



Football in Focus

Does Matuzalem re-dress the balance between players and clubs, post Webster?

Commentators claim the recent CAS decision in the case of *FC Shakhtar Donetsk v Francelino da Silva Matuzalem & Real Zaragoza* has overturned the same court's decision in the case of *Heart of Midlothian v Andrew Webster and Wigan Athletic FC*, providing protection for clubs faced with a player terminating his playing contract prematurely in accordance with Article 17 of the FIFA Regulations on the Status and Transfer of Players.

Does the purportedly "pro club" Matuzalem



Case provide the panacea that some commentators have predicted?

Facts

In June 2004, the 24 year old Brazilian, Matuzalem, transferred to Shakhtar Donetsk for €8,000,000 signing a five year contract (the "Contract"). The Contract provided that Matuzalem could be transferred if Shakhtar received an offer of €25,000,000.

In July 2007, Palermo offered US\$7,000,000 for the Player, which Shakhtar rejected. A few days later, having served three years with Shakhtar, Matuzalem terminated the Contract with immediate effect, outside of the "Protected Period", in accordance with Article 17 of the FIFA Regulations.

The Player then signed a three year contract with Real Zaragoza. After one season, he was loaned to Lazio for the 2008/2009 season and Zaragoza granted an option to Lazio to retain the Player's registration, following which, Lazio and Matuzalem entered into a three year playing contract.

Shakhtar brought proceedings against Zaragoza and Matuzalem for compensation for breach of contract before the FIFA DRC, relying on the €25,000,000 buy out clause.

DRC

The DRC held the buy out clause was not enforceable as it was not referable to termination of the Contract, but was conditional upon an offer from a third party club.

Instead, when calculating compensation, it considered the value of the Contract, the Zaragoza playing contract, the Player's unamortised transfer value, and the Player's bad faith.

Matuzalem and Real Zaragoza were deemed to be jointly and severally liable to pay to Shakhtar the sum of **€6,800,000**. All parties appealed to the CAS.

CAS

The Panel also considered that the buy out clause was not enforceable in these circumstances.

The CAS award of damages was instead based upon the principle of "**positive**



interest" – i.e. putting the injured party in the position it would have been in, had there been no breach of contract. The Panel consequently determined the value of the services of the Player to Shakhtar by considering the cost of the Player to Zaragoza and Lazio.

The Panel first calculated the annual costs of acquiring the Player for Zaragoza and Lazio respectively by reference to the cost of Lazio's option and Matuzalem's total remuneration at Zaragoza and Lazio respectively.

These annual costs were then multiplied by two (i.e. the years remaining on the Contract) and the average of the two calculations was taken i.e. **€11,258,934**.

The Panel gave due regard to, but did not include as separate heads of loss, the unamortised transfer fee originally paid for Matuzalem and the rejected offer from Palermo.

Finally, the Panel added **€600,000** (six months salary under the Contract) to compensate Shakhtar for sporting loss, as it had lost its captain only a few weeks before the start of the season.

Total compensation awarded was therefore **€11,858,934** plus interest.

Summary

There are substantial differences between this and the CAS decision in Webster. By way

of illustration, whilst the Panel in Webster determined that the market value of a player was irrelevant to the calculation of compensation, the acquisition cost of the Player formed a substantial part of the damages awarded to Shakhtar.

In Webster, the Panel rejected Hearts' claim for the loss of a transfer fee. The Matuzalem Panel, however, held that such a head of loss could be compensated, provided there was a link between the termination and the loss. On the facts, the Panel however held that there was no link, despite the offer of Palermo.

Whilst each case will turn on its own facts, in practical terms, clubs may take into account the comments of the two Panels in Webster and Matuzalem and determine an appropriately managed approach to potential and actual Article 17 terminations.



By way of illustration:

(a) **In advance** of any termination, clubs may consider the inclusion in playing contracts of appropriately drafted

liquidated damages clauses or the amendment of existing provisions (potentially including new heads of loss considered to be applicable in Matuzalem).

(b) **During** the term of a playing contract, offers of new contracts made to the player by the former club (particularly where remuneration is significantly increased) and offers from third parties may support a future damages claim. In any event, the Protected Period re-commences upon entering into a new playing contract, which may deter players from terminating under Article 17.

(c) **After** the termination, following Matuzalem, clubs should adduce evidence of the particular loss (whether sporting or commercial) caused by the player's premature termination and, if it seeks to claim the costs of a replacement player, there should be a direct link between the player's termination and his replacement.

In practical terms, however, the nature and amount of damages awarded in Matuzalem may discourage both players from seeking to rely on Article 17 and clubs seeking to sign players that do.

A more comprehensive evaluation of the Matuzalem decision is available on request.

