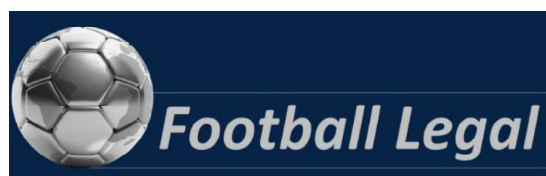




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Ministerial decree exempting football from Act on Employment and Security

By Dennis KOOLAARD
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→ National law - Labour law - Player contract - Breach of contract

Ministry of Social Affairs and Employment, Ministerial Decree,
24 June 2015, no. 2015-0000159867

With the Act on Employment and Security (*Wet Werk en Zekerheid* - hereinafter: the “WWZ”), major reforms are made to Dutch employment law. The WWZ is mainly intended to make dismissal procedures faster, fairer and cheaper.¹ The implementation of the WWZ has major consequences for both employers as well as employees and thus for clubs and players.²

The chain provision

On 1 July 2015, the so-called chain provision was amended. Before the implementation of the WWZ³, the maximum total duration of successive fixed term employment contracts was limited to three years. This is now reduced to a maximum of 24 months. The maximum number of successive fixed term employment contracts remains three.⁴ As such, if either a fourth fixed term employment contract is concluded, or the duration of at least two successive fixed term employment contracts surpass a total term of 24 months, the fixed term employment contract is automatically transposed into an indefinite employment contract.⁵ This chain is only interrupted if the employee and the employer have not concluded a new fixed term employment contract within six months from expiration of the previous fixed term employment contract (under the previous legislation this period was three months). With the implementation of the WWZ, the possibility to deviate from this chain provision by means of a collective bargaining agreement was narrowed down considerably, making it

impossible for the football sector to deviate there from at its own initiative.⁶

Since employment contracts in football are in principle always fixed term employment contracts, this change in legislation would have had major consequences if no exception would have been made for the football industry. For example, if a club hires a player for two years and subsequently concludes a new fixed term employment contract with the player, this second fixed term employment contract would be automatically transposed into an indefinite employment contract. A direct consequence of the conclusion of an indefinite employment contract would be that a football player is entitled to terminate his contract with one-month notice, without requiring any justification for the termination. As a consequence, football players would basically be free to leave a club at any time, as long as they would inform the club one month in advance. Since the transfer of a football player typically involves the payment of a transfer fee during the term of a fixed term employment contract from one club to another, football players represent a market value. One may agree or disagree with this practice, but the fact is that this is currently the practice in (inter)national football. If a football player would be able to resign at any time with one month notice, the market value of the player would be lost for the club. This would have been particularly damaging because the above derives from Dutch national

law, whereas clubs from other countries are not bound by such law.

In this respect an interesting parallel can be drawn between the implementation of the WWZ in the Netherlands and the recent ruling of a German court in a dispute between goalkeeper *Heinz MUELLER* and German football club *FSC Mainz 05*, where a judge apparently decided that there was no objective justification for the club to offer the player another fixed term employment contract and determined that an indefinite employment relationship was created. This issue was discussed by *Joachim RAIN* in the previous edition of *Football Legal*⁷ and an article is dedicated to this important case in the present issue.⁸ Although the consequences of the ruling in *Heinz MUELLER v. FSC Mainz 05* (assuming the decision will not be overturned on appeal and indeed becomes established case law) and the implementation of the WWZ in the Netherlands are comparable, it is submitted that the situation under Dutch Law is somewhat different from the situation under German Law in the sense that the conversion of a fixed term employment contract into an indefinite employment contract would be automatic in the Netherlands, whereas in Germany a court ruling to this effect would have to be obtained first.

In the process leading up to the implementation of the WWZ, the employment unions FBO (the union

¹ Voetbalzaken, no. 6 2014, FBO, p. 1

² It must be noted that the implementation of the WWZ has all kind of consequences for clubs and players, but it was not considered opportune to provide a detailed analysis of all possible consequences in this short contribution.

