditions of the “kontrakt”, which have not been amended, supplemented or cancelled by this Additional Agreement, remain in effect and binding for the Parties*”. Number 5 of the Additional Agreement envisaged that once the employee will have obtained the respective UEFA licence proving his qualification as head coach, which was expected for December 2012, “*the Club may conclude with the employee a labour “kontrakt” as head coach for the competition season 2013/2014 or for the competition seasons 2013/2014 – 2014/2015, unless the Parties agree otherwise.*”

- 2.8. On 1 June 2012, Mr Kucherov applied for the position of interim head coach of FC Karpaty as from that day. By order n° 107-k of the same day, Mr Dyachuk-Stavyts'kyi Yuriy Mikhaylovich was transferred from the position of interim head coach to the position of team manager of FC Karpaty as from 1 June 2012. As from the same date Mr Kucherov was moved to the position of interim head coach of FC Karpaty with a basic salary of UAH 5,000 per month. This order was signed by the Director General of FC Karpaty with the agreement signed by the head of the Club's trade union's committee and the chief accountant. The fact of notification was confirmed by the signatures of Mr Dyachuk-Stavyts'kyi and Mr Kucherov.
- 2.9. On 1 June 2012, an Agreement on additional payments was concluded between the parties (hereinafter referred to as “**Agreement of 1 June 2012**”). This agreement provided for an additional monthly payment of USD 16,000 to Mr Kucherov, while he was performing as head coach of the main team of FC Karpaty. In case a labour contract as head coach would be concluded for the competition season 2013/14 this payment was to be increased to USD 19,200 as from July 2013 onwards. A further increase was envisaged for the case of conclusion of a contract for also the next following competition season. In case of qualification for the Ukraine Cup Final, and for the Europe League's group tournament, respectively, premium payments were determined. According to number 1 lit b of the Agreement of 1 June 2012 bonuses for collective sport results of the team “Karpaty” in the amount of 150% of the highest rate any football player of the team received in a game while Mr Kucherov acted as head coach were fixed. The respective payments were to take place separately.
- 2.10. Mr Kucherov signed having received the following amounts as personal extras to his salary from FC Karpaty:
- September 2011: USD 9,500
 - October 2011: USD 11,500
 - November 2011: USD 11,500
 - December 2011: USD 11,500
 - January 2012: USD 11,500
 - February 2012: USD 6,500
 - March 2012: USD 6,500
 - April 2012: USD 6,500
 - May 2012: USD 6,500
 - June 2012: USD 16,000

- 11 July 2012: USD 14,000; separate receipt of amount *“in connection with the fulfilment of sporting tasks in the competition season 2012/2013 by the football club in the OPFC of Ukraine “Premier-League”*”.

- 2.11. On 29 July 2012, Mr Kucherov was replaced as head coach by Mr Nikolay Nikolov Kostov. This was communicated to the team on the same day and to Mr Kucherov in a meeting between the Director General of FC Karpaty, I. M. Dedyshyn, and Mr Kucherov on 31 July 2012. The later fact was confirmed by Mr Dedyshyn as witness during the hearing and not objected by Mr Kucherov. During this meeting an *“Act on termination of duties execution”* (hereinafter referred to as **“Head Coach Termination Act of 29 July 2012”**), signed by the Director General of FC Karpaty, was presented to Mr Kucherov and signed by him. According to the text of this Act the Club and Mr Kucherov agreed that Mr Kucherov *“is suspended from execution of FC Karpaty main team’s head coach’s duties and their execution is terminated as from 29 July 2012.”*
- 2.12. FC Karpaty presented a witness statement in writing, signed by Mr Dyachuk-Stavyts’kyy, dated 26 March 2013, where this person, director of the football academy *“Karpaty”*, confirmed as to the above Act that a conversation in his presence between the Director General of FC Karpaty and Mr Kucherov *“concerning suspending the latter from performing duties as head coach and dismissal from employment”* took place. He wrote: *“During this conversation, among other issues a discussion was held on the topic that P. Kucherov cannot continue to perform duties of head coach and that FC “Karpaty” terminates the contract with him”*. This witness statement contained also the following sentences:
- “In this regard he was offered to sign the Act on suspension from execution of head coach’s duties and Agreement on termination of the contract from 31.07.2012, and when he did not agree with the last one – he was informed that the club would terminate the contract unilaterally, as it is envisaged by the contract.*
- All documents related to the above were given to P. Kucherov by the general director. P. Kucherov has seen and read these documents, but he only signed the Act on suspension from execution of head coach’s duties.*
- Next week, on Monday (06.08.2012) P. Kucherov was dismissed from employment, but at that time he did not come to the office of FC “Karpaty” any more.”*
- 2.13. Mr Dyachuk-Stavyts’kyy was nominated to be heard at the hearing, but withdrawn by the Appellant and with the Respondent’s consent at the beginning of the hearing.
- 2.14. At the hearing, Mr Taras Pankevych, head of FC Karpaty’s legal department, confirmed at the example of the end of contract with the former head coach Kononov (see para 2.3 above) that FC Karpaty uses the same form of order for all such cases of dismissal from employment. The document has been set up by the FC Karpaty’s human resources manager. The General Director of FC Karpaty, Mr Dedyshyn, heard by video conference, confirmed his statement submitted to the FFU’s Dispute Resolution Chamber as part of the FC Karpaty’s objection (rejoinder) dated 26 March 2013 to the Respondent’s supplement of claim dated 13 March 2013. This statement reads inter alia as follows:

“My eventual meeting with the Claimant” (id est Mr Kucherov) “happened in two days – on 31.07.2012 (Tuesday) in FC “Karpaty” administrative office (3, Voronoho str., Lviv). On that particular day I gave to the Claimant the “Act of termination of duties execution” (dated as mentioned above 29.07.2012) to be signed by him, with which he got acquainted, agreed and signed (which is not denied by him).

Herewith, simultaneously with it, I have informed the Claimant about a decision made by the leadership of the Club to terminate labor relations with him and offered, as it usually happens, to determine the order of formalizing of such termination – either by “agreement of parties” (i.e. from 31.07.2012 – in order for the last day of work to coincide with the last calendar day of the month, which required a signing of relevant agreement about Contract termination) or in a way provided by ii.6.3.2 of i.6.3 of the Contract, i.e. – through written notice and in five days – the order with the following wording: “on the grounds provided by the contract”.

Thus, in fact on 31.07.2012 the Claimant was provided and properly made acquainted with the aforementioned Act “of termination of execution of duties” (dated 29.07.2012) and with a draft of agreement about termination of contract “by agreement of parties” (dated 31.07.2012p.) as well as with the notice about contract termination (also dated 31.07.2012) which informed about Contract termination as of 06.08.2012, thus in five days after notification as provided by i.6.3.2).

Having signed the Act of “termination of duties execution” the Claimant ignored other documents related to labor relations and didn't sign them.

It wasn't certified by any specific document (for example – “Act of refusal to sign”), since taking into account current state of affairs, in particular – with regard to sporting results of Claimant's work as interim head coach and previous agreements that were reflected in Contract (in relation to Club's possibility of early unilateral termination of relations with the Claimant), no dispute with the Claimant in regards to labor relations was expected.

Henceforth, after 31.07.2012 the Claimant never appeared in the Club.

