

Chapter 12

Player Agents

Ricardo Daniel Omar Frega Navía

Contents

12.1 CAS 2007/A/1334 and 2007/A/1335, Alejandro Ruben Bouza and Alberto Cayetano Lavalle v. Real Madrid 227

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In recent years the CAS has handed down many decisions on disputes between clubs and agents, or between players and agents. The ‘Bouza Lavalle’ Award hinges on the financial risks borne by agents, particularly when verbal agreements and the players’ medical checks are concerned (see Art. 30.1, 2001 FIFA Regulations on the Status and Transfer of Players). Gabriel Milito should have been transferred from Atlético Independiente to Real Madrid. However, Real Madrid refused to proceed on medical grounds, unhappy about Milito’s physical condition. A few days later Milito signed a contract with Real Zaragoza (facilitated by other agents). Thus, agents Bouza and Lavalle received no payment. The CAS dismissed the appeal filed by Bouza and Lavalle. Against the background of the facts and regulations, the author believes the CAS would have done better to rule in their favour.

Dr. Ricardo Daniel Omar Frega Navía—Attorney-at-law, Estudio Jurídico Deportivo Frega Navía y Asociados.

R. D. O. Frega Navía (✉)
Buenos Aires, Argentina
e-mail: freganavia@estudiojuridicodeportivo.com

There is no doubt that this case has given rise to much legal debate on the various issues that arise therein. Nevertheless, I must put on record my strong disagreement with the findings of this panel of the TAS, given that its Arbitration Decision contains a number of legal concepts and factual analyses which make me wonder whether the impartiality that ought to be at the heart of an arbitration existed at all, and this notwithstanding the fact that one of the parties, Real Madrid, is one of the most powerful football clubs in economic terms.

I will refrain from repeating in detail the main facts of the case, as they are contained already in the arbitral findings; therefore I will restrict myself to the said findings.

However, by way of introduction to these observations, it is worth noting that they essentially pertain to the fact that Real Madrid concluded an assignment contract with Club Atlético Independiente in relation to the footballer Gabriel Milito, who was to undergo a future medical check-up. On the basis of this check-up, the contract would be finalized.

Gabriel Milito was the captain of one of the foremost sports clubs in South America (Club Atlético Independiente), a steady player in one of the national selections with a good track record, such as Argentina, and for all these reasons the Spanish club chose to sign him up. With such a brilliant trajectory behind him, there is no doubt that Milito was in a perfect athletic condition.

Finally, to conclude the summary to the background of the case, it should be pointed out that the footballer had already agreed his conditions of employment with the Spanish club, thereby consenting to the transfer (as attested to by means of the witness statement on the part of Andrés Ducatzenzeiler, who was President of Club Atlético Independiente at the time of this event, not to mention the numerous press cuttings submitted during the proceedings). He was to sign both agreements (the transfer agreement and the contract of employment) in Madrid, on completion of the match that, as a member of the Argentinean national selection, he was playing in Buenos Aires against the Uruguayan national selection. Unfortunately his performance in that match was not up to his usual standard, and it was for this reason that the Real Madrid directors changed their minds and set in train all the legal devices aimed at terminating the transfer that had been agreed. Even the Spanish media gave a full account of this appalling game.

In this context, Real Madrid stated that the decision not to proceed with the contract had been based on a medical check-up which could not possibly have been taken seriously. In that context, it should be noted that *on no occasion was the footballer officially notified of the nature of his alleged injury, nor was this information brought forward during the proceedings before FIFA and TAS*. Both of the proceedings (FIFA and TAS) concluded with no mention at all being made of the nature of the ailment. Nor was there any mention of a medical report that may have been submitted in that respect. All we got was a mere verbal allusion from Real Madrid, which was unsupported by any medical documentation whatsoever. This shows the appalling degree of arbitrariness surrounding this club's decision not to proceed with the agreement. To further counteract the major contradictions in this club's findings, the footballer also submitted himself to a

medical check-up by the Argentinean National Selection physician, and no impediment whatsoever was found therein that would affect the performance of a star footballer.