³ Since 1 January 2015, the WWZ is being implemented in the Netherlands. The second phase was implemented on 1 July 2015 and the third phase will be implemented on 1 January 2016.

⁴ Article 7:668A Dutch Code of Civil Procedure

⁵ JELINHAUS / VAN DRONGELEN, De Wet werk en zekerheid: grote gevolgen voor de sport!, TvS&R 2014-2, p. 30

⁶ JELINHAUS / VAN DRONGELEN, De Wet werk en zekerheid: grote gevolgen voor de sport!, TvS&R 2014-2, p. 30

⁷ RAIN, Employment contracts in German Football, with a specific focus on tools regulating their terms, *Football Legal* # 3, p. 21-25

⁸ RAIN, The “Heinz MÜLLER Case”, *Football Legal* # 4, p. 215



representing the interests of Dutch professional football clubs), *VVCS*, *ProProf* (unions representing the interests of Dutch professional football players), *CBV* (union representing the interests of professional football coaches) and the Royal Dutch Football Federation entered into a discussion with the Dutch Ministry of Social Affairs & Employment with the objective to have a ministerial decree implemented exempting football from the chain provision of the WWZ.⁹

During these discussions, the fear was expressed that Dutch football would be devaluated because players would walk out the door for only a very small amount of compensation, or none at all. Foreign clubs especially could use the situation in the Netherlands to acquire players from Dutch clubs for significantly reduced fees.¹⁰

Luckily for Dutch football, the lobby of the unions was successful and they were able to convince parliament with these arguments, which finally lead to the creation of an exemption from standard employment law for the Dutch professional football sector by means of a ministerial decree. This ministerial decree provided the stakeholders in Dutch football with the opportunity to deviate from the chain provision of the WWZ by means of concluding a collective bargaining agreement to this effect. This exemption from standard employment law was initially created only for professional football players and professional head coaches in football.¹¹ However, the Minister of Social Affairs & Employment announced on 18 June 2015 that an exemption would also be created for professional football coaches that are not head coaches.¹² As a consequence, all coaches that fall under the scope of the collective bargaining agreement for trainer/coaches are also exempted from the chain provision. No exemption is currently created for other sports.

Compensation for breach of contract

Another consequence deriving from the implementation of the WWZ is related to the compensation to be paid to clubs in case of a premature unilateral termination of a fixed term employment contract by a football player. Similar to

the FIFA Regulations on the Status and Transfer of Players (hereinafter: the “FIFA Regulations”), should an employee (a player) terminate his fixed term employment contract without just cause, compensation is in principle due to the employer (the club). Before the implementation of the WWZ, clubs had the possibility to choose between claiming compensation equal to the remaining value of the fixed term employment contract (*i.e.* the remaining term under the fixed term employment contract multiplied by the salary) or to claim “*complete compensation*”. With the implementation of the WWZ and the desired simplification of dismissal procedures, the latter possibility was abandoned.¹³ As a consequence, based on the WWZ, football players would in principle be entitled to terminate their employment contracts without just cause in exchange for payment of the remaining value of their contract only; a situation resembling the principles established in the Webster judgment of the Court of Arbitration for Sport.¹⁴

Here too, the crucial aspect in justifying an exception for the football industry from general employment law appears to be that, different from ordinary employment relationships, football players resemble a market value. Should compensation for breach of contract be limited to the remaining value of the fixed term employment contract, this market value could not be taken into account in awarding compensation to a club. Similar to the situation in respect of the chain provision discussed supra, the fear was expressed that football players playing for Dutch clubs would simply walk out the door by paying the remaining value of their contract (which would in practice most likely be paid by the player’s new club) thereby damaging the football industry in the Netherlands in comparison with other countries.