On 06.08.2012, after five days as provided by the Contract and notification dated 31.07.2012, the Order No 192-k “About dismissal from job” was issued by FC “Karpaty” according to which the Claimant was dismissed from job with the following words “on the grounds provided by the contract” (i.e. art 36 of Labor Code) – on the basis of i.6.3.2 of the Contract and aforementioned notification dated 31.07.2012.

Herewith, I'm stressing that the latter (notification of 31.07.2012) should not have been “officially sent” to the Claimant as he states in Supplement dated 13.03.2012. It is provided by the Contract (ii.6.3.2 i.6.3) that the employee should be notified in writing that a decision was made to terminate the contract no less than five days prior to such termination. Such written notification was executed by FC “Karpaty” on 31.07.2012 by presenting the Claimant with aforementioned package of documents (incl. notification about contract termination of 31.07.2012) in course of conversation.

Therefore, on 06.08.2012 FC “Karpaty” has lawfully issued Order No 192-k, by which Claimant was dismissed from job.” (emphazised by FC Karpaty).

2.15. Further to that, Mr Dedyshyn stated at the hearing, that the notice about contract termination he showed to Mr Kucherov at the occasion of their meeting on 31 July 2012 bore only his own signature. Also the respective draft submitted as exhibit to the Appeal Brief (draft agreement on termination of contract dated 31 July 2012) provided only for the signatures of Mr Dedyshin and Mr Kucherov, but in fact were neither signed by the one nor by the other. The Order No 192-k "About dismissal from job" dated 6 August 2012 in the Ukrainian original contained only the signatures of the General Director of FC Karpaty, I.M. Dedyshyn, and of FC Karpaty's chief accountant, Ms I.I. Petryshyn. The signature of the head of FC Karpaty's trade union's committee, Mr Ya Priymak, was not included at that date. On 14 November 2013, FC Karpaty showed a correspondence between the Director General of FC Karpaty and the head of FC Karpaty's trade union's committee where the Director General asked for the approval by the head of the trade union's committee of the Order of dismissal on 31 July 2012. Such approval was granted on 2 August 2012.

2.16. On 1 August 2012, Mr Nikolov Nikolay Kostov was hired by FC Karpaty as head coach.

2.17. On 3 August 2012, in an interview for the online news "Sport Ekspress v Ukraine" Mr Kucherov stated the following: "*Certainly I am very satisfied with the period spent at FC "Karpaty". Thanks to the Lviv club and personally Oleg Kononov, to whom I came last year in order to assist, I managed to get acquainted with Ukrainian football – its level and specifics. For all this time functions performed by me allowed me to obtain certain experience.*

I had an opportunity to implement different coaching ideas in "Karpaty", and I received experience in sense of creativity. For that I am grateful both to fate and to the club at which I worked during a year." This interview was downloaded by FC Karpaty on 30 July 2013.

2.18. On 10 December 2012, Mr Kucherov initiated proceedings against FC Karpaty at the Dispute Resolution Chamber of the FFU (hereinafter referred to as "FFU DRC" and claimed a total amount of USD 230,500 and UAH 50,000 composed as follows:

Outstanding remuneration:

- USD 16,000 for July 2012
- USD 4,000 as bonus for draw away against Volyn Lutsk on 13 July 2012.

Compensation for alleged termination of the "kontrakt" without just cause:

- USD 50,000 (salaries for the period from 1 August 2012 until 31 May 2013
- USD 160,000 (personal extras for the same period)
- USD 50,000 (bonuses approximate lost profit based on number 1.1. b) of the Agreement of 1 June 2012).

Mr Kucherov stated in his Complaint that he had offered FC Karpaty a compromise, but that silence over more than four months of unemployment was the only reaction on FC Karpaty's side.

2.19. FC Karpaty objected on 16 February 2013 holding that

- the statement of Mr Kucherov that FC Karpaty has terminated the "kontrakt" without "grounds provided by the legislation of the Ukraine and the contract" was not true;
- there was not taken any decision by the leadership of FC Karpaty about payments of bonuses for "away draw";
- the FC Karpaty had no debts towards Mr Kucherov;
- Mr Kucherov owed an amount of UAH 48,264.84 to FC Karpaty as reimbursement of the costs paid by the latter for the UEFA Pro-Diploma (UAH 56,000 – USD 967.74 retained on the remaining amount due for Mr Kucherov's personal extra to his salary for July 2012).

FC Karpaty asked the FFU DRC for dismissal of Mr Kucherov's claim and ordering him to pay UAH 48,264.84 to FC Karpaty.

2.20. On 17 April 2013, the FFU DRC issued its decision (hereinafter referred to as "**FFU DRC decision**" or "**Challenged Decision**") and ruled as follows:

1. *The claim of coach Kucherov Pavlo Volodymyrovych concerning non-fulfilment of financial commitments under the "kontrakt", agreement of additional payment and unilateral early termination of labour relations by Limited Liability Company "Club of Professional Football "Karpaty" Lviv – shall be partially satisfied.*
2. *It shall be acknowledged that the "kontrakt", concluded on 3 October 2011 between Limited Liability Company "Club of Professional Football "Karpaty" Lviv and the citizen of the Kingdom of the Netherlands Kucherov Pavlo Volodymyrovych was terminated on the club's initiative unilaterally without just cause for the grounds not envisaged by the "kontrakt", the legislation of the Ukraine and the Regulations on the Status and Transfers of Players of the Football Federation of the Ukraine.*
3. *The Limited Liability Company "Club of Professional Football "Karpaty" Lviv is obliged to:*
 - 3.1. *hand out the employment record booklet to Kucherov Pavlo Volodymyrovych;*
 - 3.2. *pay to Kucherov Pavlo Volodymyrovych the debt for July 2012 and part of August 2012 in salary payment in the amount of UAH 967.00 (nine hundred sixty-seven UAH 00 kopecks) and personal extras in the amount of USD 17,419.08 (seventeen thousand four hundred nineteen US dollars and eight cent) in Hryvna equivalent at the exchange rate of the National Bank of the Ukraine as of the date of payment;*
 - 3.3. *pay to Kucherov Pavlo Volodymyrovych the compensation for unilateral early termination of the "kontrakt" on the club's initiative without just reason for the grounds not envisaged by the "kontrakt", the legislation of the Ukraine, and the Regulations on the Status and Transfers of Players of the Football Federation of the Ukraine in the amount of UAH 49,033.00 (forty-nine thousand thirty-three UAH 00 kopecks) and USD 60,419.48 (sixty thousand four hundred nineteen US dollars and 48 cents) in Hryvna equivalent at the exchange rate of the National Bank of the Ukraine as of the date of payment.*
4. *The other part of the demands of coach Kucherov Pavlo Volodymyrovych is dismissed.*
5. *Counterclaims of Limited Liability Company "Club of Professional Football "Karpaty" Lviv concerning the reimbursement by Kucherov P. V. the balance of the costs of the studying under the "UEFA Pro-diploma" program are dismissed.*

The decision enters into legal force with the expiry of the period for submission of appeal.

Appeal against the decision of the FFU's Dispute Resolution Chamber can be submitted to the International Court of Arbitration for Sport within 21 (twenty-one) days from the date of receipt of the FFU's Dispute Resolution Chamber's decision in full."

