

Fixed-Term Contracts for Professional Football Players Illegal – No Right to Premiums after Relegation to Second Division

Dr. Heiko Reiter

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Decision

In its decision of 19 March 2015 (3 Ca 1197/14), the Mainz Labor Court ruled on the legality of a fixed-term employment contract with a professional football player – former Mainz 05 goalkeeper Heinz Müller – and the question as to whether players who no longer train and play with a club's first-division Bundesliga team are still entitled to receive payment for point bonuses.

The Mainz Labor Court granted the player's motion in part.

The question as to whether the contract of a professional football player may be limited to a fixed term is governed by § 14 of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz – TzBfG), which stipulates in its § 14(1) that an objective reason must exist for limitation of an employment contract to a fixed term in excess of two years. The court was not able to see any such objective reason in the nature of the work, in common industry practice, in the public's need for a change of personnel or in the exceptionally high compensation of professional football players, reasoning as follows:

- The nature of the work involved did not make it possible to draw parallels with the case law pertaining to the creative employees of radio and television stations, employees of the press or performing artists or actors. In all of these cases, the personal interests of the employees must be weighed against the protection of the specific fundamental rights of broadcasting, the press and art in the individual case. However, no equivalent right exists in the case of the football club in the present case, which means that it is also not possible to assume the existence of a specific characteristic in the case of professional sports that would justify a fixed-term contract.

- Common industry practice cannot constitute an objective reason for a fixed-term contract. According to the case law of the Federal Labor Court, common industry practice can only serve as guidance. A prohibited violation of a rule cannot be accepted on the grounds that it is common practice.

- A general need on the part of the public for a change in personnel is equally ill-suited as justification for a fixed-term contract. The need for change would exist only in the absence of successful performance on the part of a player, which makes it impossible to talk in terms of an objectifiable need for change that is independent of successful performance. Even if such a need did exist, it would not outweigh the interests of the employee.

- High remuneration also cannot justify a fixed-term contract. Previous case law to that effect predates § 14 of the Act on Part-Time Employment and Fixed-Term Contracts. Since the European legislation on which the provision contained in § 14 of the Act on Part-Time Employment and Fixed-Term Contracts is based was intended to avoid precarization of employment, a danger that is particularly acute in the case of professional football players in view of the fact that the opportunity to learn a trade or acquire professional qualifications outside the realm of professional sports is very limited or non-existent for professional athletes in the years in which such training is usually acquired, it is not possible to justify fixed-term contracts in this case.

On the other hand, the Mainz Labor Court denied the employee's request for payment of point bonuses for the times during which he was not a member of the club's first-division team. Ultimately, the Labor Court assumed that the plaintiff could not demonstrate the existence of any breach of good faith as required by § 162(1) of the

German Civil Code (Bürgerliches Gesetzbuch – BGB) although he bore the burden of evidence and proof. In view of the complexity of the decision-making criteria, the employer in this case would have broad discretionary latitude when it comes to deciding whether a player qualifies for a first-division team. In particular, important factors to be taken into account here would include interaction between players, tactical considerations, possibly also based specifically on the opposing teams, comparison with other players on the team that could be chosen, possibly also future prospects, potential improvement, synergies, etc.

Implications for Practice

The judgment of the Mainz Labor Court is one of very few that address the permissibility of fixed-term employment contracts in the area of professional sports. No case law has been forthcoming from the Federal Labor Court on this issue up to now, and the permissibility of fixed-term contracts that exceed the permissible term of two years is the subject of dispute in the legal literature. If the judgment stands, this will have enormous implications as regards contracts in practice, not only in the area of professional football but also for all other professional team sports. Fixed-term employment contracts with professional athletes – as well as with their managers and coaches – are today common in that area. Contrary to the opinion of the Mainz Labor Court, we believe that the practice of using fixed-term contracts can be justified by § 14(1) no. 4 of the Act on Part-Time Employment and Fixed-Term Contracts in the case of professional athletes. In particular, the fact that professional football players cannot be employed as such until they reach retirement age must be taken into account since the change in their physical constitution with age pre-

cludes this possibility. Moreover, every athlete is also subject to the “wear and tear” manifested in the form of slower reactions, a loss of speed, etc., which occur at different points in time, and their employers also have to be able to react to such changes. In addition, it is compellingly necessary to be able to change rosters for each new season in order to introduce tactical changes and deal with the necessity of working with different types of players and personalities. An employer will want to be able to field a team that offers an ideal combination of skills and personalities at all times.

Pending a decision by the Federal Labor Court, employers in the area of professional sports will, however, be well advised to include the express wish of players for fixed-term employment in their contracts with professional athletes, for fixed-term contracts are permissible according to the case law of the Federal Labor Court if it can be shown in the individual case that a professional athlete would have accepted only temporary employment even if offered an unlimited contract.

As regards payment of point bonuses to players who are not members of the club's first-division team, the Mainz Labor Court made it encouragingly clear that employers enjoy broad discretionary latitude when making decisions as to whether a player qualifies for a place on the first-division team or not and that the respective player bears the burden of providing evidence and proof in the case of a claim to the effect that the employer acted in breach of good faith when making such a decision (§ 162(1) of the German Civil Code). In the present case, the plaintiff was not able to provide proof to the effect that his transfer from the first-division team was not based on objective reasons. The employer was as a result also under no obligation to pay bonuses.

Legal Update

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Heiko Reiter on +49 69 170000-220 or by email to hreiter@goerg.de. For further information about the author visit our website www.goerg.com.

Our offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Klingelhöferstraße 5, 10785 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

COLOGNE

Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

ESSEN

Alfredstraße 220, 45131 Essen
Phone +49 201 38444-0, Fax +49 201 38444-20

FRANKFURT AM MAIN

Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

HAMBURG

Dammthorstraße 12, 20354 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

MUNICH

Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90