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The particularities of the “job” performance of the professional athlete: Rights and obligations of the parties to the employment contract

Introduction

Sport is traditionally an activity tending to the physical, moral and spiritual improvement of the person. Sport is however no longer merely a hobby. It is commercialized. There exists a great industry moving around sport. Professional athletes cannot pursue any other activity. The sport performance is translated into an activity having economic value. Sport business acquires a particular importance for many countries, being a sector in continuous evolution.

This progression from the amateurism of the athletes to the spirit of commercialization demands a legal framework. There is, however, a need to take into account the specificity of the sport phenomenon. Because of its dual quality, as both athlete and employee, the professional athlete is thus "shared" between two sets of standards: labour law and sports standards. The articulation between the two legal orders is not always easy.

Furthermore, there is need of social protection of professional athletes as not all of them belong to the highest category, which is very well-paid and has the capacity to protect its own interests. Therefore, there is a reason to apply labour law: the athlete is integrated in the business organization of the team having to follow the instructions given by the representatives of the club or of the coach. A new branch of law is created; the sport labour law.

The rules governing sport labour relations belong either to the group of typical labour law or to the specific regulations of sports law. These regulations are typical law provisions, statutes of sport federations and specific collective agreements.

Sometimes we meet also standard employment contracts proposed by national sport federations.

The obligations

The main obligation of the athlete is to perform his sport activity and to participate in all of the sport events proposed by the club. This concerns not only the participation in a match but also to all training sessions organized by the club. Even if the athlete is not selected for participation in a match, he must be ready for performance. In any event he is obliged to employ all his energy and his sporting capacity for his employer's benefit, as any other employee. He must put everything into action: his science of play, his energy and his physical abilities to serve the game even if he has no obligation for his performance to result in e.g. goals or, for the coach, to win all matches.

The place of the performance can be designated not only within the country, but also abroad.

Furthermore, athletes are expected to respect rules concerning doping and to refrain from it as it damages the exemplary image of sport. They shall not refuse to participate in doping tests organized either by the sport federation or by the club. Even the serious suspicion concerning doping may destroy the trust needed for the participation to the activities of the club. In these cases the termination of the employment contract is not excluded.

A general duty of fidelity is also recognized. He has to avoid any activity which could be considered contrary to the interests of his employer. It is obvious that not only he must refrain from participation, but he has to reveal any kind of illegal activities that tend to alter the result of a game.

He is obligated not to reveal any kind of information concerning the organization and the tactics of the team risking damaging it directly or indirectly. He has forfeited the possibility to exercise competitive activities to those of the club, such as to participate in athletic games of another club. However, this duty is limited during the period of validity of the contract. After its termination the athlete is free to participate to other teams.

Finally, he has to participate to the public relations activities of the club. In the event that he has contracted to a clause concerning his participation to advertisement activities of the club, he shall participate in them. These activities could be considered

as secondary obligations included in the employment contract. During the sports activities or the social activities of the club he is not entitled to wear sports gear other than that produced by the outfitter of the club.

The power of direction

The employment contract of the athlete is not distinguished from other types of employment contracts concerning the managerial power of direction. The athlete shall follow the instructions of the representatives of the club concerning the content, the time and the place of the performance, as it is rather impossible to define them in all detail in the initial contract. This instructions will concern the games, the training and every kind of supplementary activity. He shall also follow the directions of the coach concerning individual training, a measure which normally does not constitute discrimination compared to his colleagues.

This power of direction will be exercised by the persons legally representing the club, or all other persons to whom the power of direction has been partially transferred, such as the coaches or other trainers. The athlete shall respect and obey their orders concerning his performance even if he does not agree with them. This requirement is apparent in team sports where the personal ability is less important than the capacity to follow a team spirit, that is to say to be part of a team following common principles in order to achieve a common objective. Therefore, the athlete cannot, in principle, claim a concrete position in the team, unless it is differently concluded in the employment contract.

Like all other employees the athlete is not obliged to follow the orders of his employer or of his coach which risk endangering his health. Therefore, he has discretion not to follow excessive training periods which risk his health. On the other hand practice of many sports includes some risks of injury which is expected to be accepted by the athlete. He is not entitled to disobey the instructions of the coach invoking the possibility of this risk, e.g. refusing to participate to the formation of a wall for defending a free kick in football.

As mentioned above, the athlete must participate in public relations activities of the club. The athletes constitute the most important part of the image of the company and the requirement to contribute to its improvement via these activities is a secondary obligation of their employment contract. It is not excluded that the athlete must,

during these activities, wear the clothing provided by the club. He has also to be present in the group photos of the team.

However, the use of the individual image of the athlete for advertising reasons needs, to our opinion, a special clause. The right to his image must prevail here, but without reference to the employer's image, name, emblems and / or other distinctive signs. The employer's prior consent must be obtained from the employee in order to use his individual image and that of the employer.