2.21. The FFU's DRC decision was served on FC Karpaty by fax on 18 June 2013.

III. PROCEEDINGS BEFORE THE CAS AND EVENTS DURING THESE PROCEEDINGS

- 3.1. On 9 July 2013, FC Karpaty submitted its Statement of Appeal against the FFU's DRC decision in accordance with Articles R47 and R48 of the Code.
- 3.2. In accordance with Article R51 of the Code, FC Karpaty filed its Appeal Brief on 2 August 2013.
- 3.3. Further to a request from the Appellant and in the absence of any objection from the Respondent, on 27 August 2013, the Deputy President of the CAS Appeals Arbitration Division decided to submit this case to a sole arbitrator.
- 3.4. On 29 August 2013, Mr Michael Geistlinger, professor in Salzburg, Austria, was appointed as Sole Arbitrator in this case.
- 3.5. In accordance with Article R55 of the Code, Mr Kucherov filed the Answer of Respondent ("Statement of Defense") on 11 September 2013.
- 3.6. Further to an evidentiary request from FC Karpaty, the Sole Arbitrator requested the FFU file on 3 September 2013. The FFU file was forwarded to the parties on 9 September 2013 and they were invited to submit an English translation of any extracts upon which they intended to rely with a first deadline of two weeks, which was extended for one week.
- 3.7. On 1 October 2013, FC Karpaty submitted an English translation of some extracts of the FFU file. One extract, FC Karpaty wanted to rely on, was an explanation of Ms I. Yu. Kotsymbas of 25 March 2013 for use during the FFU's DCR procedure, where she stated that Mr Kucherov was not familiarized with the Order of dismissal dated 6 August 2012 on or after that date as well as did not receive his employment record booklet, because he did not show up at FC Karpaty's HR service. Ms Kotsymbas declared that Mr Kucherov was not available at his previous phone number which statement Mr Kucherov contradicted during the hearing claiming that he had written sms from his phone to Mr Dedyshyn in this period. During the hearing Mr Dedyshyn answered that he cannot remember having sent sms to Mr Kucherov. According to the explanation of Ms Kotsymbas the Order on dismissal from the employment and the employment record booklet were brought to Mr Kucherov's place of residence by employees of FC Karpaty, but he was not available there. She made a document being set up in hand-writing by her, the legal consultant, Mr L. K. Borovyk, and the driver of FC Karpaty's motor transport service, Mr M. M. Babiy, confirming non-availability of Mr Kucherov on 6 August 2012. This document dated from 8 August 2012. Further to

that FC Karpaty wanted to rely on an interview transmitted on internet by Sport Ekspres and dating from 22 November 2012, where Mr Kucherov was said of having left from Lviv to the Netherlands and having had no long-term plans with FC Karpaty, but that he was more interested in finishing his coaching courses in Kyiv.

- 3.8. On the same day, the Respondent was reminded by the Sole Arbitrator that except he orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely, after the submission of the appeal brief and of the answer.
- 3.9. Further to an evidentiary request from FC Karpaty, on 9 October 2013, the Sole Arbitrator invited Mr Kucherov and the FFU to submit, by fax on or before 14 October 2013, a copy of the employment contract he concluded in December 2012 with FC Naftan from Belarus' and of any other documents related to this contract and which contain information regarding remuneration and any other benefits. This contract, which was concluded on 13 January 2013, was submitted to the CAS court office in the Russian original on 11 October 2013. The contract shows that Mr Kucherov was hired as head coach starting from 10 January 2013. At the hearing Mr Kucherov explained that the contract was terminated in the meanwhile.
- 3.10. Since by letter dated 11 October 2013, Mr Kucherov reiterated his counter-claim from the Answer of Respondent in the amount "*(amongst others) ... of UAH 967.00 and USD 19,096.72 for outstanding payments, as well as amounts of UAH 49,033.00 and USD 142,908.88 as compensation due to FC Karpaty's termination of the employment agreement without just cause*", thereby requesting a respective amendment to the Order of Procedure, on 14 October 2013, the Sole Arbitrator communicated to the parties his decision on the inadmissibility of this counter-claim, since counter-claims are not allowed in the CAS appeals procedures since 1 January 2010.
- 3.11. The Appellant signed the Order of Procedure on 14 October 2013. The signed Order of Procedure was handed over to the Sole Arbitrator by the Respondent at the beginning of the hearing, which took place at the CAS Headquarters on 16 October 2013. The Appellant was represented by Mr Taras Pankevych and Mr Nazar Girskyy, its in-house Counsels. Mr Pankevych was also nominated as witness. The Appellant was further represented by Mr Jorge Ibarrola, Mr Jean-Marie Kiener and Ms Nathalie St Cyr Clarks, external Counsels. Mr Pavlo Volodymyrovych Kucherov appeared in person and was represented by Mr André Brantjes, assisted by Mr T. H. Geukes Foppen, Counsels.
- 3.12. At the beginning of the hearing, Mr Ibarrola cancelled the appearance of Mr Dyachuk-Stavyts'kyy, General Director of FC Karpaty's football academy, and of Ms Iryna Ivanivna Petryshyn, Chief accountant of FC Karpaty, as witnesses. Mr Igor Dedyshyn, General Director of FC Karpaty, gave evidence by video conference via skype and was translated from Ukrainian to English by Mr Girskyy.
- 3.13. Mr Pankevych, when being heard as party-witness, described the drafting of the payment act (receipt note) on a payment of USD 14,000, which document was typed by Mr Pankevych himself based on oral advice by Mr Kucherov. According to Mr Pankevych, he was told by the General Director that it was an advance payment of personal extras and that there was no other specific payment required. He doubted that it

could be a payment relating to the previous season or a bonus for games of the competition season 2012/13 which were not yet played. ~~bonus~~The Respondent, however, underlined the bonus character of this payment. Further to that and upon questions by the Sole Arbitrator, Mr Pankevych described the forms used for dismissal of coaches. Mr Dedyshyn supported the advance salary character of the payment of the USD 14,000 and described the meeting of 31 July 2012 as well as the form and contents of the documents that were shown to Mr Kucherov during this meeting.

- 3.14. At the hearing, the Sole Arbitrator initiated a debate on the applicability of the Ukrainian law in general, as well as on eventual further provisions of the Ukrainian Labour Code and Ukrainian Civil Code in addition to those submitted or referred to by the parties in their submissions orally or in writing. It was agreed that, whereas the Sole Arbitrator was entitled to adduce any applicable provision of the Ukrainian or other applicable law, irrespective of whether discussed or shown by the parties, he would offer them a chance to comment on such provision, eventually referred to by him, if deemed necessary, in a brief manner upon short notice and within a short deadline.
- 3.15. By letter dated 7 November 2013, the Sole Arbitrator informed the parties that he found that the English translation of art 6.3.2 of the “kontrakt” dated 3 October 2011 did not fully reflect the Ukrainian text on its left side and should read as follows: *“In case of a decision taken by the Club leadership with obligatory notification in writing to the Employee about such termination of the Contract not less than 5 days prior to such termination.”* He invited the parties to submit eventual comments on such discrepancy within a week’s deadline and also within the same deadline to comment on the relevancy of the “Tipovye pravila vnutrennego trudovogo rasporyadka dlya rabochikh i sluzhashchikh predpriyatiy, uchrezhdeniy, organizatsiy (“Model Rules for the internal work order for employees and office workers of enterprises, institutions and organizations”), chapter II, numbers 5 – 10, for the interpretation of the contracts binding the parties and for art 6.3.2 in particular. Finally the Sole Arbitrator noted that art 21 par 3 Ukrainian Labour Code allows for the conclusion of a “kontrakt” between FC Karpaty and its coach, limits, however, what is allowed to agree upon by the parties in such “kontrakt”. The Sole Arbitrator deemed a priori that, in addition to the provisions already referred to by the parties, arts 201 ff and 243 ff of the Ukrainian Labour Code might be relevant and asked the parties for their comments on those provisions within a week’s deadline. He noted that the parties’ observations shall be strictly limited to these issues and reminded them that he remained free to apply, within his award, any other provisions of Ukrainian law or of any applicable regulations.
- 3.16. On 14 November 2013, the Appellant presented FC Karpaty’s own internal work order rules, however only in Ukrainian language with translation only of arts 2.16 – 2.19 into English, and submitted evidence by means of a copy of Mr Kucherov’s Personal Card as employee that he had signed having taken due note of the applicability of the Club’s internal work order rules
The Appellant further gave evidence that Mr Kucherov was a member of the Club’s trade union, that FC Karpaty requested consent from the trade union for the coach’s dismissal and that such consent was given by this trade union.
- 3.17. On the same day, the Respondent submitted his answers and comments to the questions of the Sole Arbitrator.

