

Around the World

Switzerland

SWITZERLAND: SOCCER /EMPLOYMENT LAW /TERMINATION WITH IMMEDIATE EFFECT /RIGHT TO PERFORM ITS CONTRACTUAL DUTIES

Discussion of Decision No 4A_53/2011 dated April 28, 2011 by the Swiss Federal Supreme Court

☞ Constructive dismissal;
Football; Sportspersons;
Switzerland

Facts

Eddy Barea, a professional soccer player, was employed by the Swiss soccer club Neuchâtel Xamax SA (Xamax). He had played in the club's team participating in the Swiss top league for more than five years and had been nominated to be the captain of the team for his sixth season with the club. During the half-time break of a championship game approximately half-way through his sixth season, Miroslav Blazevic, the team's coach, ordered the team to use the offside trap whenever their opponent was granted a free kick. Eddy Barea, however, refused openly and in front of the entire team to do so as he considered these tactics to be too risky. Consequently, Miroslav Blazevic replaced Eddy Barea for the second half of the game and expelled him from the team. After the game, he told the media that Eddy Barea had behaved like an idiot and a traitor (for which he was later fined CHF 300 based on criminal law).

Four days after this incident, Eddy Barea contested the rightfulness of his expulsion in a letter to Xamax, offering to re-join the team. A week later, Xamax confirmed in writing that Eddy Barea was finally and definitely discharged from his obligations *vis-à-vis* Xamax, but was assured that he would receive his salary and was offered the opportunity to practise with the Xamax U21 team. After letting Xamax know that he qualified its behaviour to be a termination of his employment agreement with immediate effect and not receiving a reaction from Xamax, Eddy Barea himself terminated his employment agreement with immediate effect one month after the incident described above.

After this escalation, and not receiving the money he expected, Eddy Barea sued Xamax a few months later. He requested (i) damages for salary not paid for the remainder of the employment period (approximately four months) as well as (ii) a compensation payment for moral injustice caused by the unjustified and abusive termination of his employment agreement. The case went up to the Federal Supreme Court (FSC) which rendered a final decision on April 28, 2011.

Held

The FSC first discussed the admissibility of a termination of an employment agreement with immediate effect in general. Notice for such termination may only be given restrictively and as an exceptional means of last resort, i.e. if the terminating party can in good faith not be expected to continue the employment relationship under the present circumstances.

As to the case at hand, the lower courts had already determined that Xamax had not terminated the employment agreement by expelling Eddy Barea from the team as it had kept paying his salary and as it had offered him the opportunity to practise with the U21 team. This issue remained undiscussed before the FSC. However, the termination notice given by Eddy Barea, the circumstances leading up to such notice and the consequences of it were analysed.

On the one hand, the FSC confirmed that Eddy Barea had breached his employment obligations by refusing to obey Miroslav Blazevic's instructions. On the other hand, it also took into consideration that Eddy Barea had played for Xamax for more than five seasons, apparently to the satisfaction of Xamax considering that he had been chosen for the prestigious position of team captain. No earlier misbehaviour has been recorded. Therefore, taking the entire relationship between Xamax and Eddy Barea into account, the FSC qualified Eddy Barea's definite and final expulsion from the team in punishment of the one single refusal to follow instructions as an overreaction by Xamax.

The FSC acknowledged that legal Swiss doctrine accepted a legitimate interest of certain groups of employees, namely artists, sports professionals and surgeons, to be given the possibility by their employer to perform their employment obligations. Eddy Barea, in reality, had no chance of getting back into the team. But in order to keep up his value on the market as well as his chances to successfully pursue his career, he would have needed practice time and games played with a top team and not just a U21 team. Therefore, the final expulsion from the team had the same effect on him as a termination of the employment contract with immediate effect by Xamax would have had. However, Xamax had rightfully not given notice for such termination as Eddy Barea had not breached his obligations severely enough. Eddy Barea was caught in an employment relationship which was not formally terminated but had factually been vacated of its content by the employer. Therefore, and as Eddy Barea had additionally been offended in the press by Miroslav Blazevic who was a representative of Xamax, the FSC decided that he was not to be expected in good faith to continue the employment relationship. He was allowed to resort to giving notice of termination with immediate effect.

During the proceedings, Xamax had argued that—even if Eddy Barea had had the right to give notice for termination with immediate effect—such notice had been given too late. Pursuant to Swiss law, notice for termination with immediate effect has to be given without delay after the incident which made the continuation of the employment agreement unbearable. Eddy Barea, however, had waited one month after the unfortunate encounter with Miroslav Blazevic. The FSC held that Eddy Barea's notice of termination was not given too late. He could only be certain to have been finally expelled from the team after having received Xamax's first letter. To this, so the FSC held, he reacted in a timely manner by first letting Xamax know that he considered the employment agreement terminated without notice by Xamax, and, after not having received a reaction after ten days, by terminating the agreement himself.

