

## Fixed-term contracts in football: Analysis of the Müller Case

The judgement by the Labour Court of the Federal Land of Rhineland-Palatinate in the legal dispute of Heinz Müller v. 1. FSV Mainz 05, dated 17 February 2016, was expected with some great anticipation. The judgement doesn't only affect the parties involved, but also the whole German and European football community. In consequence, it is certainly one of the most important sport law cases in Germany, and a landmark case for football in Europe.



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### I. Facts

Heinz Müller (hereafter Müller) is a former German goalkeeper who has played in over 200 games of professional football. From 2009 until 2014 he played for 1. FSV Mainz 05 (hereafter Mainz 05). Mainz 05 is a German football club that plays in the Bundesliga (first division). Müller and Mainz 05 agreed on a fixed-term employment contract, which lasted from 01/07/2009 until 30/06/2012. In May 2012, the parties agreed on extending the contract until 30/06/2014 with an option to extend the existing contract until 30/06/2015. As a precondition, Müller must have appeared in not less than 23 games during the Bundesliga-season of 2013/2014, for the option to be activated. In 2014, after a period of 5 years, Mainz 05 decided not to extend the contract for another term. Furthermore, after the 17th Match Day (December 2013) of the Bundesliga-season 2013/2014, Mainz 05 decided that Müller had to train and play with the second team. Since then, Müller was not fielded for the first team of Mainz 05 and consequently did not reach the 23 appearances during the season as required by the contract.



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Müller demanded Mainz 05 to exercise the option contractually agreed. He felt the responsible coach prevented him from playing those 23 games in bad faith. He also claimed for lost prize money. Furthermore, he claimed that his contract existed for an unlimited time period because the fixed-term agreement made in the employment contract of 05/07/2012 was ineffective for lack of an objective reason within the meaning of Section 14 paragraph 1 of the German Act on Part-Time Work and Fixed-Term Employment (TzBfG)<sup>1</sup>.

<sup>1</sup> [http://www.mayr-arbeitsrecht.de/fileadmin/mayr-arbeitsrecht/Arbeitshilfen/englisch/Part-Time-and-Limited-Term-Employment\\_Act.pdf](http://www.mayr-arbeitsrecht.de/fileadmin/mayr-arbeitsrecht/Arbeitshilfen/englisch/Part-Time-and-Limited-Term-Employment_Act.pdf)

To understand the action of Heinz Müller, and the impact this case might have on German and European soccer, and professional sports, it is necessary to first of all understand the legal background of this case.

## **II. Legal Background**

A contract between a professional football player and a club falls within the scope of common labour law; the club is the employer while the player is an employee. There is neither an exception for sports law within the ordinary labour law, nor a special “sports” law. Although fixed-term employment contracts have been a general practice for decades in professional sports, and especially in professional football, it still needs to fully comply with common labour law. Fixed-term employment contracts under German law are subject to Section 630 paragraph 3 of the German Civil Code (BGB), if the requirements of Section 14 of the German Part-Time Work and Fixed-Term Employment Act (TzBfG) are met.

The TzBfG implements Council Directive 1999/70/EC<sup>2</sup> into German law. A Council Directive in the law of the European Union is framework law, which binds the EU member states to realize specific goals determined in the directive. The aim of the Council Directive regarding fixed-term employment is to protect the employees against discrimination and “chains” of repeatedly renewed fixed-term employment contracts. In essence, objective reasons for fixed-term employment contracts are necessary to prevent abuse (see: Council Directive 1990/70/EC “general considerations” No.7) and, fixed-term contracts should only be a feature of employment in certain sectors, occupations, and activities (see: Council Directive 1990/70/EC “general considerations” No.8). This demonstrates that fixed-term employment contracts should be an exception, and employment contracts of an indefinite duration, as the general form of employment agreements, should be promoted.

Hence, Section 14 paragraph 1 TzBfG lies down by law that there has to be an objective ground that justifies the definite duration of a contract. Such objective reasons exist in particular if, for example, the operational need for work involved is only temporary (Section 14 paragraph 1 No.1 TzBfG) or, the individual character of the job performed justifies a fixed term (Section 14 paragraph 1 No.4 TzBfG – important for our case, see below), or, there are personal reasons residing with the employee which justify the fixed-term (Section 14 paragraph 1 No.6 TzBfG – important for our case, see below), among others.