- 3.18. On 18 November 2013, the Sole Arbitrator granted the parties a week to reply strictly limited to its counter-party's latest submission.
- 3.19. By letter dated 22 November 2013, the Respondent objected to the admission of the new exhibits submitted by the Appellant holding that there were neither a mutual agreement nor exception circumstances to such submission. He pointed at the fact that certain pieces of the new documents were drawn up only in Ukrainian language and the English translations of the other pieces were unreliable.
- 3.20. By letter dated 25 November 2013, the Appellant repeats that it holds sufficiently given evidence by testimonies and circumstantial evidence that Mr Kucherov has been notified the termination of his employment contract during the meeting of 31 July 2012 in accordance with art 6.3.2 of the Employment Contract. Based on art 8 Swiss Civil Code which is applicable in CAS proceedings a judge is even allowed to base his decision on clues or on a high degree of likelihood. By exhibits having accompanied its letter dating 14 November 2013 the Appellant has given evidence for the request and receipt of the trade union's consent to dismiss Mr Kucherov. As to the quality of witnesses in the opinion of the Appellant there "*is absolutely no rule or principle of law that prevents witnesses being connected to a party or from testifying in that party's favour. ... Most importantly, however, the witnesses were called upon for the sole reason that they had personal knowledge of facts pertinent to the dispute.*"
- 3.21. By letter dated 26 November 2013, the parties were informed that the Sole Arbitrator will proceed with the drafting of the award and that the decision regarding the admissibility of the exhibits submitted by the Appellant on 14 November 2013 will be made within the award. The Sole Arbitrator decided to admit the new evidence based on his authority to do so under art R56 of the Code based on exceptional circumstances. In the case at hands from the beginning both parties should have provided the Sole Arbitrator with the Rules on the internal work order of FC Karpaty since both of them were aware or must have been aware of the fact that they exist. The Sole Arbitrator is bound to refer to the applicable law which as will be stated below at para 6.2. is Ukrainian law binding FC Karpaty like any other Ukrainian employer to set up internal rules. It is certainly exceptional that only when the Sole Arbitrator has been confronting the parties with the Model Rules otherwise eventually applicable one of them showed ready to submit the respective internal document the knowledge of which has been signed also by the other party. As to the evidence relating to the role and rights of FC Karpaty's trade union's committee in general and with regard to the termination of the "kontrakt" with Mr Kucherov in particular, this evidence is closely connected to the Club's internal work order rules.

IV. SUBMISSIONS OF THE PARTIES

a. The Appellant:

- 4.1. The Appellant, considers the following decisions of the FFU DRC as final and binding:
- Mr Kucherov "*is not entitled to any bonuses in relation to the away draw obtained by FC Karpaty against Volyn Lutsk on 13 July 2012;*"
 - Mr Kucherov "*is not entitled to a compensation of USD 50,000 for expected bonuses in accordance with clause 1.1 of the Agreement of 1 June 2012;*

- *any possible compensation due to the Respondent for alleged unilateral termination without just cause of the Employment agreement (if any) shall be reduced by the remuneration received by the Coach from FC Naftan between 27 December 2012 to 31 May 2013*".

- 4.2. The Appellant challenged the other findings of the FFU DRC and argues an error in the FFU DRC's holding that FC Karpaty terminated the Employment agreement without just cause, or in the alternative that the FFU DRC wrongly assessed the compensation due to Mr Kucherov in relation to such termination, if any.
- 4.3. Referring to arts 21 para 3 read together with 36 para 8 of the Ukrainian Labour Code the Appellant holds that the FC Karpaty did not violate Ukrainian law when it terminated the employment relationship based on the terms laid down by the Employment Agreement. There was a decision taken by the leadership and notified to the Respondent, either orally, or also in writing on 31 July 2012, whatever language version of the "kontrakt" was to prevail. Mr Kucherov's refusal to sign could not invalidate the notification.
- 4.4. As to the discrepancy between the Ukrainian and the English versions of the employment contract, pointed at by the Sole Arbitrator, the Appellant confirmed such discrepancy and held in its letter dated 14 November 2013 that, since the contract did not provide which language should prevail in case of discrepancy, it was for the Sole Arbitrator to decide accordingly. With reference to art 18 (1) Swiss Code of Obligations and CAS jurisprudence the Appellant pointed at the real intention of the parties to be decisive. Since the contract was negotiated and agreed upon in the English language and only this version could be understood by Mr Kucherov, the English version was decisive. At any rate the Club complied with both versions of art 6.3.2 of the "kontrakt" and Mr Kucherov's refusal to sign the termination agreement cannot nullify the validity of the notification. According to the Appellant, it violates Swiss Public Order to be respected by any arbitral court based in Switzerland if Mr Kucherov abuses his right and hides behind a purported procedural defect while he tried to prevent the actual notification.
- 4.5. With regard to the question of the Sole Arbitrator as to the applicability of the Model Rules for the Internal Work Order, the Appellant points at their Soviet background and the need for incorporation according to the Law of Ukraine on Succession and holds that "in the practice, some of the provisions of the Model Rules keep being applied, provided however that they do not contradict the internal legislation adopted by the Ukrainian parliament. ...". With reference to the mutual rights of the employer and employee as to the terms for the termination of their employment relationship art 21 para 3, art 36 para 8 and art 40 of the Ukrainian Labour Code have to be considered. Due to these rules, the Appellant holds, the Model Rules are not applicable in the present case. Moreover, the Appellant referred to FC Karpaty's own internal work order rules, which were approved based on art 142 para 1 Ukrainian Labour Code on 15 September 2009 and according to the Appellant "do not, and cannot, establish any provisions that would limit the rights of an employee more restrictively than corresponding provisions of the Labour Code. Art. 2.16 of the Rules of the Club thus require any dismissal to be performed in accordance with Arts. 28, 36-41 of the Labour Code".

