

A professional sportsman – an independent worker?

The status of professional sportsmen is not unambiguously determined in the Czech legal theory and practice. Professional sportsmen do not form a group whose status would be regulated by a specific separate statute and a distinction between sportsmen that are entrepreneurs and sportsmen that are employees is formed in practice. This was not changed even by the decisions of the CJEU in cases Walrawe and Dona, or Bosman, because the status of a worker is not clearly interchangeable with the status of an employee.

Even if it is possible to expect a high number of litigations due to the massive expansion of professional sport (e.g. immediate termination of employment with a sportsman-employee), in fact these are rather rare issues that seldom come before high courts.

One of the cases, which for the tax purposes examined the question whether professional sportsmen perform a dependent work, was the case of a professional footballer decided by the Supreme Administrative Court¹. Dependent work as a defining feature of labour relationship is regulated by the Labour Code. It is understood as the work done personally by the employee for the employer in relation of the employer's superiority and employee's subordination, on behalf of the employer and according to the instructions of the employer. Dependent work must be performed for wages, salary or remuneration for work, on employer's expense and liability, during the working time and at the employer's workplace, or at another agreed place². Dependent work can be performed exclusively in the basic labour relationship, unless it is regulated by special legal regulations (e.g. the Civil Service Act). Basic labour relationships are employment relationship and legal relationships based on specific agreements about work done outside the employment relationship³.

The crucial question in this case was whether a football player had to pay taxes as an employee or as an entrepreneur. This was a crucial issue to determine, as the costs of a single player for the club would be higher by 34 % provided that the legal relationship between a professional footballer and a club had to be governed by labour law⁴.

The complainant claimed that his earnings should be taxed at a more favourable rate for employees, because he as a professional sportsman did not act as an individual but as a part of the whole team. Therefore, he was a subject to a strict duty to observe orders given by a football club (for example, training sessions, jersey dressing, participation in promotions, etc.). According to the complainant, it was clear from the contract that the degree of dependence on the payer's instructions is absolute and unconditional and the status of a professional footballer satisfies all the defining features of the dependent work: this activity is performed for a single subject, it ensures the fulfilment of the normal activity for the other

¹ Judgement of the Supreme Administrative Court of 24 February 2012, No. 2 Afs 20/2012.

² Labour Code, § 2.

³ Labour Code, § 3.

⁴ Kateřina Radostová, Philipp Chizola, Právní postavení fotbalisty – zaměstnanec nebo osoba samostatně výdělečně činná? In: Sportovní právo, Auditorium, Praha 2012.

entity, and the footballer only provides his/her own activity. He also uses the property of a football club and does not own virtually anything that he needs for his work. The player himself cannot even specify the form of the jersey, including the advertisements, and the earnings from the use of this outfit are the revenue of the club and not of the player. In this type of relationship, the performance of the activity is also in the name of the club and there is also the element of sanctioning dependence.

The Supreme Administrative Court took a considerably liberal approach to the nature of the activity of a professional footballer. It is based on the premise that the relationship of a professional sportsman to his club has many characteristics of dependent activity and it is therefore necessary to always determine the nature of the activity based on the circumstances in the particular case. The Supreme Administrative Court has previously stated⁵ that "*the activity of a professional sportsman is not simply subordinate to the concept of 'dependent work' within the meaning of the Labour Code. Therefore, concluding different contracts than contracts between sportsmen and their clubs cannot be excluded or even considered to be illegal. ... At the same time, however, it should be noted that the above does not mean that the sportsman and the club cannot conclude the employment contract. The Supreme Administrative Court only takes the view that, in the current situation of a considerable lack of clarity on the legal status of professional sportsmen, the state cannot enforce only one of the possible forms of their contractual cooperation with clubs, even through tax policy.*"

In this case, the Supreme Administrative Court had no doubt that the complainant entered into a contractual relationship with his club on a voluntary basis as a self-employed person and continued to behave in this way outside and also in relation to the financial administration, so there was no reasonable reason for redefining this relationship. Another reason why the Supreme Administrative Court did not regard the relationship between a footballer and his club as a dependent activity was the professional contract itself, as it made it clear that the player would pay from his respective income tax on the agreed remuneration as well as the corresponding health and social insurance. It also stated that the player is not insured under the contract in case of an accident and is therefore obliged to cover his personal insurance for himself. According to the contract, the player was aware that he is a self-employed person and is therefore required to pay the tax to the competent Tax Office.

The complainant behaved in this way, as he in his tax return - as a self-employed person - declared tangible property and applied his depreciation as well as registered himself as a VAT payer, declaring that he was self-employed.