In order to conclude this brief summary of the facts of this case, it should be pointed out that within 10 days of the said transfer having been abated unilaterally by Real Madrid, the footballer was transferred to another Spanish club, Real Zaragoza, for a similar sum as had been agreed with Real Madrid, both in terms of the footballer's transfer and his contract of employment. The main difference here is that this transaction was facilitated by other agents, since the Appellants Bouza and Lavalle had only been authorized by Club Atlético Independiente to conduct business with Real Madrid, for a period of 30 days. To complete this scenario, the said club proceeded immediately to contract an English defender (to take Milito's place), notwithstanding the fact that this latter footballer was recovering from a major physical ailment and would take some time before he could return officially to the game.

Faced with this state of affairs, the agents stated that Real Madrid was in breach for non-contractual liability (Article 41 of the Swiss Code of Professional Responsibility: "Whomsoever unlawfully causes harm to another, whether intentionally, or due to negligence or imprudence, must remedy the damage thus caused"), in view of the fact that they had been prevented from receiving the commission to which they were legally entitled for having acted as intermediaries for Club Atlético Independiente, after having accomplished the task that had been assigned to them. However this entitlement had been unlawfully thwarted by Real Madrid, on the basis of a decision which gave rise to two types of legal irregularities: (a) on the one hand, under Article 30.1 of the FIFA Regulations on the Status and Transfer (as applied for the year 2001) that was applicable in this regard, which Article states that the validity of a transfer contract or an employment contract between a player and a club cannot be contingent upon a positive result of a medical examination, and on the other hand: (b) the medical cause advanced by Real Madrid was arbitrary in every meaning of the word, since no information whatsoever was provided, neither to the player, to Club Atlético Independiente, nor to the agents, regarding what future medical injury they were referring to, given that on no occasion were they informed as to the scientific basis for their decision. Let it be repeated that throughout the entire proceedings before FIFA and TAS, impossible as it may seem to be, the European club never made any reference to the type of injury that would justify its discontinuation decision. Moreover one would presume that a high-quality footballer such as Milito would be in a good physical condition, so that the party that ought to prove irrefutably that this was not the case was the party citing the alleged physical ailment (in this case, Real Madrid). There is no doubt whatsoever that it was up to the European club to prove conclusively that its decision was based on medical factors. One would presume that the player was in an optimum physical condition, and this presumption can only be negated if the other party can prove the contrary to be the case. Therefore neither the footballer, Club Atlético Independiente, nor the complainant agents were under any obligation to prove that the footballer was in prime

physical condition. The onus of proof regarding a matter that has been unsupported by facts ought to be on the party making the allegation; in other words, Real Madrid should have established during these proceedings that their discontinuation decision regarding the transfer contract was warranted on the basis of a specific medical report, a report which in actual fact it failed to produce at any stage during the proceedings. Having failed to produce such a report, the legal act on which it based its unilateral decision to abate the contract becomes arbitrary, and thus unlawful.

In view of the logical brief nature of these observations, I will proceed to reflect on the various salient points of conflict raised in the issue concerning the fact that the transfer contract had not been signed by the agents and that consequently, under the Players' Agents Regulations as interpreted by FIFA and TAS, the agents would not be entitled to their remuneration unless they could prove that they had performed their task. In that regard, the witness Ducatzenzeiler, in his acknowledged capacity as president of the club who assigned the agents, stated unequivocally that it was Lavalle and Bouza who had been exclusively charged with conducting business with Real Madrid. This put paid to the defensive approach taken by Real Madrid.

Before proceeding, I wish to dwell on a practical aspect of the proceedings. I refer specifically to the deliberate and non-meticulous fractionalization that the panel promoted in its findings on the statement of the said witness. This was an exhaustive statement that had been examined in-depth by the panel, yet when it proceeded to incorporate this in its findings, it was biased in its selection, completely molding it to what the arbitration tribunal wished to justify, while failing to take this statement in its entirety because it was clearly in conflict with what the arbitrators wished to uphold in their findings. In that regard, I need not mention the all but shameful attitude of the arbitrator put forward by Real Madrid, Mr Fernández-Ballesteros (also a Spanish national), who in his behavior appeared to be performing the task of the lawyer representing the other part (the Respondents), to such an extent that at the hearing, the President of the Tribunal was obliged to draw his attention to this tendentious behavior, requesting that he modify his attitude.