Initial attempts to convince the Minister of Social Affairs & Employment to create an exemption for football in this respect were unsuccessful. The Minister argued that it would be for clubs and players to individually determine how compensation for breach of contract would have to be compensated in their contracts.¹⁵

At a later stage, and due to the lobby of the football industry (particularly of the

KNVB and the FBO) a proposal was nevertheless made to amend the WWZ in this respect. A paragraph was added to article 7:671c and 7:677 of the Dutch Code of Civil Procedure by which the legal basis was created for certain industries to deviate from the standard practice by ministerial decree in order to enable judges to award a higher amount of compensation than is possible based on the standard provisions only. It appears that this exception is solely created for the premature termination of fixed term employment contracts by professional football players and not for other sectors.¹⁶ It is acknowledged in the relevant parliamentary papers that in establishing the compensation to be paid by a player to a club, a judge “*may take into account specific circumstances that are applicable in professional football*”.¹⁷

It is expected that the arbitration committee of the Royal Dutch Football Federation, the usually competent body to adjudicate employment-related matters in Dutch football, will use this exception in awarding compensation to clubs, as it used to take into account the market value of football players already in the past.

Transition allowance

A third feature deriving from the WWZ entails that as from 1 July 2015, employers need to pay a transition allowance to employees if the employment relationship is discontinued at the initiative of the employer. This allowance is 1/6 of the monthly salary per 6 months over the first 10 years of employment. After these first 10 years, the allowance is 1/4 of the monthly salary per 6 months. The maximum allowance is EUR 75,000 gross or a yearly salary if this yearly salary is higher than EUR 75,000 gross.¹⁸

Employees are only entitled to transition allowance if the employee had an employment relationship with the employer for at least 24 months and the employer discontinued the employment relationship. It is established that if an employer does not offer the employee an extension of his fixed term employment contract this per se entails the transition

⁹ Voetbalzaken, nr. 1 2015, FBO, p. 2

¹⁰ Parliamentary papers I 2013/14, 33988, nota van wijziging, toelichting onderdelen 20 en 25, p. 45-46

¹¹ Voetbalzaken, no. 1 2015, FBO, p. 2

¹² Voetbalzaken, no. 4 2015, FBO, p. 1

¹³ Voetbalzaken, no. 3 2014, FBO, p. 1

¹⁴ CAS 2007/A/1298 Wigan Athletic FC v. Heart of Midlothian; CAS 2007/A/1299 Heart of Midlothian v. Webster & Wigan Athletic FC & CAS 2007/A/1300 Webster v. Heart of Midlothian

¹⁵ Parliamentary papers I 2013/14, 33818, C, p. 9-10 (MvA)

¹⁶ JELINHAUS / VAN DRONGELEEN, De Wet werk en zekerheid: grote gevolgen voor de sport!, *TvS&R* 2014-2, p. 35

¹⁷ Parliamentary papers I 2013/14, 33988, nota van wijziging, toelichting onderdelen 20 en 25, p. 45-46

¹⁸ Voetbalzaken, no. 6 2014, FBO, p. 1



allowance falling due.¹⁹ This is in principle²⁰ only different if the employee engaged in serious culpable conduct.²¹ As such, it is submitted that even in case an employer decides not to extend an employment contract because of culpable conduct of the employee, the transition allowance is in principle still due, as long as the culpable conduct is not regarded as a serious culpable conduct.

An important aspect that should not be left unmentioned is that “education costs” that are incurred by the employer with the intention of broadening the qualities of the employee may be deducted from the transition allowance due.²² It remains to be seen whether investments made by clubs in training players can be deducted from the transition allowance. In the short term this appears difficult since the Minister of Social Affairs & Employment determined that “education costs” may only be deducted with the written consent of the employee before the costs are being made, a feature that was most likely not anticipated for by the clubs when concluding the employment contracts that are currently in place.

It is not expected that the Ministry of Social Affairs & Employment will create an exemption for football in respect of the transition allowance.

Conclusion

Major reforms are made to Dutch employment law which inevitably have consequences for employment-related matters in the football sector in the Netherlands. Clubs and players should be well aware of these consequences and must adjust their daily practice to the new legislation.

However, due to the effective joint lobbying of the unions in Dutch football with the Ministry of Social Affairs & Employment, and parliament in general, a potential disaster for the Dutch football industry was avoided. It is indeed quite an accomplishment that the football unions were able to convince the Dutch government of the specificity of football,

justifying the only sector-specific exception to generally applicable employment law. It remains to be seen what the consequences will be for other sports in the Netherlands that did not obtain such exception.