- 4.6. With regard to art 201 Ukrainian Labour Code, the Appellant, referring inter alia to a scientific-practical commentary and to the heading of this article, holds that this provision is only applicable to the manufacturing industry.
- 4.7. Concerning art 243 of the Ukrainian Labour Code, the Appellant states that the FC Karpaty's trade union is consulted prior to the dismissal of any employee that is initiated by the Club.
- 4.8. In the alternative that the Sole Arbitrator would not follow the argument of lawful termination of the "kontrakt" by FC Karpaty, the Appellant argued that the Respondent himself terminated the "kontrakt" unilaterally prior to the end of the notification period, namely on or before 3 August 2012. The Respondent in the opinion of the Appellant did so by failing to report to the Club after 31 July 2012 and by stating on 3 August 2012 that he was no longer an employee of FC Karpaty. The Respondent thereby acted against arts 39 and 38 of the Ukrainian Labour Code and did not comply with art 6.4 of the "kontrakt". The Appellant could not return the employment record booklet to the Respondent since the latter was absent from the Club and such fact anyway could not affect the termination of the employment relationship.
- 4.9. Last, but not least, the Appellant holds in the alternative that the FFU DRC wrongly assessed the compensation (if any) due by FC Karpaty to Mr Kucherov. In the opinion of the Appellant Mr Kucherov was entitled to a salary in the amount of UAH 967 for the period 1 to 6 August 2012, but was not entitled to any personal extras after his termination as head coach of FC Karpaty, which happened on 29 July 2012. The Appellant further holds that the amount of USD 14,000 received by Mr Kucherov on 11 July 2012 was an advance payment on his personal extras due for the month of July 2012. Thus, for the period from 1 July to 29 July 2012 Mr Kucherov was entitled to outstanding personal extras in the amount of USD 967.48. This sum must be set off with the amount of UAH 56,000 paid by FC Karpaty in order to enable Mr Kucherov to participate to the UEFA Pro-diploma program and to act as interim head coach at the club. The Appellant finds that the legal basis for his right to such reimbursement follows from general principles of civil law "*such as fairness and good faith, which are applicable by analogy pursuant to article 8 of the Civil Code of the Ukraine*" and in addition based on art 1212 of the Ukrainian Civil Code as irregularly acquired property. As a result the sums of UAH 967 and USD 967.48 (equivalent to UAH 7,776.89) are to be set off against UAH 56,000. Accordingly, Mr Kucherov must pay UAH 47,256 to FC Karpaty, plus interest at 5% per year from 31 July 2012.
- 4.10. The Appellant submits the following Prayers for Relief:

"In light of the above, FC Karpaty respectfully requests that the CAS rules as follows:

1. *The decision issued on 17 April 2013 by the Dispute Resolution Chamber of the Football Federation of Ukraine in the matter of FC Karpaty against Kucherov Pa(vl)o Volodymyrovych is set aside.*

Ruling de novo (emphasis in the original)

2. *Kucherov Pa(vl)o Volodymyrovych is ordered to pay 47,256 UAH (forty-seven thousand two hundred and fifty-six Ukraine Hryvnia) plus interest at 5% per year from 31 July 2012.*

3. *All the arbitration costs shall be borne by Kucherov Pa(vl)o Volodymyrovych, who shall be ordered to reimburse FC Karpaty the minimum court office fee of CHF 1,000.*
4. *Kucherov Pa(vl)o Volodymyrovych is ordered to pay FC Karpaty a contribution towards the legal and other costs incurred by the latter in the framework of these proceedings, in an amount to be determined at the discretion of the Panel."*

b. The Respondent:

- 4.11. The Respondent wished to draw the Sole Arbitrator's attention to the fact that at the core of the dispute was to be seen that the labour relations with FC Karpaty have been terminated by the Club on a unilateral basis without just reasons. As of 29 July 2012 Mr Kucherov's obligations as team coach have been terminated. On the other hand from 29 July until the date of his complaint to the FFU DRC he did not receive any order to execute any duties. Thus, he finished the coach's course he felt obliged to do so, because he never received an order to stop studying. FC Karpaty stopped to pay a salary starting from July 2012 and never contacted Mr Kucherov concerning the dismissal from work. He also did not receive his employment record booklet and, thus, could not find any other employment until the submission of his complaint to the FFU DRC.
- 4.12. The Respondent holds that the unilateral termination of the "kontrakt" from 6 August 2012 was artificially constructed. The Appellant's submission to the FFU DRC forced him to change his requests accordingly. The Respondent accepted numbers 1, 2 and 4 of the Challenged Decision, but does not agree to numbers 3.2 (salary and personal extra payments) and 3.3 (extent of compensation for unilateral termination without just reason). The Respondent finds that a written notification of termination five days prior and signed also by the trade union in his presence had to take place, but as a fact did not take place on 31 July 2012 as argued by the Appellant. During the hearing the Respondent stated that he had offered as a compromise to General Director Dedyshyn, when the meeting took place on 31 July 2012 that he would agree to a termination of his contract, if FC Karpaty paid his personal extras for two months. This offer was not considered by the Appellant. The sum of USD 14,000, received by Mr Kucherov on 11 July 2012 was not an advance payment to future payments in order to allow for vacations with his family, but was done exactly as confirmed by the text of the respective payment act drafted and set up by Mr Pankevych, id est in connection with the fulfilment of sporting tasks in the competition season 2012/2013 by the football club in the OPFC of Ukraine "Premier-League", which means a bonus payment due to Mr Kucherov.
- 4.13. The Respondent insisted in the necessary existence of a respective agreement providing for the payment of a reimbursement to FC Karpaty of the costs for Mr Kucherov's participation at the UEFA Pro-diploma program as precondition for such payment. There was no such agreement between the parties. The Respondent had been instructed by the Club to pass this course. He, thus, simply fulfilled a duty as employee in the framework of his employment contract. No reimbursement, thus, is owed to the Appellant in the opinion of the Respondent.
- 4.14. With regard to the questions raised by the Sole Arbitrator after hearing, the Respondent commented on 14 November 2013 that the termination of the agreement must take place by obligatory written notification and that Mr Kucherov did not receive such, neither by

mail, fax or email and there has not been produced evidence by the Appellant, who bears the burden of proof, to prove the contrary. He pointed at the statement of one witness at the hearing "that he remembered that a notification had been drawn up and presented to my client, however he did not know where the notification would be right now." Besides, all witnesses were party testimonies. The Appellant has not shown the alleged notification and also not proven that it had been received by Mr Kuchеров. The Respondent obviously holds that the Model Rules are applicable and that the trade union must give prior permission to the termination of an employment agreement. There does not exist any proof concerning such permission.