The protection of the personality of the athlete

During the negotiations for the conclusion of the contract, the athlete must provide information concerning his activity and his performance. He is obliged to answer in a truthful way only to the questions linked to his sport performance and to a legitimate aim. On the contrary, questions making reference to a discrimination are not admissible and the athlete is entitled to refuse to answer or to even to lie. Questions regarding his career are generally admissible. In the same way questions linked to his previous illnesses, operations etc. are admissible in the measure that may influence his performance. Finally, they should be qualified as admissible all questions regarding his previous doping offences or sanctions of exclusion imposed by the sport federation.

The principle of equal treatment is also applied in relation to the sport relationship. This principle does not concern only nationality as ground for discrimination, but all other grounds provided by national law, such as religion, race, ethnic origin, belief, sexual orientation etc. All relative European and national regulations apply.

Like all employees, the athlete is a free person during his private life. The private life of the athlete may affect his performance. Only activities directly linked with his labour performance are included in those the employer has a right to control.

However these limitations concerning athletes seem various and extremely extended. This is due to the particularity of the sport performance seeking high quality physical exertion and to the obligation to follow a team spirit. Therefore, the club is often interested as private conduct may damage its physical productivity. In the event of alcohol or drug abuse his sport performance may be affected.

Often, the image of the club coincides with the image of its athletes. The private life of the athlete affects the interest of the club. The athlete must refrain from certain

conduct during his private life which is not considered compatible with the common “image of a sportsman”. Such behaviour may create negative comments by the press. It is also often provided that he must adopt a sport life-style e.g. not visiting late night clubs, not be drunk, not staying late away from home, being in bed on a reasonable time and even following a concrete dietary regime determined by the physicians of the club. However, the club is not entitled to adopt “police” methods in order to verify if the clauses accepted are effectively respected. E.g. it is not acceptable if representatives of the club visit the homes of the athletes during the night in order to verify if they respect the bed time!

The athletic contract may possibly include clauses providing for his obligation to avoid during his free time the exercise of some activities dangerous for his physical integrity, such as skiing, moto-cross etc., as the club has a particular interest for the maintenance of the capacity of the athlete to perform his physical activity.

On the other hand, when the team travels to another location, the athletes may be requested to travel in a group in order to reinforce the spirit of the team and certainly stay in the same hotel with other teammates. It is also possible to ask them to avoid the presence of their spouse or consort in the same plane or in the same hotel.

The athlete shall also, like all other employees, exercise a duty of fidelity towards his employer the club even during his private life. He has an obligation to avoid declarations to the press or interviews commenting negatively on the performance of his colleagues, the choices and the tactics of his coach, the behavior of the supporters and the policy and the internal affairs of the club. He must take into account the legitimate interests of the club. However, a broad obligation to ask the permission of the club before any declaration to the press constitutes a rather unjustified limitation of the freedom of expression.

An important issue linked to the protection of the personality of the athlete is the knowledge of the athlete’s state of health. The club has a particular interest to know, as it is directly related to the sport performance of the athlete in order to plan the future of the team and the training of its members. Therefore, the club has to provide periodical or extraordinary medical and physiometric exams of the athletes who do not have the right to invoke their confidentiality in order to refuse to participate.

The club must not reveal information concerning the status of health of the athlete due to the interest of the supporters or the press. The protection of his private life or of his personal data prevail.

An important issue is the care of the athlete during the employment contract. Even if the club has a particular interest to the evolution of the athlete's state of health especially after a special event, such as a sport accident, the choice of the doctor or the physician by the athlete must prevail. This choice cannot be waived even by a special clause as it belongs to the hard core of the personality of the individual.

Finally, sometimes the club is obligated to terminate the contract with the athlete due to the pressure of third persons like its supporters or its sponsors. The employer must not satisfy such demands "sacrificing" the athlete. He must defend the athlete unless he was the person who created the problem e.g. by unjustified declarations to the press. In such cases the athlete may be requested to make all necessary efforts in order to normalize the situation which may risk creating problems for the club.

Disciplinary measures

Discipline is often necessary in order to reserve the regular execution of the work. Team work demands particular respect of the discipline in order to arrive at the best results. Instructions of the coach, exercising the managerial authority, obtain particular value in the way to preserve coordination of the individual efforts in order to achieve the maximum of the team effort. Therefore, discipline in team sports acquires particular importance especially in a field where individualism constitutes a natural manifestation of the athlete (and particularly of the young athlete less accustomed to team work).

This situation leads the responsible persons of the club to request strict discipline measures concerning not only the mere sport performance, but also secondary aspects of this activity. Sometimes, the way of organization of the team approaches more military life than the functional organization of a company. Finding the balance between the necessary team discipline and the respect of the personality of the athlete is not always an easy issue. Despotic attitudes, guided by the fact that the financial subvention of the club is assured by economically powerful persons, are to be avoided.

In the event of breach of discipline, some original measures are provided such as breach of the contract, individual training, financial penalties or exclusion from club

events. In any event, disciplinary measures must be proportional to the behavior of the athlete, correspond to a negligence concerning the contractual duties and respect his personality.

