

The landmark case on fixed-term contracts in football

The Labour Court of the Federal Land of Rhineland-Palatinate's ruling in the dispute between Heinz Müller and 1. FSV Mainz 05 impacts the entire European football community. Jürgen Paepke, General Counsel at DFL Deutsche Fußball Liga GmbH and Dr Johan-Michel Menke, Partner at Heuking Kühn Lüer Wojtek, who represented 1. FSV Mainz 05 in the lawsuit, examine this landmark case.

Heinz Müller is a former German goalkeeper who played for German Bundesliga club 1. FSV Mainz 05. Müller and Mainz 05 agreed on a fixed-term employment contract, which lasted from 1 July 2009 until 30 June 2012. In May 2012 the parties agreed to extend the contract until 30 June 2014 with an option to further extend until 30 June 2015. As a precondition, Müller was to have appeared in no less than 23 games during the Bundesliga 2013/2014 season. After a period of five years Mainz 05 decided not to extend the contract and following the 17th match day of the 2013/2014 season, Mainz 05 decided, that Müller must instead train and play for the second team. Since then, Müller was not fielded for the first team and consequently did not reach the 23 appearances required for that season.

Müller moved to exercise the option contractually agreed upon because he felt that the coach had prevented him from playing the 23 games in bad faith and as such also moved to claim for lost prize money. Müller claimed that his employment contract existed for an unlimited time period because the fixed-term agreement made in 5 July 2012 was ineffective due to the lack of an objective reason within the meaning of Section 14 paragraph 1 of the German Act on



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Part-Time Work and Fixed-Term Employment ('TzBfG').

Legal background

A contract between a professional football player and a club falls within the scope of common labour law. Fixed-term employment contracts under German law are lawful according to Section 630 of the German Civil Code ('BGB') if the requirements of Section 14 of the TzBfG are met. The TzBfG implements Directive 1999/70/EC into German law. The aim of the Directive on fixed-term employment is to protect employees from discrimination and 'chains' of renewed fixed-term contracts. Hence, Section 14 of the TzBfG sets out that there has to be an objective ground that justifies the definite duration of a contract. Such objective reasons exist if, for example, the need for the work is only temporary, the individual character of the job justifies a fixed-term or there are personal reasons associated with the employee that justify a fixed-term.

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 TzBfG are met. That is the case if the limitation of the term of an employment agreement is no longer than two years.

Applying this to professional team sports, this means that a club can conclude a contract with a player for the limited duration of two years. Regarding the *Müller* case, Heinz Müller and Mainz 05 agreed on a three year contract that was extended for another two years. As such these fixed-term contracts needed to be justified by an objective reason. If there is an invalid fixed-term employment agreement, Section 16 of the TzBfG states: '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 that justified the fixed-term, his contract would exist for an unlimited period of time. The consequences of such a finding would have a tremendous impact on European football.

The Labour Court Mainz

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

The Court decided that:

1. There was no payment entitlement. The Court decided that there was neither a contractual entitlement to any bonus payments as Müller did not play on the required match days nor was there an entitlement because Mainz 05 may have prevented him from playing and receiving any bonus payments in bad faith.

2. There was no objective reason justifying the definite duration of the contract, so Müller's contract existed for an unlimited duration.

The second part of the ruling contradicts former jurisdiction and had the potential to change the entire contract and transfer system in professional team sports in Europe. The decisive point of this judgment is the interpretation of the term 'objective reason.' The Court focused on the question of whether professional football meets the criteria in Sector 14 TzBfG and came to the conclusion that it does not. And this is why: In response to the argument that the wear and tear experienced in professional sports justifies a fixed-term contract, the Court found to

the contrary that there are various jobs in which employees are subject to similar wear and tear.

The Court disagreed with the argument that there exists a “need for variety” from the audience who might want to see new players at regular intervals. Bringing the high salary of football players into play the Court responded that “the protection against dismissal is not for sale”. Section 14 of the TzBfG does not exclude high earners.

Besides that, the increasing age of a player is never a reason to justify a fixed-term contract because of the prohibition against age discrimination. The Court did not agree that a fixed-term contract could also be the wish of the player. There must be objective indications that the employee would have chosen a fixed-term contract, when offered a contract with indefinite duration. The Court concluded that there was no objective reason given to justify the fixed-term contract of Heinz Müller concluded in May 2012.

Mainz 05 appealed against the judgment to the Labour Court of the Federal Land Rhineland-Palatinate. In Mainz’ opinion it was likely that present regulations would be seen as adequate to regulate fixed-term contracts in professional sports and that there are enough reasons to argue that a fixed-term employment contract with a professional football player meet the objective ground criteria.

The Labour Court of Rhineland Palatinate

The appeals court took a deeper look into the specificities of professional team sport and ruled that a fixed-term is effective.

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club is extremely high in football. This is due to the risk of player injury as well as the fact that the performance of a club depends upon various factors and unforeseen circumstances which can occur. If the team fails to be successful the coach can be changed quickly. If the tactics imposed are modified, a player may no longer fit into the system, team structure and game plan.

A football club is under constant pressure to enhance the efficiency of its team by recruiting new players. In the event of contracts with indefinite terms, the club would be unable to regularly end a contract with a player by way of an ordinary termination, due to the fact that a dismissal on personal grounds within the meaning of Section 1 of the German Employment Protection Act (‘KSchG’) would probably only be justified in case of the permanent disability of a player. It is a necessity of a professional football club that the age structure is balanced so that the club stays competitive. Every club is looking for the right mix of experienced and young players. However, with contracts of indefinite duration, the squad could become oversized as the ordinary unilateral termination of indefinite term contracts would only be legally possible in exceptional cases.

The audience’s need for variety also has to be taken into account when dealing with the objective reasoning. The audience is not *per se* looking for a change in the individual players, but audiences still expect sports directors to improve and change the team structure as a whole, e.g. to transfer players and build a team around a stable scaffold of key players.

From the player’s perspective, it must also be taken into account that the player is at least temporarily discharged of the risk

of losing his employment when concluding a fixed-term contract. Also, players have an interest in maintaining their freedom of movement. As squad places are limited it is in the interest of players, especially young players, that squad places become vacant due to the expiry of fixed-term contracts. Also if player rotation and the integration of young players was dependant on when indefinite term contracts can be terminated then this uncertainty may impact on the investment of clubs in their youth training facilities and would probably put those engagements at stake.

From the club’s perspective - it is worth noting that - it is in their interest to be able to project player salary expenses for the term of the contracts, as the club’s income and financial stability are to some extent uncertain.

Finally remuneration in football cannot be left unconsidered. True, the fixed-term protection of an employee cannot be compensated for with money, but the Directive in particular aims to improve the situation for vulnerable employees, whereas the extremely high remuneration of football players shifts the benchmark somewhat.

Conclusion

The relationship between a club, a professional football player and football competitions are characterised by peculiarities which justify the legitimate interest of the club to conclude employment contracts which are limited in terms of time.

This judgment is certainly a success for clubs, players and fans. It seems that Heinz Müller will not become a second *Bosman*.

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