Half-Time Regulatory News

New FA Rules on:

- **Agents:** permits 'dual representation' provided there is full disclosure and informed consent from the player.
- **Third Parties:** further restrictions on players and clubs granting rights to or incurring liability in relation to third parties. Prior disclosure of agreements.
- **Option Agreements:** prior disclosure of pre-contracts with overseas players and overseas clubs.





A Working Guide to the Points-Based System

There is still some confusion about the immigration points-based system (PBS) which the Government introduced in November 2008, so in this edition of Football in Focus we set out a brief guide to some of the main issues which may assist clubs. If further detailed advice is required in any particular case, please contact us.

PBS Categories

The PBS is made up of a number of different categories under which migrant workers can apply. As far as the football side of the business is concerned, clubs need only be concerned with the Tier 2 (sports person) and 5 (creative and sporting) categories.

The principal elements of the Tier 2 category are that permission may be granted for up to a maximum of 3 years, players must satisfy the English language requirement and renewal applications can be made within the UK.

The principal elements of the Tier 5 category are that permission may be granted for up to a maximum of 12 months, players do not need to satisfy the English language requirement and renewal applications must be made at the British embassy in the country of the player's origin.

English Language Test

Under Tier 2, migrants are expected to speak English to a basic standard before coming to the UK. The majority of non-EU players applying under Tier 2 will be required to pass an English language test; however, certain exceptions can apply (e.g. if a player is a national of a country that the UK Border Agency has classified as 'English speaking' or he is applying under the transitional arrangements).

Also, as clubs may be aware, players that enter the UK under Tier 5 can switch to Tier 2 whilst they are in the UK provided they meet all the requirements of Tier 2, this includes the English language requirement.

Certificates of Sponsorship

A player needs a certificate of sponsorship before he can apply for entry clearance or leave to remain under either category – the certificate of sponsorship is simply a unique reference number. The certificate of sponsorship is assigned to the player by the club, which is done using the club's Sponsor Management System.

Before a club can assign a certificate of sponsorship, it must first obtain a Governing Body Endorsement (GBE) for the player from The FA.

Governing Body Endorsements

The FA is responsible for setting the GBE criteria in England. The criteria for automatic qualification and appeals are largely unchanged from the old work permit system but two important changes have been implemented:

1. **Renewals** – if a club is seeking to extend a player's GBE but that player does not satisfy the criteria, The FA now has power to undertake a consultation process with the other football bodies (namely the Premier League and the PFA) – if they unanimously agree, the case does not need to be heard by a Review Panel.
2. **Loans** – clubs do not need a GBE for a domestic loan.

GBEs are issued to run in line with the PBS categories and not the player's contract, i.e. they will only be issued up to a maximum of 3 years under Tier 2 or 12 months under Tier 5. This means that a player will often be unable to apply for entry clearance or leave to remain to cover the whole period of his contract.

On each occasion a player extends his immigration permission (whether under Tier 2 or Tier 5) or switches categories (i.e. from Tier 5 to Tier 2), the club must first obtain a new GBE – this means the player will be required



changed to give clubs absolute certainty in this regard.

Clubs may wish to give consideration to whether they introduce any contractual protections in the contracts for those players employed under the PBS, such as the right to terminate if the player is unable to extend his immigration permission during the contract term – this is, however, a 'catch-22' situation as invariably the club will have paid a transfer fee for the player so he will have a market value and this may be in breach of Article 18.4 of FIFA Regulations, which states: "The validity of a contract may not be made subject to the grant of a work permit".

Employers' Duties

The PBS places a greater responsibility on employers to ensure compliance with the Immigration Rules. Specifically, employers are required to adhere to more stringent rules relating to record keeping and reporting information or events.

Clubs should note that if they employ any non-EEA nationals in other areas of their business and problems arise with

these workers, this could have repercussions on the football side of the business. It is therefore vital that clubs understand their obligations under the PBS because failure to comply with these could affect the status of a club's sponsor licence and indeed its ability to recruit migrant workers.

Authorising Officers

A club's Authorising Officer is responsible for overseeing the management and administration of the PBS within the club. Authorising Officers should therefore be fully aware of their duties in this regard because ultimately they are personally liable for any breach by the club of the Immigration Rules (convictions for offences can range from warnings to unlimited fines and a prison sentence of up to two years).

Note

The PBS does not affect all non-EU migrant workers coming into the UK – other options may be available depending on a player's background and particular circumstances and these should be explored in each case.

Full-Time Regulatory News

New edition of the **FIFA Regulations on the Status and Transfer of Players** to be introduced on 1 October 2009. Changes include:

- Where the triggering event for the payment of Training Compensation occurs before a player's 18th birthday, significant increases in Training Compensation apply (by up to €80,000 per season) for the four seasons between a player's 12th and 15th birthday.
- Creation of a Sub-Committee for the prior approval of every international transfer of a "Minor"; and
- Reporting obligations on Academies.



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