- 4.15. As to art 201 Ukrainian Labour Code, the Respondent holds that the provision is applicable on the Club and that it follows from this provision that "Karpaty bears the obligation to take care of the costs of the training for the UEFA Pro-diploma provided" to Mr Kuchеров, "in order for him to be able to (re-)obtain the status of head coach of the club. This furthermore stems from the fact that the parties have never made any further agreements with regard to the repayment of the costs made for the training for UEFA Pro-diploma." Thus, Mr Kuchеров is not obliged to remunerate FC Karpaty for any costs made for the UEFA course.
- 4.16. With regard to art 243, the Respondent states that he had been advised by an Ukrainian jurist that this provision is applicable and implies "that an employer must obtain approval of such trade union in the event it wishes to unilaterally terminate the employment agreement of the employee." According to the Respondent, FC Karpaty did not provide any proof for such approval, thus the agreement has been terminated without just cause and unlawfully. The Respondent draws the conclusion "that Karpaty is liable for the damage suffered by my client due to this unilateral termination without just cause." As to the costs of the UEFA Pro-diploma "no agreements have ever been made with regard to any repayment of these costs to Karpaty. It neither follows out of the employment agreement, nor out of eventual side agreements or the Ukrainian law," that Mr Kuchеров "would be obliged to (re)pay these costs."
- 4.17. As to the arguments raised by the Appellant in its letter dated 14 November 2013, the Respondent states that Mr Kuchеров understands and speaks the Ukrainian language. The English version of the employment contract has just been added for the clarity's sake and for third parties. He refers to arts 19 and 20 of the Swiss Code of Obligations which provides for the invalidity of contractual clauses which are contra bonos mores, impossible or illegal. According to CAS case law and Swiss law an unclear wording has to be interpreted against the author of such wording. In the Ukrainian language of the employment contract a written notification of termination was obligatory, but did not take place. In the opinion of the Respondent art 201 Ukrainian Labour Code does not provide an employer with any concrete right to claim for training opportunities and that the employer, thus, could request its employee for reimbursement of professional training costs. As to art 243 Ukrainian Labour Code Mr Kuchеров has never been informed of any request by Karpaty to the trade union nor of any decision of the trade union. According to this article such request must be done in the presence of the employee. This was not the case.
- 4.18. As far as not declared as inadmissible by decision of the Sole Arbitrator based on their nature as counter-claims the Respondent submits the following Prayers for Relief:

- "1. The decision issued on 17 April 2013 by the Dispute Resolution Chamber of the Football Federation of Ukraine in the matter of FC Karpaty against Kuchеров Pavlo Volodymyrovych without changes." (the words "except p. 3.2 and 3.3 decision" and the whole of number 2 of the Prayers of Relief from the Statement of Defence dated 11 September 2013 declared inadmissible).
3. Obligated to pay 5% of interest per of all sums due to Kuchеров by the decision.
4. All the arbitration costs shall be borne by FC Karpaty."

V. CAS JURISDICTION AND ADMISSIBILITY

- 5.1. The jurisdiction of the CAS, which is not disputed by the parties and confirmed by their signature of the Order of Procedure, derives from art R47 of the CAS Code and art 34 of the Regulations of the FFU DRC.
- 5.2. Art 34 of the Regulations of the FFU DRC reads as follows:

"Appeal

1. *Appeal against the decision of the DRC of the FFU can be submitted to the International Court of Arbitration for Sport (CAS, Lausanne, Switzerland). In the event of formation of All-Ukrainian Sport Arbitration, the parties shall exhaust all internal remedies of dispute settlement before bringing the matter to CAS.*
2. *The period of submission of the appeal starts from the day of receipt of the full decision of the DRC of the FFU by the party. This period is 21 days."*
- 5.3. The Challenged Decision confirms the jurisdiction of CAS and the deadline of 21 days from the date of the receipt of the full decision.
- 5.4. None of the parties raised any concern as to the admissibility of the appeal. The deadlines set by the Regulations and CAS have been met.

VI. APPLICABLE LAW

- 6.1. Art R58 of the CAS Code provides as follows:

"The Sole Arbitrator 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 Sole Arbitrator deems appropriate. In the latter case, the Sole Arbitrator shall give reasons for its decision."

- 6.2. Since none of the agreements concluded between the parties provides for a provision on the applicable law, the relevant provisions of the FFU statutes and regulations and the law of the Ukraine as the country in which the FFU DRC is domiciled shall apply. None of the parties objected to the application of Ukrainian law. At the hearing both parties explicitly agreed to the Sole Arbitrator's power also to apply relevant norms of the Ukrainian law not referred to by either of or any party.

VII. MERITS

a. Termination of the “kontrakt” by FC Karpaty without just cause?

- 7.1. The Challenged Decision held at para 22, that FC Karpaty could not arguably give evidence that it fulfilled the conditions set up by the “kontrakt” as to the notification of Mr Kucherov with regard to the decision of the leadership concerning the termination of the “kontrakt” and additional agreements as of 6 August 2012. In the present proceedings the Appellant focussed on giving such evidence. The Appellant argued that due notification took place in the meeting between Appellant and Respondent on 31 July 2012. The Respondent did not object that such meeting took place. The Appellant first held – relying on an incorrect translation of the Ukrainian text of the “kontrakt” into English – that an oral notification was enough, then changed its line of argumentation bringing forward that the English text of the “kontrakt” shall be decisive and holding that anyway also notification in writing took place, since a bundle of documents was shown to the Respondent during this meeting. After the hearing the Appellant finally presented documents showing that the approval of the termination of the “kontrakt” of the head of FC Karpaty’s trade union’s committee was only given on 2 August 2012, id est two days after the meeting.
- 7.2 As to the language that shall prevail, Mr Kucherov made clear that he understands the Ukrainian language and held that the Ukrainian version of the documents shall be decisive. Both parties agree that the “kontrakt” and the other agreements concluded between them do not provide for which language to prevail. After a careful review of the file, the Sole Arbitrator, finds, that, whenever there is a discrepancy between the Ukrainian and the English text of the “kontrakt” and other agreements between FC Karpaty and Mr Kucherov, the Ukrainian language shall prevail. This is in line with how FC Karpaty set up its Internal Work Order Rules, which were drafted only in Ukrainian language and had to be signed in this language by Mr Kucherov. The same goes for all notifications of termination of contracts used by FC Karpaty with all its coaches. These documents were produced exclusively in Ukrainian language and signed by the coaches concerned, including Mr Kucherov. This result is also seen to be in accordance with the principle of good faith referred to under Art 18 (1) Swiss Code of Obligations by the Appellant. Considering all documents submitted by FC Karpaty in the present proceedings and the standing practice of FC Karpaty concerning the use of the Ukrainian language for its rules and orders as well as the fact that the CAS reviews a decision issued by the FFU and the knowledge of languages shown by the party representatives and witnesses during the CAS hearing it is the Ukrainian language which shall be decisive for the interpretation based on the principle of confidence and will of the parties.
- 7.4. At the hearing, Mr Taras Pankevych, FC Karpaty’s in-house Counsel, confirmed that FC Karpaty’s Human Resources Manager in compliance with the Ukrainian labour legislation for the various cases of termination of labour contracts uses forms of orders. These orders, used by the Club, as he described upon request of the Sole Arbitrator at the example of the Order on Dismissal from Employment of the former head coach Kononov bears three signatures, the signature of the Club’s general director or deputy, the signature of the chief accountant, and the signature of approval of the head of the Club’s trade union. Further to that, the respective employee confirms by signature on the form that he has familiarized himself with the Order. The General Director, Mr Dedyshyn, stated at the hearing that the draft Order on dismissal from employment he

showed to Mr Kucherov bore only his signature. Later he added that he did not remember exactly how the documents he showed to Mr Kucherov looked like. By later evidence the Appellant gave evidence that the signature of the head of the Club's trade union's committee was only added on 2 August 2012. On the other hand, as to the applicability of art 243 ff Ukrainian Labour Code, the Appellant stated that FC Karpaty's trade union "*is consulted prior to the dismissal of any employee that is initiated by the Club, in particular on the basis of Art. 40 – 41 of the Code. Consent for such dismissals are requested and received in accordance with Art. 43 of the Labour Code.*"

- 7.5. Art 43 of the Labour Code, referred to by FC Karpaty, requires "*prior consent*" of the Club's trade union and lays down in para 2 that the (Club's) trade union "*informs the owner or body authorised by him in writing on the decision taken within a deadline of ten days*" (translated into English by the Sole Arbitrator). The involvement of the head of the Club's trade union's committee as obligatory is in line with art 247 para 1 number 10 Ukrainian Labour Code which reads in an English translation done by the Sole Arbitrator as follows:

"The elected body of the first instance trade union's organisation of an enterprise, institution or organization

...