If there is no objective reason that justifies the definite duration of the contract, a fixed-term contract can still be valid if the requirements of Section 14 paragraph 2 TzBfG are met. That is the case, for example, if the limitation of the term of an employment agreement is no longer than two years.

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<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:175:0043:0048:en:PDF>

Applying this to professional team sports in Germany means a club can (without further restrictions) conclude a contract with a player for the limited duration of two years. Regarding our case, Müller and Mainz 05 agreed on a three-year contract, that was extended for another two years. In consequence, these fixed-term contracts needed to be justified by an objective reason within the meaning of Section 14 paragraph 1 TzBfG. If there is an invalid fixed-term employment agreement, Section 16 TzBfG provides that: *“If the fixing of the term is not legally valid, then the employment agreement with the limited term shall be deemed to have been concluded for an indefinite period of time...”* So, if Müller was right and there was no objective reason within the meaning of Section 14 paragraph 1 TzBfG that justified the fixed-term of his employment contract of 05/07/2012, his contract would exist for an unlimited period of time. The consequences of this interpretation for the whole German and European football business would be tremendous.

### **III. 1<sup>st</sup> Instance: Judgement of the Mainz Labour Court (3 Ca 1197/14)**

Before the Mainz Labour Court, Müller claimed for outstanding bonus payments and that his contract would exist for an unlimited period of time. Alternatively, that the employment relationship between the parties would continue to be effective under the existing terms and condition until 06/30/2015.

The decision of the Labour Court Mainz was as follows:

*1) There is no payment entitlement. There is neither an entitlement from the contract, as Müller didn't play on match days 17 through 34, nor is there an entitlement because Mainz 05 prevented him from playing, and therefore from bonus payment in bad faith.*

*2) There is no objective reason, which justifies the definite duration of the contract. Therefore, Heinz Müller's contract exists for an unlimited duration.*

The second proposition contravenes former jurisdiction, and could change the complete contract and transfer system in professional team sports in Germany and Europe. From the above said, the decisive point of judgement is the interpretation of the term “objective reasons” in consideration of Council Directive 1990/70/EC. The Mainz Labour Court especially dealt with the question whether professional football meets the criterions of Section 14 paragraph 1 sentence 2 No.4 and No.6 TzBfG, and came to the conclusion that it does not.

Furthermore, the Mainz Labour Court also disagrees that there exists a “need of variety” of the audience who might want to see new players at regular intervals. This could not be seen similar to the theatre sector where a need of variety for the audience is respected and fixed-term contracts are justified. The Labour Court is convinced the audience of sports, opposite to the audience of the theatre sector, is superiorly interested in success, and not in variety. Bringing the high salaries of football players into play, the Labour Court stated: “the protection against dismissal is not for sale”. Section 14 TzBfG does not exclude big-earners.

Besides that, the progressing age of a player (and with it the early end of his/her best performance) is never a reason to justify a fixed-term contract, because of the prohibition of age discrimination. The Labour Court does not agree that a fixed-term contract could also be the wish of the player. That would only be the case when the wish aims at the definite duration of the contract. There must be objective indications that the employee would have chosen a fixed-term contract, even if he had been offered a contract with indefinite duration. From the above said, the Labour Court of Mainz judged there was no objective reason given that justified the fixed-term contract of Heinz Müller concluded in May 2012.

Mainz 05 appealed against the judgement of the Mainz Labour Court to the Labour Court of the Federal Land Rhineland-Palatinate. In Mainz' opinion, it is likely that present legal regulations will be seen as adequate to regulate fixed-term contracts in professional sports. There are enough reasons to argue that a fixed-term employment contract, with a professional football player, meets the objective ground criterion.

#### **IV. 2<sup>nd</sup> Instance: Judgement of the Labour Court of the Federal Land of Rhineland Palatinate (4 Sa/ 202/15)**

The result: The Labour Court of the Federal Land of Rhineland-Palatinate ruled in favour of Mainz 05. The appeal of 1. FSV Mainz 05 was a 100% successful.

