

# HIV infection and contracts with football players

A decision of the High Court of the Canton of Zurich, which had been taken on 8 April 2013, yet surfaced to public discussion only recently, has brought - or should bring - the possible legal implications of very serious diseases, and in particular of HIV infections, back to the attention of international sports lawyers. These implications may arise not only in professional football, but also in all comparable sporting disciplines. Michele A.R. Bernasconi, newly appointed member of the *World Sports Law Report* editorial board, and Dr. Jan Kleiner of Bär & Karrer AG, provide an analysis, in light of the aforementioned court decision, of the contractual issues that an HIV infection raises both before and after the conclusion of a contract between a football player and a club, and in particular assess the situation faced by the Court which had to examine the legal validity of a unilateral termination of an employment contract by a football club, related to an HIV infection of a professional football player.

It was almost 25 years ago, during the NBA season 1991/1992, that the great US basketball player Earvin 'Magic' Johnson Jr. was tested positive for HIV during a standard medical check. At that time, HIV infections of top athletes reached the front pages of all the newspapers.

Since then, besides a few exceptions, HIV positivity has hardly been the topic of high profile cases of professional football players or other Athletes - at least as far as publicly known.

Rather, heart failures have been at the centre of the media's attention, recently in connection with the terrible events of April and May 2015, concerning two young Belgian players, Gregory Mertens and Tim Nicot.

Against this background, and triggered by the above mentioned Court decision, this short article will focus on the contractual issues that an HIV infection raises (i) before a contract between a player and a club is concluded on the basis of the regulatory obligations and rights of professional football players and football clubs in accordance with the FIFA Regulations on the Status and Transfer of Players (the 'FIFA RSTP')<sup>1</sup> and (ii) after the conclusion of a contract, in particular in cases where a party wishes to prematurely terminate such contract.

## HIV tests and conclusion of agreements

According to art. 18 para. 4 FIFA RSTP, the validity of a contract 'may not be made subject to a successful medical examination and/or the grant of a work permit.'

As the title itself of art. 18 FIFA RSTP reveals ('Special provisions relating to contracts between professionals and clubs') the contractual relationship, which is regulated by art. 18 para. 4 FIFA RSTP is the one between a (new) club and a professional football player. Accordingly, and without commenting on the economic viability of such a contractual solution, the validity of a transfer agreement between two clubs can be made subject to successful medical examinations.

Applied to cases of HIV infections, the meaning of art. 18 para. 4 FIFA RSTP is clear: A football club cannot conclude an agreement with a (new) player and make such agreement subject to,

among other possible tests, a HIV test to be performed after entering the agreement with the player. In other words, if a club decides to sign a new player and to perform medical and HIV tests only after signature, the club cannot agree with the player that a negative HIV is a condition of validity of the agreement. Accordingly, under the FIFA RSTP, if a club discovers, after conclusion of a contract with a player, that this player is HIV positive, the club will in principle<sup>2</sup> not be able to argue that the employment contract was not validly concluded.

Assuming therefore that the agreement between club and player will be valid, the question arises whether such agreement can be prematurely terminated.

## HIV tests and termination of agreements

### a) Mutual agreement

Under the FIFA RSTP, agreements between clubs and professional players 'may only be terminated upon expiry of the term of the contract or by mutual agreement.' (Art. 13 FIFA RSTP). A first possible modality of termination of an agreement between a club and a professional player therefore is to reach a consensus and conclude a valid, mutual termination agreement.

### b) Unilateral termination

As widely known, a contract between a professional player and a club 'may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.' (Art. 14 RSTP). If a contract is terminated without just cause, art. 17 FIFA RSTP - and possibly, in addition to it, some provisions of Swiss law - will apply. Just cause exists in any circumstance under which it can

no longer be reasonably expected for a party to continue the contractual relationship<sup>3</sup>. Under both the jurisprudence of the Swiss Federal Tribunal as well as in Court of Arbitration for Sport ('CAS') case law, the existence of just cause or 'good cause' is admitted only restrictively<sup>4</sup>.

In consequence, the question arises whether or not an HIV infection constitutes a just cause, i.e. a valid legal ground for a club to terminate an agreement with a player. This question brings us to the case adjudicated by the Swiss court. In fact, in its decision, the Court had to examine the legal validity of a unilateral termination of an employment contract by a football club, related to an HIV infection of a professional football player.

## The Swiss Court case of the player with an HIV Infection<sup>5</sup>

### a) The facts

The case adjudicated by the High Court of the Canton of Zurich goes back many years, i.e. as far back as 2002. In May 2002, a club and a professional player concluded a fixed-term employment contract for a duration of three years. During the subsequent medical examination, an HIV infection of the player was discovered.

Although the player brought forward expertise from a medical consultant, according to which he was fully able to play football at a professional level, the club terminated the employment with immediate effect, arguing for the existence of good cause.

Despite initial attempts to amicably resolve this matter, the parties eventually ended up in front of the labour Court of Zurich and, subsequently, in front of the High Court of the Canton of Zurich.



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### b) The arguments

Having prematurely terminated the employment contract with the player, the club had to make the case that HIV positivity of a player would entitle it to such termination. In particular, the club held that in professional football, a contagious disease such as HIV could easily be transmitted. Moreover, the club reproached the player for refusing to declare his infection to his teammates and to other players. Therefore, it was the club's position that it could not take the responsibility of letting the player participate in training and/or matches.

In addition to the existence of just cause, the club also argued that it was entitled to unilaterally terminate the employment contract based on error and/or deceit by the player: The club considered that the player should have informed the club about his HIV infection prior to the conclusion of the contract. In particular, it was the club's argument that because in professional football, there is a high risk of infection, an employee is obliged to provide information about an HIV infection, and prior to the conclusion of a contract, even if he/she is not specifically asked to do so. Since the player had not provided such information, the club held that also for this reason, it was entitled to terminate the employment contract.

