

Dismissal of a Coach in Dutch Professional Football: Insights of the case OLISEH/Fortuna Sittard



By Tim WILMS¹
Lawyer, CMS Netherlands
Amsterdam - the Netherlands

→ **Coach contract - Breach of contract - Collective bargaining agreement - Royal Dutch Football Federations (KNVB)**

KNVB Arbitration Tribunal, 5 April 2018, case no. 1473, *Sunday Oliseh v. Fortuna Sittard*

It is common practice that coaches of Dutch professional football clubs have a fixed-term employment contract that cannot be prematurely terminated by

one party. In practice the consequence is that clubs that want to dismiss a coach before his contract expires - e.g. due to bad results - are often obliged to pay a relatively high compensation to the coach. In principle, this compensation should be equal to the amount of salary that would have been due until the expiry date of the original contract term. The court or arbitration panel may, however, reduce such compensation, depending on the circumstances of the case. With regard thereto, the recent decision of the Arbitration Tribunal of the Royal Dutch Football Association (the KNVB Arbitration Tribunal) of 5 April 2018 in the case of the First Division (i.e. the second level in Dutch professional football) club Fortuna Sittard and (former) head coach Sunday OLISEH (hereinafter referred to as OLISEH) is highly relevant.²

Legal framework coaches

The contractual relationship between Dutch professional football clubs³ and coaches is governed by the collective bargaining agreement "Trainer Coaches Professional Football 2016-2019" (the CBA). The CBA is applicable to head coaches and assistants of the first team, coaches of second and youth teams, technical directors and head scouts of Dutch professional football clubs. The CBA exempts these persons from the Dutch mandatory provisions on succession of fixed-term employment contracts.

Regular employees in the Netherlands may have several - with a maximum of three subsequent - fixed-term employment contracts only during the first two years of employment, otherwise the employment contract is presumed to be open-ended.⁴ Professional football clubs may agree with coaches and the aforementioned persons on an indefinite number of successive fixed-term employment contracts.⁵ In practice, this exemption results in the situation that coaches are mainly employed by clubs on the basis of fixed-term employment contracts.

The benefit for clubs of a fixed-term contract is that such contract may not be prematurely terminated by the coach without being obliged to compensate the club with an amount that is at least equal to the salary that the

coach would have earned until the expiry date of the contract term. This prevents that coaches can easily terminate their contract and move to another club without damages being due.⁶ However, this also provides that clubs that would like to prematurely terminate the employment contract of a coach are in principle held to pay compensation equal to the amount of salary that would have been due until the expiry date of the original contract term. Nevertheless, parties may also decide to agree beforehand on a contractual severance payment that is due in case of premature termination, in order to prevent discussions about the compensation afterwards.

¹ Tim WILMS is lawyer at CMS Netherlands and part of the employment as well as sports & media team of CMS.

² Decision of the Arbitration Tribunal of the Dutch Royal Football Federation of 5 April 2018, no. 1473, *Sunday Oliseh v. Fortuna Sittard*. Available in Dutch at: www.knvb.nl

³ Professional football divisions in the Netherlands are currently the Premier League ('Eredivisie' - the highest domestic level) and the First Division ('Eerste Divisie' - the second domestic level).

⁴ Art. 7:669a of the Dutch Civil Code.

⁵ The same exemption applies for players of professional football clubs.

⁶ A contract for indefinite period of time could for example be terminated by an employee (i.e. a coach) by observance of the statutory notice period of one month. The notice period of the employee could contractually be prolonged but this could never be more than six months. In case the notice period of the employee is prolonged, the notice period for the employer should be twice as long.



It should also be noted that a court or arbitration panel, depending on which instance has jurisdiction, may only terminate the employment contract of a coach upon request of the club if there is a statutory dismissal ground.⁷ With regard to dismissal because of "behavior", the following statutory dismissal grounds exist: culpable acts or omissions of the employee ("e-ground"); severe and permanent disturbed working relationship ("g-ground"); other grounds under which continuation of employment cannot be reasonably expected from the employer ("h-ground"). Interestingly, according to the legislator - as stated in 2015 when the new dismissal law including the afore-mentioned dismissal grounds came into force - the situation in which a football club intends to dismiss a coach due to bad results can lead to dismissal based on the "h-ground".⁸ However, there are no cases known in which a court or arbitration panel was requested to dismiss a coach due to bad results ("h-ground"). In practice, in most cases, clubs terminate the employment contract of coaches via an amicable settlement and therefore no proceedings have to take place. It thus remains unclear whether in future cases courts or arbitration panels will actually be willing to use dismissal based on the "h-ground" for coaches and, if so, what will be considered as "bad results".

