

# Player employment: 'practice group 2' & employment rights

Thomas E. Herrich, Dr. Johan-Michel Menke and Thomas Schulz examine whether a 'relocation clause' included in a player's contract withstands legal scrutiny.

## Introduction

The relocation of professional football players to the 'second team' of their club has caused a stir in Germany. Former national team keeper Tim Wiese and Swiss international Eren Derdiyok were relocated to the so-called 'practice group 2' of their club, TSG 1899 Hoffenheim. Recently, Maik Franz and Peer Kluge, both players of Hertha BSC Berlin, went to the Labour Court in response to their relocation to the 'second team.' As professional football players, they did this under reference to their right to employment under their employment contract, which they viewed as constituting participation in regular first team practice sessions.

## Jurisdiction

Relocation to the second team generally does not conflict with the right to employment of a professional footballer, as long as he is allowed to take part in team practice. Whether participation in the second team's practice is lawful in a particular case is judged by the existence of an effective relocation clause (see 'Relocation clause') as well as the further requirements (see 'Further requirements').

## Relocation clause

The opening question is whether it is possible for a club to relocate a professional player to their second team, as the employment contract provides for a right to participation in the 'first team' practice sessions<sup>1</sup>. According to §§ 611, 613 BGB (German Civil Code) in conjunction with § 242 BGB, this even applies if the employment



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contract does not state an explicit rule on this topic<sup>2</sup>. Therefore, the employer's decisional authority does not simply comprise the possibility to relocate a professional player to the second team. Due to this, so-called 'relocation clauses' are included in employment contracts with professional players. In the past, such relocation clauses were subject to labour law related disputes as to whether or not such clauses were legally allowed at all, or if they conflict with other terms.

The Labour Court in Bielefeld decided that such a clause in the contract of a professional player is not a surprising term, as defined by § 305 c BGB<sup>3</sup>. The court found that such a provision is not legally void under § 307 Sec. 1 sentence 2, since it is certain, unambiguous and doesn't lead to misunderstandings. Furthermore, such a clause is not ineffective, according to § 307 Sec. 1 sentence 1 BGB<sup>4</sup>.

In the opinion of the Berlin Labour Court, the employment contract of a professional football player is a consumer contract<sup>5</sup>. Hence, the circumstances of the formation of a contract have to be considered, according to § 310 Sec. 3 number 3 BGB<sup>6</sup>. Contrary to other employees, professional football players have the chance to exert influence on the offered conditions of the contract<sup>7</sup>. Therefore, the validity of an employment contract for the first and second Bundesliga means that the rights and duties in the contract may be regulated in a way that the decision, if and how a player may play in a match, remains with the club<sup>8</sup>. How the player is actually employed, and in which team he may practice, does not concern the employment relationship as a legal relationship<sup>9</sup>.

One can conclude that a relocation clause, in principle, withstands the judicial control of general terms and conditions.

However, the additional terms of the contract may conflict with the legitimacy of such a clause. For if the additional terms are clear, in the sense that the player may only play in the first team, the employer's decisional authority is restricted and, by decision of the Labour Court Münster, a relocation clause is void. Indications for a player's exclusive assignment to the first team are the validity of an employment contract only for a specified league or the premium schemes.

## Further requirements

The presence of an effective relocation clause alone does not mean that any relocation of a professional player is lawful, as differences in skill levels between the first and second team might exist. When relocated to the second team, the player runs the risk of not being able to participate in a practice which is appropriate for his skills. Within Germany, it is common ground that a relocation of a professional player to the second team is effective if that team does not play below the fifth league<sup>10</sup>. What is not yet decided is the question of whether the second team's affiliation to the fifth league is required in every particular case, especially if the first team does not play in the highest league (1. Bundesliga). One can assume it is not the second team's affiliation to a certain league that is the decisive factor, but the difference in performance of both teams<sup>11</sup>.