### c) The Court's considerations

As a first step, the Court examined whether the player would have been obliged to provide information about his HIV infection prior to the conclusion of his employment contract.

In this respect, the Court found two principles of Swiss law to be crucial: First, the Court stated that in cases where particular circumstances would render an

employee incapable to fulfil his duties under an employment contract, the principle of good faith obliges the employee to inform his employer, by himself, about such circumstances. At the same time, the Court also considered that an HIV infection constituted a personal characteristic/attribute of an employee, about which an employer is in principle not allowed to request information from the employee<sup>6</sup>.

However, the Court also referred to Swiss legal doctrine, which has established exceptions to these principles. In particular, an employer may exceptionally be allowed to gather information related to the HIV status of an employee, provided that a specific workplace causes an increased risk of infection for third persons. The Court thus concluded that it would have been possible for the club to enquire about a possible HIV infection of the player.

From the above, it resulted that in cases where an employer is exceptionally entitled to request information about the HIV status of an employee, the latter is not obliged to provide such information. A player may therefore rather leave it to the club to request an HIV test if the club deems this to be necessary. As long as there are no visible symptoms, the employee must only inform his employer about his HIV infection if it is recognisable that he is not suited for the respective work due to his infection<sup>7</sup>. As a result, the Court held that the fact that the player had not given information about his HIV infection did not constitute a good cause justifying the club's premature and unilateral termination of the employment contract with immediate effect<sup>8</sup>.

In addition to the above, the club argued that the constant risk of infection of other players would

make it unreasonable to expect the club to adhere to the contractual relationship, in particular, since the player refused to communicate his HIV infection to his teammates.

The Court held that by itself, an HIV infection does not make it unacceptable for a club to adhere to an employment relationship with a player. Only in circumstances where no appropriate measures can be taken to reduce the risk of infection, can it no longer be expected for a club to continue the employment contract with a player. The Court also considered that the club itself had stated that it would have been possible to take such measures. In consequence, the Court was of the view that it would have been up to the club to take these measures (e.g. to inform the teammates of the player about the infection).

In this respect, the club brought forward that an HIV infection belonged to the so-called 'sphere of intimacy' of a person and that accordingly, it could not pressure the player to provide such information (e.g. by issuing a warning). If it had done so, this would - according to the club - have amounted to coercion or blackmail.

The Court acknowledged that indeed, the club could not have informed the teammates of the player without the latter's consent and that indeed, only if the player's teammates had been informed accordingly, the necessary precautions to prevent infections could have been taken<sup>9</sup>. Still, the Court rejected the club's argument that the refusal of the player to disclose this information to his teammates immediately constituted a good cause for a premature termination of the employment contract<sup>10</sup>.

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such information for the teammates, and also about the consequences if the player were to refuse to inform his teammates. The Court therefore concluded that a termination of the employment contract would only have been possible after a prior warning to the player and if, despite such a warning, the player still prevented the club from taking the necessary precautions (notably by refusing to inform the other members of the team about the HIV infection)<sup>11</sup>.

As a result, the Court concluded that the termination of the employment contract by the club was not based on good cause<sup>12</sup>.

### Conclusion

Based on the above considerations, the following conclusions must be drawn:

1. The validity of a contract between a professional player and a club cannot be made subject to a negative HIV test.

2. HIV infection may constitute a reason for a club to prematurely and unilaterally terminate an employment contract with a player, but only (i) if a player refuses to disclose his HIV infection to his teammates and (ii) if the club submits to the player an explicit warning that if the player does not change his attitude, the club will terminate the contractual relationship.

3. If a HIV positive player accepts to disclose his HIV infection to his teammates and to take the appropriate measures to prevent contagion, there is no good cause to terminate the employment contract prematurely.

edition, available in English at [http://resources.fifa.com/mm/document/affederation/administration/02/55/56/41/regulationsonthestatusandtransferofplayersapril2015e\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/55/56/41/regulationsonthestatusandtransferofplayersapril2015e_neutral.pdf)

2. Unless there are other valid legal grounds to claim invalidity, like for example cases of fraudulent inducement.

3. Art. 337 para. 2 CO; cf. also CAS 2008/A/1517, at para 56; CAS 2006/A/1180, at para. 21, 25. On the issue of termination of a professional football player's employment contract, see also Kleiner, Jan: Der Spielervertrag im Berufsfussball, Zurich 2013, at p. 721 et seqq.

4. Swiss Federal Tribunal, decision 130 III 213 et seqq., para. 3.1 at p. 220; CAS 2008/A/1517, at para. 56; CAS 2006/A/1100, at para. 11.

5. High Court of the Canton of Zurich, decision dated 8 April 2013 - LA110040-0/U. The decision was only discussed publicly recently, see Cf. Netzle, Stephan, Fristlose Entlassung eines Fussballspielers wegen HIV-Infektion, in: Zeitschrift für Sport und Recht (SpuRt), 1/2015, at p. 26-29.

6. Decision LA110040-0/U, at para. 4.2.3.

7. Decision LA110040-0/U, at para. 4.2.4-4.2.5.

8. Decision LA110040-0/U, at para. 4.2.6.

9. Decision LA110040-0/U, at para. 4.4.2.

10. Decision LA110040-0/U, at para. 4.4.4.

11. Decision LA110040-0/U, at para. 4.4.5.

12. It must be highlighted that under Swiss law, such a termination is still valid (i.e. the employment contract is effectively terminated), but an employee, in principle, has a claim for the salary due under the contract, had it not been prematurely terminated.



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1. Reference will be made to the 2015