The matter of OLISEH and Fortuna Sittard

OLISEH started as head coach of *Fortuna Sittard* as of 1 January 2017. He was employed based on a fixed-term employment contract which would end on 1 June 2019. On 14 February 2018, when *Fortuna Sittard* was ranked third in the First Division, *Fortuna Sittard* suspended OLISEH with immediate effect. *Fortuna Sittard* stated that OLISEH created an unworkable situation due to numerous incidents that occurred. According to *Fortuna Sittard*, players, staff and assistants were treated unjustly by OLISEH. *Fortuna Sittard* stated that OLISEH used abusive language, belittled and threatened people and ignored staff members. Several employees left the club because of the behavior of OLISEH according to *Fortuna Sittard*. The incidents started in the 2016-2017 sporting season and continued in the 2017-2018 sporting season.

In the 2017-2018 sporting season, OLISEH, according to *Fortuna Sittard*, for example violently pushed an employee of *Fortuna Sittard* against the wall and accused a player of the club of match-fixing. OLISEH received three official warnings and the club had a conversation with him after the 2016-2017 sporting season during which it was discussed with OLISEH that his behavior should improve. These efforts did, however, not result in any improvement according to *Fortuna Sittard*. *Fortuna Sittard* appointed a mediator to improve the working relationship but OLISEH did not attend a scheduled meeting with this mediator. OLISEH was suspended. Based on the above, *Fortuna Sittard* was of the opinion that the actions of OLISEH could be considered as "culpable acts" which justified the termination of the employment contract.

Alternatively, the club stated that the disturbed working relationship justified termination. *Fortuna Sittard* therefore requested the Arbitration Panel to terminate the employment contract of OLISEH.⁹

OLISEH disputed before the Arbitration Panel that termination of the employment contract was justified. He stated that the problems with the club started after he requested clarification from the club with regard to black money payments to the players. Furthermore, OLISEH contested several incidents and stated that the incidents in the 2016-2017 sporting season should not have been taken into consideration since the club decided to extend his contract after this season. OLISEH disputed that his actions could be considered as culpable acts and disputed that the working relationship was severely disturbed. According to OLISEH, he had an interest in being reinstated since the results of the team were good and he intended to be promoted to the Premier League with the club, while his work at the club was his only source of income. In light of the above, OLISEH requested the Arbitration Panel to be reinstated and to reject the request for termination of the employment contract by the club. If the Arbitration Panel would, however, terminate the employment contract, OLISEH claimed that he would be entitled to (i) a severance payment of EUR 114,000 net, (ii) a bonus of EUR 100,000 gross to which he would be entitled in case of promotion and (iii) an additional reasonable compensation.

⁷ The statutory dismissal grounds are laid down in Article 7:669 (3) of the Dutch Civil Code. Please note that Article 7:669 (1) of the Dutch Civil Code stipulates that in addition to a statutory dismissal ground, termination is only allowed if there is no suitable position for the employee available - either with or without training - within the group of the employer within a reasonable time.

⁸ Parliamentary Papers II 2013/14, 33 818, no. 7, p. 130.

⁹ In practice, disputes between members of the Dutch Royal Football Association (e.g. clubs, players, coaches) are dealt with by the Arbitration Panel of the Royal Football Association instead of the civil court based on the regulations of the association and underlying contracts which mostly include an arbitration clause.



Assessment by the Arbitration Panel

The Arbitration Panel concluded that the statements of the parties demonstrate that as from the beginning of *OLISEH*'s employment, incidents took place between *OLISEH* on the one hand and players, (medical) staff and assistant coaches on the other hand. *Fortuna Sittard* nevertheless decided to extend the contract of *OLISEH* after the 2016-2017 sporting season. At that moment, the club therefore was aware or should have been aware that *OLISEH* was not an easy person and that he was regularly involved in incidents. The Arbitration Panel is of the opinion that under these circumstances termination of the employment contract due to culpable acts of *OLISEH* is not justified.

It follows however from the submitted documents in the proceedings, the statements of the parties in the media and the incidents that took place (as described in the previous paragraph) that there was a disturbed working relationship. The Arbitration Panel concluded that there was no future for *OLISEH* at the club and that it was better for both parties to go separate ways. As a consequence, the employment contract of *OLISEH* should end in short term and reinstatement would not serve a purpose.