Moreover, the club has to present a realistic outlook to the professional player that he will be able to make use of his abilities in a competitive team<sup>12</sup>. The club TSG 1899 Hoffenheim tried to fulfil the requirement of a qualified team practice by establishing a 'practice group 2.' Such a 'practice group 2' could guarantee participation in a qualified team practice. Also, the

'practice group 2' consisted of players who were at an appropriate level of skill. In principle, the right to employment would be satisfied, especially because a professional player does not have the right to actually play in a match. However, in the case of TSG 1899 Hoffenheim, the Labour Court Mannheim pointed out that a club must at least present the realistic outlook to the player of being able to use his abilities in a qualified competition (fifth league or higher)<sup>13</sup>. The club TSG 1899 Hoffenheim did not meet this requirement by simply introducing a 'practice group 2'. One can infer from this decision that the creation of a 'practice group 2' without a competitive character doesn't fulfil the player's right to employment.

In relocation to the second team cases, both a qualified team practice and other conditions must correspond with those of the first team. In order for the professional player to keep and cultivate his skills, he relies on professional, qualified practice<sup>14</sup>. Even in cases of relocation, a club is legally obligated to employ the player in a way similar to that which allows practice with the first team<sup>15</sup>. Therefore, in the case of relocation, the club must guarantee the player a qualified possibility of practicing his skills at an appropriate level.

Such qualified practice initially refers to the player's possibility of practicing his skills under the guidance of a skilled and qualified coach. In addition, even when relocated to the second team, the player has to receive an adequate level of sports medical and physiotherapeutic treatment. The club also owes the player the provision of practice facilities at a first team level<sup>16</sup>.

**Conclusion**

There is a right to participate in the practice sessions of the first team,

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however this depends upon the circumstances. It is not possible for clubs to relocate the player to the second team or impose individual practice sessions on the player without further conditions.

In order to make a relocation possible, clubs must insist on a relocation clause. A relocation clause may be an unreasonable discrimination against the player, according to § 307 Sec. 1 and 2 BGB. The model contract of the Deutsche Fußball Liga GmbH (German Football League) meets the requirements in this regard. The authors recommend the following passage: 'At the club's disposition, the player is obligated to participate in matches or practices of a different team of the club, if this team does not play below the fifth league.'

The remaining conditions of the contract must not conflict with the relocation clause. Such a discrepancy may result - as decisions by the Labour Court in Berlin in 2006 and in Münster have shown - from provisions linking the employment contract to a certain league, or if the contract noticeably focuses on the player belonging to the first team.

Concerning whether an effective (permanent) relocation to the second team is possible, the individual circumstances have to be considered. As can be seen in the cited decisions of the Higher Labour Court in Hamm and the Labour Court in Mannheim, it is imperative that the player is allowed to practice according to his proficiency level. Therefore, a significant skill difference between the first and the second team must not exist, as otherwise the performance gap would be too wide and an adequate practice level could not be guaranteed.

Furthermore, the second team has to participate in a competition. It is not sufficient to ensure the

same level of practice through the establishment of a 'practice group 2' if such a group does not have a competitive character.

Also, the same conditions of practice have to be in place for both teams. This encompasses, for example, the quality and facilities of the training ground, the infrastructural facilities, medical and physiotherapeutic treatment.

Naturally, the practice itself must also be conducted by qualified coaches. Thus, a coach of the second team has to have the same occupational skills as the head coach of the first team.

If a club does not adhere to the jurisdiction's guidelines on the drafting of contracts, as well as relocation clauses, it risks an interim injunction by the player. The club's chances of winning such proceedings and, therefore, obtaining a practical advantage until the decision is made in the main proceedings, increase depending on how many of the above requirements are met.

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1. Labour Court Berlin, decision of 26.09.2006 - 36 Ga 16919/06.
2. Ibid..
3. Labour Court Bielefeld, decision of 16.02.2011 - 6 Ga 7/11.
4. Ibid.
5. Labour Court Berlin, ruling of 17.02.2014 - 38 Ga 2145/14.
6. Ibid.
7. Ibid.
8. Ibid.
9. Ibid.
10. Labour Court Mannheim, decision of 28.08.2013 - 10 Ga 3/13.
11. Labour Court Münster, decision of 20.08.2009 - 1 Ga 39/09.
12. Ibid. footnote 10.
13. Ibid. footnote 10.
14. Higher Labour Court Hamm, decision of 28.11.2011 - 11 SaGa 35/11; Ibid. footnote 1.
15. Ibid. footnote 10
16. Ibid. footnote 3; Ibid. footnote 1.