In doubting the impartiality of the panel, I refer to para 61 of the Arbitration Findings which contains a reasoning that is so absurd as to make us suspect that the final decision was founded on sinister motives. I refer to the argument put forward by the agents, who asked: "how could it be possible that within days of the refusal by Real Madrid to proceed on medical grounds, the same footballer passed another medical check-up without any problems, with his new employer, Real Zaragoza?" Faced with this line of questioning, the panel contended that "the fact that the footballer was signed up without delay by Real Zaragoza does not have any evidential value either because the risk tendency concerning two subjects in the same situation could be very different, and in any event there is no record in the proceedings as to whether or not the player was subject to a medical check-up by the Real Zaragoza physicians". The palpable failure of such an argument in legal terms is all too obvious. How could they presume within reason that Real Zaragoza failed to conduct an exhaustive medical check-up on the player, particularly in

view of his recent failure to obtain an important transfer on medical grounds? Evidently, the said medical check-up did take place, and was obviously passed by the footballer, thus securing the contract with the Real Zaragoza club.

Another item for debate concerned the argument that even if the transfer contract had been endorsed by both clubs, it had not been signed by the footballer, given his absence from the country in which the agreement had been concluded. Notwithstanding this and having regard to the press cuttings submitted in evidence, and likewise on the basis of witness testimony, it was quite clear that the player had given his consent to the transfer contract (a matter which was not even contested by the Respondents), and to the payment conditions provided for in the contract of employment. In view of the acceptance by FIFA and TAS of the validity of players' contracts that were concluded verbally, the player's clear intention has been established in this regard and the absence of a signature would not constitute an impediment to his acceptance of the said transfer. Therefore the transfer contract was perfectly intact and had entered into effect. In that context, the contractual clause which makes the validity of the agreement subject to a condition should be voided because this is totally prohibited under the FIFA Regulations (passing of a medical check-up after signing the transfer contract).

The panel's interpretation of the provisions of Article 30.1 of the said FIFA Regulations (para 51 of the Arbitration Findings, first part) is an obvious exercise in legal science-fiction as it accords the said rule with something that it fails to establish. It invents a line of reasoning which is not contained in the Regulations at all. The text of the provision is plain and to the point and cannot be interpreted to mean the contrary. More particularly so given that in this case the footballer had given his consent and that by its unlawful act, the club prevented him from signing the agreement afterward when the footballer was in an actual position to do so (on completion of his commitment to the national selection).

On the basis of what has been argued up to this point concerning what amounts to a double unlawful act on the part of Real Madrid (on the one hand, abatement of the transfer contract on unfounded and arbitrary grounds [unsupported by any medical report], and on the other hand its setting down of a condition that was void under the said FIFA Regulations), it is clear that Real Madrid should compensate the loss and damage it caused to a third party, in this case the agents who had appropriately performed their tasks and who consequently were denied their right to receive their remuneration from Club Atlético Independiente, i.e. the club that contracted their services, and which had no hand or part in the discontinuation decision concerning the transfer; in fact it rigorously opposed the abatement decision on the part of Real Madrid (as evidenced by the witness statement from Mr. Ducatenzeiler and by the press cuttings submitted in the proceedings).

Finally, para 69 of the Arbitration Decision states that in any event a claim for loss or damage would have to be made against Club Atlético Independiente because this was the party that had a contractual obligation toward the agents. The scenario set out in the Arbitration Decision was that in not having sued Real Madrid, the Argentinean club had collapsed the causal connection, thereby obviating any causality between Real Madrid and Lavalle and Bouza.

This theory ought to be rejected because Club Atlético Independiente had no cause for action against Real Madrid in view of the fact that any damage it may have sustained had been fully remedied by the subsequent transfer to Real Zaragoza. The South American entity had been compensated, and in that context was in no position to make a claim against Real Madrid. In summary: it was not a matter of Club Atlético Independiente opting not to litigate for the breach on the part of Real Madrid, rather in the wake of the new transfer it had no opportunity to proceed against Real Madrid because the damage had been remedied with the new transfer, given the monies received, which were practically the same. Furthermore, the basis for the non-contractual liability is quite clear: the author of the unlawful act should answer for the damages caused to the third parties (i.e. the agents, with whom the author of the unlawful act had no contractual obligation).

To conclude, it should be stated that this Arbitration Decision was delivered in front of the Swiss Federal Tribunal, with no leave given to appeal, since no issues of constitutional law have arisen in this case.