Implementation of the KNVB Regulations for Intermediaries

By Dennis KOOLAARD
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→ Royal Dutch Football Federations (KNVB) - National regulation - Intermediary

KNVB, Board's decree, 30 March 2015



In the Netherlands, by decree of the board of the Royal Dutch Football Federations (Koninklijke Nederlandse Voetbal Bond - hereinafter: the “KNVB”), the KNVB Regulations for Intermediaries (hereinafter: the “KNVB RI”) were implemented on 30 March 2015.

Following the implementation of FIFA's Regulations on Working With Intermediaries (hereinafter: the “FIFA RWI”), all national football federations affiliated to FIFA were required to implement their own set of regulations for intermediaries in their respective jurisdictions, based on the minimum requirements established in the FIFA RWI.

Since no overview of the Dutch regulations was adopted in the third edition of *Football Legal* published in June 2015, it was deemed appropriate to provide a short overview of the Dutch regulations in comparison to the regulations implemented by other national football associations.¹

The most notable distinguishing feature in the KNVB RI is arguably that FIFA's recommendation to implement a cap on the remuneration to be received by intermediaries was not followed. Instead, the KNVB RI determine that “[t]he amount of the fee payable to an intermediary who represents a player is calculated on the basis of the agreed gross annual salary, including a pro rata signing-on fee, excluding guaranteed or non-guaranteed premiums and/or bonuses of the player for the full term of the player contract.”² As to the remuneration to be received by intermediaries from clubs, the KNVB RI determine that “[c]lubs that are represented by an intermediary must, if a fee has been agreed upon, remunerate the intermediary by payment of a fixed amount that is agreed on prior to the negotiations on the conclusion of the player contract and/or the relevant agreement with regard to the transfer of a player [...]”.³

The KNVB opted to stay loyal to the provision under FIFA Players' Agents Regulations, i.e. the former set of regulations of FIFA governing the activity of players' agents/intermediaries that is now replaced by the FIFA RWI, according to which an intermediary would be remunerated with 3% of the annual gross basic salary if a club and an intermediary failed to reach an agreement about the amount of fee payable to the intermediary.⁴

In order to be registered as an intermediary with the KNVB, intermediaries need to provide a) a fully completed and signed intermediary statement; b) a copy of a valid passport and/or valid ID card; and c) an original certificate of conduct, or in the event that the natural person and/or legal entity is not listed in the Persons Database of the Dutch government or in the register of the Dutch Chamber of Commerce, a similar document in the country where the natural person and/or legal entity is registered, subject to approval by the board, with this document having been issued no later than six months before registration and with a view to represent players and/or clubs. The requirements for registration may be considered quite flexible in comparison with the requirements of other national football federations. It is for example not necessary for KNVB-registered intermediaries to have arranged for an

¹⁹ JELLINGHAUS / VAN DRONGELEN, De Wet werk en zekerheid: grote gevolgen voor de sport!, *TvS&R* 2014-2, p. 31

²⁰ It must be noted that there are other exemptions such as an employee being younger than 18 years and working less than 12 hours per week and if the employee reached his retirement age, but it is unlikely that these exemptions will be relevant in professional football.

²¹ Voetbalzaken, no. 6 2014, FBO, p. 1

²² Voetbalzaken, no. 6 2014, FBO, p. 2

¹ A comprehensive analysis of the KNVB RI will be published in the forthcoming edition of the *European Sports Law & Policy Bulletin* concerning the new FIFA Regulations on Working With Intermediaries.

² Article 8(2) of the KNVB RI

³ Article 8(3) of the KNVB RI

⁴ Article 8(6) of the KNVB RI



adequate insurance⁵, to be fluent in the language of the national federation concerned⁶, to be legally residing in the country of the national federation concerned⁷ or to have a personal interview with the national football federation.⁸

The registration fee is currently EUR 544.50 (EUR 450, excl. 21% VAT). These costs are quite moderate in comparison with other countries,⁹ although it must be noted that the KNVB may amend the registration fee on a yearly basis.

