Dahmane case: does Belgium have a trademark on landmark football cases?

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Introduction

Mohamed Dahmane (Dahmane) is a professional Belgian-Algerian football player. Dahmane and the Belgian football club Racing Genk (Genk) concluded an employment contract which was valid from 1 July 2007 until 30 June 2011. The contract stipulated a gross annual basic salary of € 180,000, excluding additional bonuses. As of 1 January 2008, the parties agreed that Dahmane was entitled to a gross annual basic salary of € 252,188.[4]

By the end of 2007, the relationship between Dahmane and the team management deteriorated and, on 23 January 2008, Dahmane was demoted to the development team. On 28 January 2008, Dahmane unilaterally terminated the employment contract. Dahmane argued that the behavior of the club and his exclusion from the first team provided an "urgent cause" for premature termination of the contract.

Genk subsequently filed a claim against Dahmane for unjustified breach of contract with the Labour Court in Tongeren and held that they were entitled to receive compensation. The Labour Court agreed with Genk and ruled that Dahmane had unilaterally terminated the contract without an "urgent cause". Therefore, Dahmane had to pay compensation of € 878,800 to Genk. This compensation, the equivalent of 36 months' wages, had to be paid in full.

On appeal, the Labour Court of Appeal confirmed that Dahmane had terminated the contract without an "urgent cause".[5] Regardless of these findings, the Labour Court of Appeal deferred any further decision, since there were questions raised regarding the compensation to which Genk was entitled.

Difference in compensation

In Belgium, the employee or employer that terminates a fixed-term employment contract unilaterally without "urgent cause" is obliged to pay compensation to the other party, as stipulated in the Law of 3 July 1978 regarding employment contracts (Employment Contracts Act)[6]. The compensation is calculated on the basis of the remaining term of the contract and the salary of the employee. With regard to fixed-term employment contracts terminated before 31 December 2013, the compensation may not exceed 12 months' wages.[7]

An exception is made in the case of sportsmen.[8] The exception is outlined in the Law of 24 February 1978 regarding the employment contract for professional sportsmen (Law of February 1978)[9, 10], in conjunction with the Royal Decree of 13 July 2004 (Royal Decree). In the case of Dahmane the following relevant provisions applied:

- art. 4 (4) of the Law of February 1978: compensation in cases regarding fixed-term employment contracts is equal to the remaining salary until the end of the contract period. However, the compensation cannot exceed double of the amount mentioned in art. 5 (2) Law of February 1978;
- art. 5 (2) of the Law of February 1978: compensation in cases regarding employment contracts for an indefinite period is further stipulated in a Royal Decree or, in absence of a Royal Decree, equal to the remaining monthly wages of the contract year but at least 25% of the annual wage;
- art. 1 Royal Decree: compensation is equal to 18 months' wages if the annual wage exceeds € 98,526.10.

Considering the above, Genk would be entitled to a compensation of 36 months' wages. This is a substantial amount considering the fact that, if Dahmane would not have been a sportsman, Genk would have only received a compensation of 12 months' wages.

Belgian Constitution

On appeal, Dahmane pleaded that the difference between the compensation in cases of sportsmen and in cases of ordinary workers contradicts the Belgian Constitution. More specifically, Dahmane argued

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4 See: Labour Court of Appeal Antwerp, 22 June 2010, A.R. 2009/AH/199 + A.R. 2009/AH/280, III,1.
5 Labour Court of Appeal Antwerp, 22 June 2010, A.R. 2009/AH/199 + A.R. 2009/AH/280. Available at: www.law.kuleuven.be/arbeidsrecht/pdf_documenten/nieuwsbrief/arbh_antwerpen_22062010_sportbeoefenaar.pdf.
6 Available at: www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1978070301&table_name=wet.
7 Art. 40 in conjunction with art. 82 (3), Employment Contracts Act.
8 The literal translation would be "sports practitioners".
9 Available at: www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1978022401&table_name=wet.
10 This law applies to "*individuals who enter into an obligation to prepare themselves for or participate in a sports competition or event under another person's authority in return for remuneration exceeding a certain amount*" (art. 2 (1)).

that the right to equal treatment, the right to non-discrimination and the right to free choice of occupation[11] are at stake. In the interlocutory decision of 22 June 2010, the Labour Court of Appeal asked preliminary questions to the Constitutional Court regarding these issues.

The Constitutional Court found that the inequality between sportsmen and other workers was the consequence of the provisions in the Royal Decree. Therefore, the Constitutional Court lacked jurisdiction, since its jurisdiction is limited to cases concerning primary legislation.[12]

Hence, the Constitutional Court referred the case back to the Labour Court of Appeal. The Labour Court of Appeal now had to assess whether the Royal Decree was compatible with the Constitution. In other words: the Labour Court of Appeal had to determine whether the different treatment of sportsmen compared to other workers was constitutional.