Finally, arbitrary measures are to be avoided. As an example of arbitrary measure we can mention a recent decision of a Greek basketball club which decided, in order to punish the athletes after the loss of the title of the European champion, to organize their return from Constantinople (Istanbul) to Athens by bus and not by air-plane as it was previously planned and constitutes regular transportation. A few athletes decided not to follow the team and to return by plane paying for their own tickets. The issue was if these athletes have committed an offence or they had only refused to obey an arbitrary measure of the club.

Right to employment

In many national legal orders a right of the employee is not limited to the payment of a salary, but a right to the employment is recognized. This right is understood also as a right included in the general protection of the personality of the employee.

The participation of the athlete to the game is effectively of particular importance for him. This is the way to maintain and to improve his image, his popularity and his performance. This is the crucial moment of the whole activity of the athlete and to which all his efforts are orientated. On the other hand, as some pay bonuses depend on the participation of the athlete in a game, he may have a particular financial interest to this participation.

However, this right finds important limits in team sports, where considerations other than the interest of the athlete to participate, prevail. The number of the athletes who are going to participate in a game is lower than the total number of club's athletes. It is therefore absolutely normal that not all of them can participate to the game. Therefore, it belongs to the coach to proceed to the choice of the athletes who are going to participate in the game or who will remain on the substitute bench. These choices are often complex depending on a variety of factors, sometimes not directly related to the performance of the athletes themselves, such as adjusting to the opponent's tactics or adaptation to the group's future obligations. Unless it is possible to be proved that the lack of choice is due to an arbitrary decision of the responsible persons of the club, the athlete cannot claim his participation in a game or to a concrete number of games.

However, the club has to give all the athletes the chance to participate in a game. It cannot therefore refuse an athlete to participate in the training sessions and to use the training installations of the club like all other athletes.

In the event that the athlete does not participate in a game for a long period of time, it is also questionable if he is entitled to give notice to the club.

In any event, if the exclusion from the team's activities is systematic and objectively unjustifiable tending to his marginalization, then it could be considered as “mobbing”, justifying the resolution of the employment contract.

The salary

The main obligation of the club as an employer is the payment of the salary. This salary is either annual or monthly based. A portion from the basic salary supplementary bonuses are often agreed depending either on the performance of the team e.g. winning a championship or another title, or on the performance of the athlete e.g. a concrete number of participations to a match, or goals or points scored.

If he does not participate on his own responsibility in a match, his salary reduction will not be based on the duration of the match.

The athlete like all other employees is also entitled to annual holidays and to a holiday bonus. However due to the particular structure of their salary, the calculation and the manner of payment of this bonus is not always clear, e.g. often it is provided only as an annual salary. It is also often provided that a part of monthly salary of the athlete will be considered as an advance of the holiday pay and bonus, which is considered legal in many national legal orders.

Health and security

Athletes should be protected against any damage to their integrity and their health. The club therefore has the duty to take all measures in order to protect them and in order to avoid any injury. It has also the duty to provide all the necessary protective equipment. It must also avoid training methods that are extremely exhausting or simply dangerous. In any event, someone has to take into account the particularities of each sport and the requirements of its practice.

On the other hand, if the athlete is ill or in a vulnerable physical situation, the club must protect him and not expose him to participation in a match or another similar activity.

Finally, having taken into account the practice of several sports, we cannot exclude the appearance of some relatively dangerous situations. In many sports, the eventuality of an accident is always present being directly linked to the exercise of the sport. The athlete being member of the team has tacitly accepted this possibility. In these cases someone shall be contented to provide some protective measures in order to avoid major injuries. However, we should not exclude the responsibility of the club/employer in the event it/he has not respected its/his duties concerning the health and the security or in the event of mistake of diagnosis by the indicated doctor.

Finally, the club must protect the athlete from acts of bullying emanating either from some of his teammates or other members of the team attempting to marginalize him and place him outside the team.

Working time

Sporting activity has a particular rhythm of work, organized in sporting seasons, in which the competitions take place. Therefore, there is a question of how the rhythm of the season the sports will be adapted to the labour law and if working time regulations are really adapted to the management of sports activities.

In fact, provisions on working time are not completely accommodated to the enterprise of sports. The performance of the athlete is not evaluated according to the time during which it is performed. In the period of matches athletes must remain at the disposal of the coach during long periods of the day following training procedures or seminars. They often remain at the disposal of the club during the entire day in hotels or campuses chosen by the club. Daily working time may exceed, in these situations, eight hours per working day or working week. In this event it is difficult to realize an overtime payment, as the salary of the athlete is not conceived as a time based salary, but as a total sum including all of the types of his obligations independently of their duration.

The interval between the end of the working day and the beginning of the next day may also not exceed 11 hours. Young players may remain at the disposition of the club after 22.00 h. and participate to the match or other sport events.

Finally, as many matches take place on Sundays, the interdiction of Sunday work is not possible or even feasible to be applied. In general, we can say that the fulfillment of the various athletic obligations of the team constitutes a priority.

Finally, grant of holidays shall be adapted to the particularities of professional sport performance. Therefore the athlete will not be entitled to leave the team for holidays during the period of championship but only after the end of it. Generally, a system of group holiday is adopted, that is to say that all the athletes leave the team during the same period when sports events are not scheduled.

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