10. *gives its approval or disapproval to the termination of an employment contract upon initiative of the Employer or body, authorised by the Employer, with an Employee who is a member of the trade union acting in the enterprise, institution and organisation, in the cases provided by law.*

...".

The same provision can be found in art 38 para 1 number 10 of the Ukrainian Law on Trade Unions, Their Rights and Guarantees of Activity. As to both provisions the Appellant showed evidence that Mr Kucherov was a member of the Club's trade union at the relevant moment of time.

- 7.6. Whatever provision of the Ukrainian labour law is referred to, for the case at hands the approval of the head of the Club's trade union's committee was obligatory and did not exist on 31 July 2012. Due to the fact that such approval, based on the rights of the representatives of the trade union under Ukrainian law must be considered as a constituent element of the termination of a labour contract no information on termination "*z obov'yazkovim pis'movim povidomleniyam Klubu*" ("*with obligatory notification in writing by the Club*" could take place. If the head of the Club's trade union's committee would have said "no" on 2 August 2012, no termination of the contract would and could have taken place. What could have been done on 31 July 2012, was to tell Mr Kucherov that the club leadership has initiated an internal procedure for his dismissal, but this is not enough to fulfil the requirements as laid down by art 6.3.2 of the "kontrakt" in the light of the Internal Work Order of FC Karpaty, the Model Rules for Internal Work Orders in the Ukraine and the Labour Code of the Ukraine. Thus, it was impossible, orally or in writing, to notify the Respondent on the termination of the "kontrakt" on 31 July 2012. The note to be delivered, containing all necessary elements according to the Ukrainian law was ready only on 2 August

2013. Only on that day, the head of the Club's trade union's committee signed approval. Due to the fact, therefore, that the Order on such termination to be notified could be established only on 2 August 2012, the Sole Arbitrator does not see a necessity to analyse whether the effort reported by the Appellant of having notified the Order on 6 August 2012 could meet the requirements set up by Ukrainian law for substitute service of notification. On 6 August 2012, whatever happened, the time-limit of five days from 2 August 2012, as asked for by art 6.3.2 of the "kontrakt" in compliance with Ukrainian labour law, was not met.

7.7. Thus, the Sole Arbitrator holds that the finding of number 2 of the Challenged Decision, that the unilateral termination of the "kontrakt" of 3 October 2011 by FC Karpaty without just cause for reasons not envisaged by the "kontrakt", the legislation of the Ukraine and the Regulations on the Status and Transfers of the Players of the FFU was correct. FC Karpaty did not fulfil the "kontrakt", its own Rules on the internal work order and Ukrainian labour law. Given this result, the Sole Arbitrator does not hold it necessary to analyse also an eventual violation of the FFU Regulations on the Status and Transfers of Players as held by the FFU DRC, but not sufficiently discussed by the parties in the present proceedings.

b. Termination of the "kontrakt" by Mr Kucherov?

7.8. The Appellant argues alternatively that by not reporting to FC Karpaty after 31 July 2012 and by his interview given on 3 August 2012 Mr Kucherov terminated the Employment Agreement prior to the end of the notification period. Mr Kucherov objected that having not received any other order by the Club he continued to study at the course for the UEFA Pro-diploma which he had been assigned to by FC Karpaty in order to be able to act as interim head coach. He did not terminate the "kontrakt".

7.9. As the Appellant correctly points out, Art 6.4 of the "kontrakt" allowed a termination of the "kontrakt" by the Employee, before its expiry term, however, only before 1 January 2012 and required a notification in writing not less than 14 calendar days prior to such termination. Art 39 Ukrainian Labour Code, which is to be applied on labour contracts that have been concluded with validity for a certain period of time, mentions three further reasons in addition to the reason of art 38 para 1 Ukrainian Labour Code, which latter, however, was limited by the "kontrakt" to the time before 1 January 2012. These further reasons are disease or invalidity of the Employee which reasons hinder him to fulfil his employment contract, or violation of the labour law, collective agreement or employment contract by the Employer. The Appellant not presenting any piece of evidence assumes that Mr Kucherov – obviously relying on violation of the "kontrakt" by the Appellant and, thus, the latter arguing against itself – unilaterally and prior to the end of the notification period terminated the "kontrakt".

7.10. The Sole Arbitrator holds this construction of the Appellant as absurd and wishes to recall the statements of the Respondent at the hearing, but also in his interview given on 3 August 2012. In this interview Mr Kucherov stated, inter alia, the following: *"The result in football never comes from himself – it is necessary to work hard for it. A certain time is required for progress and movement ahead. However it is often the case that the coach is not provided with it, that's when the decisions are made by the management of the club like in my case."* This statement clearly cannot be understood that Mr Kucherov even thought of or intended to terminate the "kontrakt" on his side.

7.11. The Sole Arbitrator, thus, finds that the “kontrakt” was not validly terminated by the Respondent.

c. Wrong assessment of the compensation by the FFU DRC?

7.12. The Appellant argues that the FFU DRC erred grossly when it concluded that monthly extras of USD 9,500 were due to Mr Kucherov after the date of dismissal. Further to that the reason for the payment of USD 14,000, made on 11 July 2012, indicated by the payment act (receipt note) did not reflect the true nature of the payment. Finally, UAH 56,000 paid by FC Karpaty in order to enable Mr Kucherov to attend the UEFA Pro-diploma course needs to be set off against any payment due. The Respondent holds that the monthly extras of USD 9,500 were owed to him, that the payment act (receipt note) correctly showed the nature of the payment and that FC Karpaty has no legal title for asking for reimbursement of the course costs.

7.13. The FFU DRC in the Challenged Decision argued as follows:

“43. Termination of fulfilment of the duties of the head coach of the main team of the Club by the Claimant took place on July 29, 2012, that being confirmed by the Act of duties fulfilment termination dated July 29, 2012 and not denied by the Parties. Thus, starting with July 20, 2013” (must read correctly 2012) “the validity of Agreements about additional payments dated October 18, 2011 and June 01, 2012 was terminated.

44. Due to the above, the Chamber considers that the Claimant was entitled to labour remuneration for being interim head coach in the amount of 5,000.00 UAH (salary) and USD 16,000.00 (personal extra) till July 29, 2012. After that date and until the moment of dismissal the Claimant was entitled to get salary for the work of the coach in the amount of 5,000.00 UAH and USD 9,500.00 of personal extra that was set by the agreement of the Parties. No other arguments were provided by the Respondent as the grounds for non-payment of the indicated funds.”