Labour Court of Appeal

In its judgment of 6 May 2014[13], the Labour Court of Appeal first ruled that it is an established fact that sportsmen (and their employers) are treated differently with regard to compensation in cases of unjustified premature termination of fixed-term employment contracts. Such a distinction can – with regard to the applicable provisions of the Constitution – only be justified by objective and reasonable arguments.[14] Moreover, the exception needs to be proportionate in relation to its aim.

Second, the Labour Court of Appeal found that Genk incorrectly assumes that there would be a distinction between ordinary workers and professional football players as well. The Law of February 1978 has a wider scope and applies to each agreement between a professional sportsman and his employer. Therefore, the Labour Court of Appeal had to decide whether the exception for sportsmen in general can be justified by objective and reasonable grounds.

Genk pointed out that the difference might be justified by the specificity of sport and/or the specific character of the employment contracts of professional sportsmen. To exemplify this argument, Genk referred to the EU White Paper on Sport and the social role of sports. In addition, Genk stated that the European Court of Justice acknowledged in its jurisprudence, *inter alia*, that sport has unique and specific characteristics. In this context, Genk also stressed the fact that it is essential to maintain a competitive balance in professional sports.

The Labour Court of Appeal indicated, contrary to the suggestions of Genk, that the preamble of the Royal Degree does not make any reference to the specificity of sport, nor does it give any other justification for the application of separate rules to sportsmen in this context. Therefore, the argument that the specificity of sport would provide a justification in the matter at hand cannot be taken into account. Nevertheless, the Labour Court of Appeal acknowledged that (professional) sport has certain characteristics which make the working environment and employment relationship different from other workers. Taking into account the arguments of Genk, the Labour Court of Appeal found that the aim of preventing unfair competition and maintaining a competitive balance for the participating teams in the competition can justify additional measures to protect employment relationships in sport.

Genk argued that the economic aspects of sport (e.g. gain/profit) and the integrity of sport constitute a reasonable ground to except sportsmen from the regulations that would apply to other employees. These arguments were dismissed by the Labour Court of Appeal. Economic aspects, as well as integrity standards, are not unique or more important to the professional sports sector than to other industries, such as the business or services sector.

Furthermore, the Labour Court of Appeal made a clear distinction between a transfer fee and the compensation in relation to the employee terminating his employment contract. The Labour Court of Appeal argued that the transfer fee is related to the market value of the player and the economic loss of the club and is paid by the acquiring club in a direct deal with the vendor club. The compensation in question, where the player takes the initiative to terminate his employment contract, is paid by the player. Nevertheless, we want to emphasise that transfer fees will be needless when players can opt to unilateral terminate their contracts and pay relatively small compensation. Surprisingly, the Labour Court of Appeal failed to identify this problem.

Finally, the Labour Court of Appeal addressed the question of proportionality. Were the measures taken by Genk proportionate to the aim of preventing unfair competition and maintaining a competitive balance within the Belgian sports league? In answering this question, the Labour Court of Appeal took into consideration that the Belgian Football competitions take about 12 months and that the careers of professional sportsmen are relatively short. All such circumstances led to the conclusion that a compensation that grossly exceeds 12 months of wages (i.e. 36 months) for a premature and unjustified termination of a contract cannot be considered a proportionate measure.

Conclusions on the decision of the Belgian Labour Court of Appeal

The Belgian Labour Court of Appeal ruled that the distinction between sportsmen and other employees, which is a consequence of the Royal Decree, cannot be justified on objective and reasonable grounds. Hence, art. 1 of the Royal Decree is not in conformity with the principle of equal treatment, the principle of non-discrimination and the principle of free choice of occupation. As a consequence, the Royal Decree is set aside by the Labour Court of Appeal.

Since the Royal Decree is set aside, Genk is entitled to compensation as stipulated in art. 5(2) of the Law of February 1978. As pointed out before, this article stipulates that a compensation for an untimely termination of an employment agreement is equal to the remaining monthly wages of the contract with a minimum of 25% of the annual wage. Since Dahmane terminated the contract on 28 January 2008 and the contract year would end on 30 June 2008, he is obliged to pay to the club compensation equal to 10.24 months' wages.[15]

As a consequence, the Labour Court of Appeal ruled that it is no longer relevant to discuss whether the Labour Court of Appeal should, as suggested by Genk, ask preliminary questions to the European Court of Justice regarding the conformity of the Royal Decree with the free movement of workers as stipulated in art. 45 of TFEU.

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[11] Art. 10, 11 and 23 Belgian Constitution.
[12] Constitutional Court, 18 May 2011, no. 84/2011.
[13] Labour Court of Appeal, Antwerp, 6 May 2014, A.R. 2009/AH/199.
[14] See also Constitutional Court, 18 May 2011, no. 84/2011, III.B.7.
[15] From 28 January 2008 until 30 June 2008 (5 months and 4 days = 5.12 month) times two = 10.24 months.