Finally, the KNVB RI determines that disputes between intermediaries and members of the KNVB, as well as disputes among intermediaries will be settled by arbitration to the exclusion of civil court, with due observance of the relevant provisions in the Arbitration Regulations.¹⁰ It is understood that this clause refers to the Arbitration Committee of the KNVB, which is generally perceived as meeting the minimum requirements established by FIFA.

Certification for organisations representing intermediaries

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→ Royal Dutch Football Federations (KNVB) - National regulation - Intermediary

The Netherlands is the first country close to reaching an agreement between the different stakeholders in football regarding a certification for organisations of intermediaries.

Following the implementation of the FIFA Regulations on Working With Intermediaries, the concept of FIFA-certified players' agents was abandoned. In the absence of any obligation requiring persons willing to represent the interests of players and/or clubs to pass a test in order to be granted a license, or to have an adequate insurance policy, there no longer is a system in place warranting the quality and reliability of intermediaries. The fear has been expressed that this would lead to a "wild-west" situation, where anyone is suddenly allowed to represent players and/or clubs.

In order to prevent, or at least attempt to limit such a situation, the Royal Dutch Football Federation (KNVB) is currently debating the implementation of a certification for organisations of intermediaries with other stakeholders in Dutch football. The idea is not for intermediaries to be individually certified, but rather that the organisation to which they are affiliated is.

A working group consisting of representatives of the KNVB, *ProAgent* (the union representing the interests of intermediaries in Dutch football), *VVCS* and *ProProf* (the unions representing the interests of players in Dutch football) was created to discuss the requirements that would be necessary for certification.

Although no final decision has currently been reached, the working group found a common ground during a meeting held on 9 June 2015 regarding the following requirements:

1. Permanent education. The relevant organisation would have to require its affiliated intermediaries to participate in permanent education.
2. Insurance. The relevant organisation would have to make sure that each of its affiliated intermediaries has an insurance policy in place similar to the insurance policy that was mandatory under the previous regulations.
3. Legal assistance. The organisation needs to provide legal advice / support to its affiliated intermediaries.
4. Code of conduct. The organisation needs to have a code of conduct in place that is applicable to all its affiliated intermediaries.
5. Pre-registration. The organisation may only allow intermediaries to join the organisation if they are registered as intermediaries with the KNVB.
6. Minimum number of members. The organisation would need to have at least 50 members or is an officially recognised union.
7. Independent assessment committee. The organisation would need to have an

independent assessment committee in place in order the assess compliance of its affiliated members with the code of conduct, with the authority to suspend membership.

8. Financial transparency. Certain minimum requirements regarding financial transparency of the organisation may be added.

It remains to be seen how such a certification system will be implemented, but the initiative is certainly to be applauded since it would undoubtedly provide clubs and players with more warranties regarding the quality and reliability of intermediaries than the current system. The developments regarding the implementation of a system of certification for organisations of intermediaries are interesting and the result might set an interesting precedent for other countries.

⁵ Which is a requirement in Portugal (see: CLUNY / ODA, FIFA's new Regulations on Working with Intermediaries, National Implementations – Portugal, *Football Legal* # 3, p. 80).

⁶ Which is a requirement in France (see: MOYERSOEN, FIFA's new Regulations on Working with Intermediaries, National Implementations – France, *Football Legal* # 3, p. 66).

⁷ Which is a requirement in Italy (see: GALLAVOTTI, FIFA's new Regulations on Working with Intermediaries, National Implementations – Italy, *Football Legal* # 3, p. 52).

⁸ Which is a requirement in Spain (see: CRESPO / RIPOLL RODRIGUEZ, FIFA's new Regulations on Working with Intermediaries, National Implementations – Spain, *Football Legal* # 3, p. 61).

⁹ Other federations are said to charge the following registration fees: England EUR 700, Spain EUR 816, Germany EUR 500, Portugal EUR 1,000 and the United Arab Emirates EUR 5,000.

¹⁰ Article 9 of the KNVB RI



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