As to the claims filed by Eddy Barea, the FSC stated that a valid reason for termination of the employment agreement with immediate effect may be that the other party's conduct is manifestly contrary to the agreement. In the case of a justified termination of contract with immediate effect by the employee, the employee has a claim for compensation of what he would have earned if the employment relationship had been terminated ordinarily, taking into account and setting off what the employee saved because of the termination, earned otherwise or intentionally failed to do so. The FSC accepted that Eddy Barea was entitled to such a claim. Additionally, if the employee's personality rights are breached, he may request a compensation payment for moral injustice. The FSC qualified Miroslav Blazevic's statements *vis-à-vis* the media for which he had been fined to be such breach of personality rights and granted Eddy Barea a claim against Xamax based thereon.

Xamax had only opposed the claims in general and had not entered into discussions on the amounts awarded by the previous court instance (CHF 28,978.20 which Eddy Barea would have earned had the employment

agreement been executed as well as CHF 15,000 for moral injustice rendered). Consequently, the FSC found no reason to review the amounts as such.

Discussion

This is the first FSC decision on the question of whether a sports professional has the right not only to be paid based on his employment agreement but also to be given the opportunity to perform his job. So far, this issue had only been widely discussed in legal doctrine, in various degrees of intensity, and with all kinds of views taken, however, mostly in favour of such a right. Having to fill this vacuum in jurisdiction, the FSC confirmed that a professional top league soccer player may have a legitimate interest in being able to be occupied by his employer and that, in order to preserve his market value, he needed not only practise with players of his level but also to play games at top league level (note 2.1.2 of the decision).

It is obvious that the FSC used very careful wording. It did not state that any professional soccer player in any situation has a general right to practise and play with the top team of his club. It only held that there "may" be a "legitimate interest" for a player to do so. Also, it noted the necessity of factual employment including practise sessions and games played in order for the player to preserve his market value—but did not explicitly confirm that any player had a right to preserve his market value. Further, it acknowledged Eddy Barea's right to terminate the employment agreement with immediate effect only based on the combination of (i) the disproportionate punishment in the form of the expulsion from the team and (ii) the verbal abuse by the coach in the media.

It is understandable that the FSC did not go beyond this and acknowledge any rights in general. In the absence of special circumstances such as highly specialised work, an employee does not have the right to exercise his job and the employer has the right to release an employee from his obligation to work provided it keeps paying the employee his salary. Considering the deviation from jurisprudence in ordinary employment situations, the Eddy Barea decision seems rather generous to the employee, although not excessive taking into account the specific circumstances of the case and the legal doctrine requesting the courts to differentiate between highly specialised and ordinary employees. Supposedly as a compromise between all positions, the FSC chose its wording carefully and used case specific tailor-made expressions in order not to prejudice future decisions.

It remains to be seen how the FSC will decide in other cases if the circumstances in question are not identical to the ones in the present case (e.g. rightful termination of contract by the employer based on severe misconduct by the employee, only semi-professional employment as a sportsperson etc.). It will certainly need more than one decision covering various circumstances until sports professionals and their attorneys can rely on a firm jurisdiction on the subject of the right to practise and even play games—which cannot be taken for granted after only one decision. Yet, the Eddy Barea decision is to be qualified as a step in this direction and will, no doubt, be argued as a leading case by attorneys representing sports professionals.

The FSC decided rather generously in favour of Eddy Barea not only on the question whether the termination was admissible at all, but also on the question whether the notice for termination was given in a timely manner. Based on firm jurisdiction, such notice is to be given within a short time after circumstances allowing such a termination are confirmed. Normally, individuals have to give notice within two to three days whereas corporations may take up to five days. In the case at hand, Eddy Barea took considerably longer. The FSC's argumentation pursuant to which Xamax had forfeited its right to call upon such delay based on the principle of good faith as it had

not reacted to Eddy Barea's letter seems to stretch the boundaries of its own jurisdiction rather far. Therefore, this case and the time span allowed cannot be relied upon by future employees intending to give notice with immediate effect.

As a side note: in the season 2012/13, Xamax has caused much more commotion than in the case discussed above. Its new owner, the Chechen businessman, Bulat Tschagajew, had introduced a previously unknown hire-and-fire mentality. Within eight months, he fired approximately 50 (!) soccer players and staff (source: <http://newsnetz-blog.ch/zumrundenleder/bulat-o-meter/>), including four head coaches. Also, remaining and new employees complained about not having been paid for months. The story reads like a soap opera and culminated in the sad result that Xamax—a traditional and successful Swiss soccer club for 40-plus years—is now being liquidated in bankruptcy proceedings and has disappeared from professional soccer which resulted in another approximately 20 persons losing their jobs. Bulat Tschagajew has since been arrested for suspected disloyal management and forgery of documents. At the time this article was submitted for printing, nearly four months after the arrest, he was still in investigative custody. The story will go on.

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