Issues in The Netherlands

The recently published Act on Employment and Security[16] may confront professional sports clubs in The Netherlands with similar issues as in Belgium resulting from the Dahmane case. The current Dutch legislation stipulates that a party that terminates a fixed-term employment contract without an "urgent cause" could be obliged to pay a fixed or a full compensation to the other party. A fixed compensation is based on the wages that the sportsman in question may earn for the remaining contract term; while a full compensation includes additional damages (e.g. loss of profits) as well.[17]

In the new legislation, it is proposed that a full compensation will no longer exist as of 1 July 2015. In that event, the new act will have a huge impact on the contracts of professional sportsmen, especially on contracts with professional football players in The Netherlands. It might become increasingly attractive for professional sportsmen to prematurely terminate their contracts, where it is likely that they have to compensate their club just the fixed-term compensation, which is much lower than the real value of the player.

We emphasise the fact that Dutch law may be excluded in the employment agreements with professional football players in The Netherlands, but that such will not result in the exclusion of mandatory Dutch employment law legislation.

The above problem for sportsmen was acknowledged during the legislative process of the Act on Employment and Security. After questions of Senate members, the responsible Minister pointed out that parties, when entering into employment contracts, would still have the opportunity to mutually agree on a higher compensation in case of premature termination.[18]

It is questionable whether the freedom of contract, to which the Minister referred, will indeed lead to such solutions. Players' agents, in general, do not tend to bind their players on stricter provisions than necessary under national legislation. It is up to clubs and their advisors to find solutions and to draft the employment agreements in such ways that the clubs continue to have the right to full compensation in the event of premature termination. Such options are available, even under changing Dutch legislation.

European context

Recently, the media has publicly compared the Dahmane case with the Bosman case. In both cases, a football player of a relatively small Belgian football club started a case, claiming that football players should be treated as normal workers. While in both cases the court ruled in favour of the football player, it is necessary to highlight consequences similar as those of the Bosman ruling cannot be expected from the Dahmane ruling. The impact of the Bosman case in Europe was caused by the fact that the European Court of Justice considered the UEFA regulations at hand contrary to the free movement of employees. While the Bosman ruling was applicable throughout Europe, the Dahmane case was dealt with solely under Belgian law. The ruling of the Labour Court of Appeal focused on the compatibility of a specific Belgian law with the Belgian constitution. Therefore, the Dahmane case can be considered primarily as a pure domestic matter and we do not see any transnational consequences comparable to Bosman.

One of the key points of the Dahmane case judgment of the Labour Court of Appeal is, in our opinion, that the Royal Decree lacked a motivation for the "special" treatment of sportsmen. The Belgian legislator failed to address here, why premature contract termination in cases relating to sportsmen would justify a compensation that exceeds the compensation of other workers. Without any proper justification of the legislator, and also taking into consideration the relevant provisions of the Belgian Constitution, the judgment of the Labour Court of Appeal is not surprising.

In the event that separate provisions for sportsmen are properly motivated, we would like to stress that it is highly questionable whether such provisions would be considered as incompatible with EU law. The European Court of Justice has, on several occasions, ruled that the specificity and special characteristics of sport might justify separate provisions for sportsmen. We refer to these comparable matters the European Court of Justice decided upon and we find arguments to apply the same reasoning here to defend Belgian regulations that protect (investments of) clubs in situations as at hand in the Dahmane case.

Conclusion

Where the media tend to see the Dahmane case as a turnaround comparable to Bosman, with a huge impact on the European player transfer system, we would like to bring some nuance into that discussion. As explained above, the Dahmane case is expected to have little consequences at a European level. However, the ruling of the Labour Court of Appeal could potentially have a substantial impact on the Belgian transfer system.

The result of the Bosman ruling was that clubs started concluding long-term contracts with their players, because they were no longer allowed to demand transfer fees for players whose contract had ended. Due to the Dahmane case judgment, such lengthy employment contracts could become a dead letter in Belgium. Since the Royal Decree is set aside, football players that want to be transferred to another club are encouraged to prematurely break their contracts and pay relatively small compensation, which may not exceed 12 months' wages. Different than in The Netherlands, Belgian clubs and players are not allowed to contractual agree a higher compensation in case of premature termination. Such a provision would be contrary to mandatory Belgian employment law and be null and void. Therefore, mass unilateral contract terminations by football players in Belgium might confront Belgian clubs with problematic situations.

Time will tell whether such situations will actually occur and whether new, properly justified, regulation is necessary.

We will report on this issue again as soon as any new developments occur.

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[16] Available at: www.eerstekamer.nl/wetsvoorstel/33818_wet_werk_en_zekerheid.
[17] Art. 7:677 (4), Civil Code.
[18] Parliamentary Papers I 2013/2014, 33 818, C.