The Arbitration Panel ruled that both parties could be blamed for creating the disturbed working relationship. The club was blamed for the lack of initiatives to normalize the working circumstances. Until the first warning on 11 September 2017, *OLISEH*'s unacceptable behavior was not discussed with him. *Fortuna Sittard* therefore allowed *OLISEH* to behave to a high extent in - according to the club - an unacceptable way. Since the

club did not take any measures, it apparently took for granted that *OLISEH* insulted employees of the club and used bad language. Furthermore, as a good employer, the club was held to engage a - for both parties acceptable - mediator in an earlier stage such as on 11 September 2017 when the first warning was given to *OLISEH*. According to the Arbitration Panel, it was also relevant that *OLISEH* did not have to report to the board or any board members of the club, which gave *OLISEH* a lot of freedom to do his job.

The Arbitration Panel found that the statements of players, assistant-coaches and a physiotherapist submitted by the club showed that *OLISEH* could be blamed for his behavior. The Arbitration Panel referred to the minutes of the meeting of the players council of 14 March 2018 from which it followed that the communication between players and staff had significantly improved after the suspension of *OLISEH*. Another example referred to was the statement of the physiotherapist that has been appointed as from the start of the 2017-2018 sporting season. The physiotherapist declared that there was a lack of communication and appreciation in the relationship between *OLISEH* and the medical staff. In addition, he declared that *OLISEH* ignored his advice, kept players away from him and did not allow him to attend meetings.

Decision of the Arbitration Panel and compensation

Based on the above, the Arbitration Panel decided to terminate the employment contract of *OLISEH* as per 1 May 2018 due to a disturbed working relationship. No contractual severance payment had been

agreed upon between the club and *OLISEH* and therefore the Arbitration Panel had to decide which compensation *OLISEH* was entitled to. According to the Arbitration Panel and because both parties could be blamed for the disturbed working relationship, there was no reason to allow *OLISEH* with a compensation equal to the amount of salary that would have been due until the expiry date of the original contract term. The Arbitration Panel ruled that - taking into account all circumstances - *OLISEH* was *ex aequo et bono* entitled to a compensation of EUR 90,000 gross. This amount comprises approximately 8 monthly salaries (in gross), while the remaining contract term was 13 months. *OLISEH* was not awarded with the requested bonus to which he would have been entitled if the club was promoted, since those are too uncertain factors and *OLISEH* also had his part in the creation of the reason for termination.¹⁰ An additional reasonable compensation, which could have been granted if the employment contract had ended due to seriously culpable actions of the club, was not awarded because the role of *OLISEH* with regard to the creation of the disturbed working relationship was too important to award such additional compensation.

Comment

There is limited published case law of the Arbitration Panel regarding the termination of employment contracts of coaches of Dutch professional football clubs. This is most likely because most cases are settled away from courts.

¹⁰ On 28 April 2018, *Fortuna Sittard* ended second in the First Division and therefore promoted to the Premier League.



Parties in negotiations are aware of what can be expected since coaches are in principle entitled to compensation equal to the salary that would have been due until the expiry date of the original contract term. In addition, it is imaginable that clubs would like to prevent costly and timely proceedings regarding termination which may also lead to (negative) media attention. Another important aspect is that - especially since case law is limited - clubs do not want to risk that a situation occurs in which a court or arbitration panel rules that there are insufficient reasons for dismissal.

The decision in the matter of *OLISEH* and *Fortuna Sittard* is relevant because it gives clubs some more guidance with regard to compensation for coaches in case of dismissal. In addition, it demonstrates that the circumstances of the case may justify a significantly reduced compensation instead of the salary amount that would have been due until the expiry of the contract. In the matter of *OLISEH* and *Fortuna Sittard*, the reduced compensation is not a big surprise since *OLISEH*, by his behavior, had his part in the creation of a disturbed working relationship. Based on the circumstances and several incidents, the disturbed working relationship was obvious and termination seemed the only possible outcome.

” The decision in the matter of *OLISEH* and *Fortuna Sittard* is relevant because it gives clubs some more guidance with regard to compensation for coaches “

A question that remains unanswered is whether a reduced compensation might also be justified in the case of a termination of employment due to bad results (of the club) of the coach. As previously mentioned, the legislator stated that bad results of a coach could be a reason for dismissal based on the so called “*h-ground*”. Also in that situation, it could be stressed that the coach is (partly) to “*blame*” for the creation of a dismissal ground since the coach is responsible for the results of the team. Whether courts and arbitration panels will be open to draw such far-reaching conclusions remains, however, to be seen. As for now, the decision in the case of *OLISEH* and *Fortuna Sittard* provides a frame of reference for clubs in negotiations with coaches regarding the termination of the contract of the coach.