7.14. Considering the Ukrainian text of the two provisions, the Sole Arbitrator finds that the article “the” in the third line from below of para 44 of the Challenged Decision before the word “agreement” might have misled the Appellant of assuming an error at the FFU DRC. The Sole Arbitrator finds that the Ukrainian text seems to be better translated by saying “... and USD 9,500.00 of personal extras that was set by agreement of the Parties”. The Sole Arbitrator holds that the FFU DRC – having not been contradicted by the parties in the procedure before the DRC – obviously understood art 1 para 2 of the Agreement about additional payments of 18 October 2011 that it was agreed between the parties that as for the period until 18 October 2011, that means until Mr Kucherov was appointed interim head coach, and, therefore for any period of work where he did not act as head coach, Mr Kucherov was entitled to receive a personal extra of USD 9,500 per month. In the opinion of the Sole Arbitrator such understanding of the FFU DRC makes sense, since there is no other reasonable explanation – at least neither the Appellant, nor the Respondent provided the Sole Arbitrator with such – why the Agreement of 18 October 2011 differentiated two sums of personal extras, one for the period as head coach (USD 11,500 per month) and one for the period simply as coach (USD 9,500 per month), even if specified so in the Agreement of 18 October 2011 for the period until 18 October 2011. Therefore, the Sole Arbitrator holds that the

FFU DRC appears sufficiently justified in having Mr Kuchеров awarded USD 370 x 8 days = USD 2,451.61 as personal extras for the period 29 July 2012 – 6 August 2012. Since the Challenged Decision obviously refers to an underlying agreement between the parties, confirmed by the Agreement about additional payments for the period until 18 October 2011, it is not relevant that the FFU DRC in para 65 of the Challenged Decision declared the latter agreement as having been terminated as of 29 July 2010.

- 7.15. At the hearing, the in-house Counsel of FC Karpaty, Mr Pankevych, and, thus, a lawyer gave a party-witness statement that he himself wrote the act of payment (receipt note) for the amount of USD 14,000, made on 11 July 2012, but upon dictation of Mr Kuchеров without knowing the true reason for the payment. Since the first game of the season 2012/13 was played only two days later, the payment could not have been a bonus payment for a game that was not yet even played. Also at the hearing, FC Karpaty's General Director Dedyshyn declared that he had given authorisation to Mr Pankevych to give release to the payment and issue a respective payment act. Mr Dedyshyn's understanding was that the payment was an advance payment to future payments enabling Mr Kuchеров to have vacations with his family. The Respondent insisted that the payment act (receipt note) correctly reflected the aims and nature of the payment.
- 7.16. The Sole Arbitrator finds that the statements of the parties contradict each other. Since the payment act (receipt note) was established by a lawyer and it cannot be assumed that a false statement was intended to be made, the Sole Arbitrator holds that the FFU DRC at para 41 of the Challenged Decision correctly relied on the text of the payment act (receipt note), which should read correctly translated into English: "*Receipt of monetary funds in the amount of USD 14,000 in connection with the fulfilment of sporting tasks in the competition season 2012/2013 by the football club in the OPFC of Ukraine "Premier-League"*". In the opinion of the Sole Arbitrator, such holding of the FFU DRC was not unreasonable. FC Karpaty did not provide evidence that could convince the Sole Arbitrator of the opposite.
- 7.17. Whereas the Respondent insists that there is no agreement between the parties which provides for a legal title of FC Karpaty to ask for reimbursement of the UEFA Pro-diploma course costs, the Appellant sees such title in the general principles of civil law and in art 1212 Ukrainian Civil Code. The Sole Arbitrator drew the attention of the parties to arts 201 ff (chapter 14) of the Ukrainian Labour Code. By letter dated 14 November 2013, the Appellant held that art 201 Ukrainian Labour Code is not applicable at the case at hands, because it relates only to the manufacturing industry. The Appellant obviously was misled by the title of this provision, which means, however, "*vocational training*". Arts 201 ff Ukrainian Labour Code and the whole chapter 14 cover any kind of employment under Ukrainian law.

Art 201 Ukrainian Labour Code reads as follows:

"For vocational preparation and enhancement of the qualification of the employees, in particular of young ones, the owner or body authorised by him organizes individual, brigade, course or other vocational training on expense of the enterprise, organisation and institution."

- 7.18. The further provisions of chapter 14 of the Ukrainian Labour Code diversify and specify this basic provision and underline a wide-reaching commitment of employers in the

Ukraine to further the qualification of their employees and bear the respective costs. The Sole Arbitrator concludes that the participation of Mr Kuchеров at the UEFA Pro-diploma course was not only in the interests of FC Karpaty, but even an indispensable requirement for the employment of Mr Kuchеров who was hired in order to act as head-coach of the main team of FC Karpaty. In the opinion of the Sole Arbitrator, the basic values reflected by chapter 14 of the Labour Code of the Ukraine, clearly point into the direction that FC Karpaty is responsible to pay the costs for the necessary qualification of its employee, even more, since the participation at the course was ordered by FC Karpaty. The principle of fairness and good faith, thus, if necessary to be applied at all in the present case, points in the opposite direction than argued by the Appellant.

- 7.19. The Sole Arbitrator holds that art 1212 of the Ukrainian Civil Code is not applicable in the case at hands, because neither the term "*property*", which according to the commentary edited by E. O. Kharitonov and O. M. Kalitenko, *Grazhdanskiy kodeks Ukrainy: Khar'kov, Odessa 2005, II, 908* requires that a material object or a legal title to property must be given, is fulfilled. Nor can in view of the obligations of an employer according to chapter 14 of the Ukrainian Labour Code be spoken of "*acquisition without legal ground*".
- 7.20. The Sole Arbitrator, thus, finds that there is no right of the Appellant to set off the amount of UAH 56,000 with the outstanding remuneration due to the Respondent. The Sole Arbitrator, therefore, upholds the Challenged Decision of the FFU DRC and dismisses the appeal and all the Appellant's Prayers for Relief. The challenged Decision is therefore confirmed.

VIII. COSTS

- 8.1. Article R64 of the Code shall apply and was not disputed by the parties. According to art R64.5 of the Code the Sole Arbitrator shall determine in the arbitral award "*which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.*"
- 8.2. The present case ends in dismissal of the appeal. Thus, the Sole Arbitrator holds that the Appellant shall bear the arbitration costs. Considering the complexity of the case and the outcome of the proceedings, as well as the financial resources of the parties, the Sole Arbitrator orders the Appellant to contribute a sum of CHF 5,000 towards the Respondent's legal fees and other expenses incurred in connection with the proceedings.

Tribunal Arbitral du Sport CAS 2013/A/3240 FC Karpaty v. Kucherov Pavlo Volodymyrovych, - Page 24
Court of Arbitration for Sport

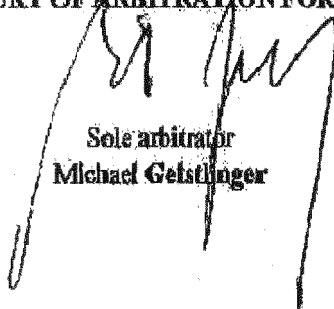
ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The Appeal of FC Karpaty and all its Prayers for Relief are dismissed.
2. The Decision of the FFU DRC of 17 April 2013 is confirmed.
3. FC Karpaty shall bear the arbitration costs, to be determined and served on by the CAS Court Office.
4. FC Karpaty shall contribute a sum of CHF 5,000 towards Mr Kucherov' s legal fees and other expenses incurred in connection with the present proceedings.
5. All other motions or prayers for relief are dismissed.

Lausanne, Switzerland on 17 December 2013

THE COURT OF ARBITRATION FOR SPORT



Sole arbitrator
Michael Getzinger