

# Around the World

## Switzerland

### EMPLOYMENT LAW —RIGHT TO ATTEND SPECIFIC TRAINING SESSIONS

*(St. Gallen District Court  
Decision SZ.2019.58 of  
Late March or Early April  
2019)*

☞ Employees' rights;  
Employers' powers and duties;  
Football clubs; Sportspersons;  
Switzerland; Training

#### Facts

The Football Club of St. Gallen, a soccer club of the Swiss Super League (Club), had employed Nassim Ben Khalifa, a professional soccer player (Player), for the three seasons from summer 2017 to summer 2020. However, halfway through the contractual period a dispute arose. Rumours had it that the Player wanted to leave the Club or that the Club wanted the Player to change to another club; however, this did not take place at that time. As from then on, the Club did not field the Player anymore. It also excluded the Player from some training sessions.

The Player requested from the local district court that the Club be ordered by an interim measure to allow the Player to attend all training sessions of the Super League team. During the hearing, however, the parties did not agree from which training sessions the Player was excluded. They only concurred that this extended to all of the final pre-match training sessions of the Super League team. The Club argued that this was the only restriction and stressed that, instead, the Player was offered individual training sessions during the relevant times. The Player, however, insisted that he was refused the participation in much more than just the final pre-match training sessions.

The Club gave sportive reasons for the exclusion of the Player from the final pre-match training sessions: the Player was not going to be fielded and therefore was not part of the specific plans that were discussed and practised at these sessions. The Player, on the other hand, argued that this separation from the team would destroy any chances to be fielded at any point in time, that he thereby was losing part of his salary and that a transfer to another club would be much more difficult under these circumstances. He felt like the Club was trying to make him leave the Club by making his life difficult.

#### Held

The single judge of the St. Gallen District Court (Judge) presented the essentials of his decision orally and was subsequently not requested by the parties to put down his entire rationale in writing. Therefore, the reasoning described hereafter does not provide a complete picture of the thoughts and considerations of the Judge. Namely, it does not define which alleged facts were established by the Judge and which procedural issues had an influence on the decision as well.

The Judge acknowledged that an employee may have, to a certain extent, a right to be given the opportunity to perform his employment obligations. This is the case namely when this performance helps the employee to maintain his employability and protects the employee against a loss of value in the relevant labour market, and it is also the case when otherwise personality rights would be violated. The Judge agreed with the Player that he generally had the right to be given the opportunity to perform his employment obligations. However, he was not of the opinion that the exclusion from the final pre-match training sessions breached this right. He

stated that the Player had not sufficiently convinced him that this limited restriction influenced the Player's abilities and professional development possibilities in a relevant way.

The judge then went on to state that the Player had provided sufficient prima facie evidence that there was no objective reason why the Player was treated differently than his teammates. He held that the Player was the only player of the team who was permanently excluded from the final pre-match training sessions even though there were other players who were not fielded in the subsequent matches either. Moreover, he held that he had no indications that the Player's behaviour or sportive arguments justified such an exclusion. Even if the Player had voiced intentions to leave the Club, this would not be a sufficient reason for a separation from the team. The Judge therefore confirmed that the exclusion from the final training sessions was to be qualified as a continued breach of the employer's duty to provide for the welfare of its employees and of the Player's personality rights.

Based thereon, the Judge ordered that the Player be integrated into all training sessions of the team without any exceptions, i.e. including the final pre-match training sessions. However, the Judge stressed that this did not include the right to be fielded for any matches, as this was not part of the Player's contractual or statutory rights.

## Discussion

This decision was issued in the form of an order of interim measure. It was ordered for the duration of 60 days and would be automatically prolonged in case the Player filed an ordinary action regarding the issue at hand within this period. Whether such an action was filed or not is not known. It certainly was not litigated to the end: as the Player and the Club unanimously terminated the employment agreement three months later so that the Player could join another club, it was not necessary anymore that ordinary court proceedings were conducted on this matter.

Under Swiss law, generally, interim measures may be ordered if the applicant shows by prima facie evidence that a right to which he or she is entitled to has been violated or a violation is anticipated, and, additionally, that the violation threatens to cause harm to the applicant that may not easily be remedied. The reduced standard of proof helps the applicant to obtain an order without lengthy and potentially tedious evidentiary hearings. This procedural advantage for the applicant is neutralised by the fact that the court will set the applicant a deadline in order to bring an ordinary action in order to keep up the interim measure. In addition, the court may combine any interim measure with an order to the applicant to provide security for potential damage the opposing party may face.

This case is not the first case in which a court had to decide on a professional athlete's right to perform his employment obligations. The leading case in this respect was Eddy Barea who had terminated his employment relationship with Neuchâtel Xamax after having been expelled from the team following a dispute with the coach. He had requested damages and compensation in ordinary civil proceedings. The matter went up to the Federal Supreme Court which, in 2011, decided that the termination had been lawful under the specific circumstances given. It also confirmed for the first time that there could be circumstances in which a professional top league soccer player may have a legitimate interest in being able to perform his employment obligations in order to preserve his market value, and that he may be granted the right to practise with players of his level and even also to play games at top league level for this reason. However, the Federal Supreme Court was careful in its wording and did not declare this to be the right of any professional athlete but made it dependent on the specific circumstances at hand. The Eddy Barea case was discussed by the authors of this contribution in [2012] I.S.L.R. Issue 2 at (pp.34–37).

Another case in which a professional soccer player succeeded in being reintegrated into his team took place in 2014. After having been downgraded to practise with the U21 team following several disputes with the coach, also by way of an interim measure, Veroljub Salatic obtained a court order by which his then employer, the Grasshopper Club of Zurich, was ordered to give the player the opportunity to practise with his team again.

There have not been sufficient cases in litigation that would allow clear and firm case law regarding the question whether and to what extent a professional athlete generally has the right to perform his employment obligations. In any case, the particular circumstances of the specific parties are to be taken into account. However, the three aforementioned judgments/orders show that there are good chances for a professional athlete to fight degradation or expulsion to a certain degree.

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