The Appeal Court took a deeper look into the specificities of professional team sports than the first instance court, and came to a different conclusion, especially when interpreting the scope of the objective reason given by the particular character of the job performed (Section 14 paragraph 1 sentence 2 no.4 TzBfG).

In the opinion of the Labour Court of the Federal Land of Rhineland – Palatinate, the degree of uncertainty as to the period during which the player will be eligible for achieving the sports-related and associated economic targets of the club is extremely high in football. This is due to the risk of injury of a player, as well as the fact that the performance of a club depends upon various factors, and unforeseeable circumstances can occur. Football is a fast moving business. If a team fails to be successful, the coach can be replaced very quickly, and; if the tactics imposed by the old coach are modified by the new coach, a player can possibly not fit in with the new team system, or with a new game plan, and therefore the player can no longer be usefully deployed.

A football club is forced to enhance the efficiency of its team season-after-season by recruiting and signing new players. In the event contracts with indefinite terms were the norm, the club would not be able to regularly end a contract with a player by way of an ordinary termination. This due to the fact a dismissal on personal grounds within the meaning of Section 1 paragraph 2 of the German Employment Protection Act (KSchG) would probably only be justified in case of a permanent disability of a player. Due to a lack of defined objective criteria and appropriate benchmarks, it would be very difficult to dismiss a "low-performer". It is a specific necessity of

a professional football club that the age structure be balanced so that the club stays competitive. Every club is looking for the right mix of experienced players, and talented young players. However, with contracts of indefinite duration, the player squad would become completely oversized and could no longer be financed, as the ordinary unilateral termination of indefinite term contracts would only be legally possible in exceptional cases.

Seeing the fast and increasing commercialization of professional football, the aspect of the need of variety of the audience has to be taken into account when dealing with the objective reason as well. The audience is not per-se looking for a change of individual players as it is interested in success. Yet, it expects sports directors to improve, and consequently change, the team structure as a whole, e.g. to transfer players and to rebuild a team around a stable scaffold of sporting key players, which are often also the supporters' favourite players.

From the player's perspective, it must be taken into account that he's at least temporarily discharged of the risk to lose his working place when concluding a fixed-term contract, which must not be ordinarily terminated. Also, players have an own interest in maintaining their freedom of movement and career planning. As the squad-places in a football team are limited (due to financial limitations, sporting reasons, or due to regulations of governing football bodies) it is in the special interest of players, especially of young players, that squad-places become vacant and available. One-way of making these vacancies available, is through fixed-term contracts.

One additional remark from our side: If this player-rotation, and the integration of young club-trained players was dependant of when indefinite-term contracts could be terminated – either by mutual agreement, or unilateral ordinary or extraordinary termination – then this uncertainty would probably also have an effect on the investment of clubs in their youth training facilities, and would probably put these engagements at stake.

Even though the court has not recurred to this argument explicitly, its worth mentioning that from the club's perspective, it is in their best interest to be able to plan and to project players' salaries and expenses for limited-term contracts, and not for indefinite ones. This because the development of the club's income, and it's financial stability, are to some extent uncertain, and subject to different factors For example, the club sporting-performances, the result of the joint selling of media rights within a league, the gate receipts and the individual sponsoring contracts.

Finally, extraordinary amounts of remuneration cannot be completely left unconsidered when discussing the Council Directive 1999/70/EC. True, the fixed-term protection of an employee cannot be compensated for with money. But the Council Directive particularly aims to improve the situation of vulnerable employees in need of social protection, whereas the extremely high remuneration of football players shifts the standard.

## V. Conclusion

After all, it becomes apparent that the relationship between a club and a professional football player, and professional football competition are characterized by peculiarities, which justify the legitimate interest of the club to conclude employment contracts, which are limited in term of time.

*Side-fact: The Labour Court of the Federal Land Rhineland-Palatinate also confirmed the decision of the Mainz Labour, that Heinz Müller did not execute the contractual extension option with legal effect. The decision of the coach not to select Müller any longer for Bundesliga games was not contrary to good faith. In opposite: when taking his decision the coach is not obliged to exercise equitable discretion, instead, he is allowed to decide at his own discretion. He is responsible for the composition of the team.*