To the complainant's argument that the basic criterion of differentiation of the employee and the self-employed person is the obligation to observe the payer's orders, which is quite clear in the case of a professional footballer, the court notes that this obligation, although significant in the present case, cannot be overvalued as a decisive criterion, since it is clear that the obligation to "follow the instructions of the payer" has, for example, also every tradesman carrying on business on the basis of a granted trade license as he has to respect his client's

⁵ Judgement of the Supreme Administrative Court of 14 March 2011, No. 2 Afs 16/2011.

instructions. To the argument about the specific nature of the professional footballer's activities in the "legislation" of the Football Association of the Czech Republic, the court stated that even these specifics distinguish the professional footballer from the activities ordinarily performed in the employment relationship (e.g. limitations resulting from the maximum possible length of a professional contract, etc.). Moreover, the Supreme Administrative Court has already stated that it is clear from the nature of the case that the part of the exercise of a professional sportsman is not only participation in matches or training of his team, but also a number of other activities which are necessary for the 100 % readiness of the sportsman (for example, the player's contract enshrines the obligation to maintain good physical and mental fitness and readiness) and also for the marketing interests of the club (promotions, autographing, meeting with fans, etc.). Ultimately, it is hardly conceivable that the specific activity of a professional sportsman in the ongoing season is by its nature compatible with such institutes of the Labour Code, such as compulsory uninterrupted rest between two shifts, breaks for food and relaxation, days of rest or overtime. Even if these problems were overcome by the creative application of the Labour Code, it is, due to the difficult application of the Labour Code to the activity in question, for the contracting parties to choose another contractual arrangement if it is possible under private law⁶.

The relationship between a football club and a professional player is thus regarded by the Supreme Administrative Court as a private relationship, and since there is no dispute that a tax liability has arisen, it is clear it must be fulfilled by one of the private-law entities. The "gentleness" in relation to the complainant would at the same time mean "strictness" towards the football club, which does not correspond to the meaning of the cited principle. In other words, if the activity of professional sportsmen is so unclear and legally unadjusted, the administrative court, whose decision-making activity is also covered by Article 4 of the Constitution ("Fundamental rights and freedoms are under the protection of the judiciary"), cannot use an interpretation that is clearly disadvantageous and unwanted for both sides of the contractual relationship, that is, for sportsman and his club. However, there can be no interpretation of this principle that would result in the situation that the tax would not have to be paid at all. Moreover, in case it later turns out that the status of the self-employed sportsman is less favourable for a professional player than in case of employment relationship, retrospective redefinition of the relationship is not possible.

The above-mentioned decision of the Supreme Administrative Court is thus consistent with the case law of the Supreme Court, which assumes that while assessing the nature of the legal relationship between the parties, the designation of the legal action is not itself decisive. It is crucial to assess the content of the manifestation of will, i.e. to find out what has actually been expressed. At the same time, the condition is that will must be free and serious and the speech definite and understandable. The legal act is otherwise invalid (§ 242 (1) (b) of the Labour Code, § 37 of the Civil Code). From that point of view, it is necessary to distinguish that while the employment relationship is characterised by the fact that the employee carries out the activity according to the instructions of the employer, at the specified working time, at his

⁶ Judgment of the Supreme Administrative Court dated 14 March 2011, No. 2 Afs 16/2011.

risk and with the aim of fulfilling the employer's tasks, the entrepreneur perform the work in his own name, on his own responsibility and in order to make a profit (Article 2 (1) of the Commercial Act)⁷. Thus, in order to regard the relationship between the two entities as an employment relationship, it must be the relationship between the employer and the employee, the subject of which is the work which is carried out personally by the employee for the employer in the relation of employer's superiority and employee's subordination, on employer's behalf, for wages, salary or remuneration for work, during a specified working time or otherwise determined or agreed time at the employer's place of work, or at another agreed place, and finally, at the expense of the employer and under his responsibility. Only if all these characteristics are met, it is an employment relationship.⁸

Even though it would be appropriate, in the context of the foreseeability of the law, to adopt autonomous legislation in the field of professional sport, the existing case law of the high courts provides sufficient guidance for the differentiation of particular legal situations established by a professional sportsman and his/her club. This situation, depending on the particular circumstances of the case, may be regarded as a labour or civil relationship.

JUDr. Lubomír Ptáček, Ph.D.

Supreme Court

⁷ Supreme Court judgment of 16 June 2011, No. 21 Cdo 920/2010.

⁸ Supreme Court judgment of 19 January 2017, No. 21 Cdo 3613/2015.