

Should a Football Association Premier League (FAPL) footballer be treated differently from other employees on fixed term contracts?

The Premier League has a rule which prevents footballers from approaching other Clubs to seek employment. Graham Shear and Alison Green, Partners at TTS, discuss whether this rule is a lawful restraint of trade.

Footballers normally sign their first meaningful contract at the age of 18 or 19 for a term of three, four or five years. Once the player begins to establish himself the club is likely to offer to replace it with a four or five year term contract on better money. If renegotiated, the most likely reason was the club seeking to protect its "investment" so that it has a longer term commitment from the player, enabling the club to sell the player, if they want to, and receive a transfer fee.

So what is all the fuss about? The FAPL is an association of its member clubs primarily concerned with protecting their interests. Rule K3 of the FAPL rules prevents any club from approaching a player who is contracted to a Premiership club unless they have obtained the written consent of the players club. One would have thought that this restriction, together with the transfer windows and the footballers fixed term contracts would be sufficient to prevent "poaching" of players and any instability that could arise.

But that is not the limit of restrictions. The FAPL says that in addition to preventing clubs from approaching players, they also need Rule K5 which prevents all Premiership players from approaching another club prior to the third Saturday in May in the year in which that player's contract ends, notwithstanding that such a discussion would be for a future contract with a prospective future employer. Player contracts all end on 30th June. Therefore, the players are prevented from making any meaningful approaches, without the consent of their club, until the last five weeks of their contract which falls in a period after the end of the playing season and when most clubs to whom an approach could be made are either on tour or on holiday.

The domestic law is relevant. The principle in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Limited (1894) AC535* sets out a doctrine of three parts:

1. Is there a restraint of trade?
2. If so, can the body seeking to rely on that restraint (in this case the FAPL) prove that the restraint is reasonable and justified in the interests of the parties and, in doing so, is it a worthwhile, balanced and legitimate basis upon which such a restriction should be imposed and is it proportionate in all the circumstances?

3. If the FAPL can show that such a restraint is reasonable and justified in the interests of the parties, can the employee show that it is contrary to public interest?

There can be little dispute that K5 is a restraint of trade. The FAPL do not deny that it is. The question therefore is whether the restraint can be justified by the FAPL as being reasonable and in the interests of the parties. Only if they can overcome this hurdle does the third part of the test come into play. So what is the FAPL's justification for the restraint imposed by rule K5? They say that it is necessary for competitive integrity, contractual stability, team stability and competitive balance. But there are no equivalent provisions to K5 in Europe's other main football nations: Italy, Spain, France and Germany. Apparently, the FAPL's European counterparts do not consider that allowing their footballers the freedoms enjoyed by employees in other walks of life would place the game in jeopardy. So why are English footballers different?

According to the FAPL, if a player were free to contact other clubs, then his performance might be affected. For example, he may be tempted to "throw the game" if he were to play against the club with which he was in discussion.

Common sense dictates footballers are likely to try hard on the pitch if they are seeking to attract the attention of another club. If a player purposefully fails to perform, he will remain "on the bench" and out of the eye of prospective employers and possibly perceived as being unreliable and having little professional integrity and hence value to the team. A prospective club would be reluctant to take on a player who acted in such a way, for fear that he would do the same to them.

The "capital" value of a player to their club begins to diminish as the end of the player's contract approaches. This discounting effect begins from about 18 months to 2 years before the contract ends. It is therefore in the club's interests to maintain long term contracts, especially for younger players, in order to retain the prospect of obtaining a hefty transfer fee should they subsequently sell the player.

It is argued by the FAPL that Rule K5 is necessary for team stability. They say without the rule there would be more transfers and if squads were continuously changing, spectator interest would be lost. But it is simply a fact of the sport that squads fluctuate and players move between teams for any number of reasons. In general, however, supporters remain loyal to their teams regardless of the changing faces of individual players. It is noteworthy that the changes of manager, promotion or relegation, are the situations which ordinarily lead to wholesale changes to the first team squad. What about the manager? There are few who would doubt that the loss of a good manager would have a far more detrimental affect on team morale than the loss of an individual player. However, there are no similar restrictions to rule K5 imposed on managers, who are free to approach other clubs during the term of their contract.

Two groups of players most affected by rule K5 are players at, or approaching, the peak of their careers, whose clubs wish to retain at the lowest salary cost. The other group is footballers nearing the end of both their playing careers in the Premiership and their fixed term contracts with their then current clubs. In both cases, it is in the clubs interest to use the rules to maintain its options. In the first case it will simply wish to maintain a strong negotiating tension and in the second, it will simply not wish to be committed whilst it considers alternative, younger players. All players who remain in the Premiership are likely to experience the situation recently faced by Shaka Hislop (37) of Portsmouth FC who was only told a couple of weeks before the end of the season that his contract would not be renewed. This late notice, together with the affect of rule K5, has made it extremely difficult for the older players to maintain continuity of their careers.

In 1990 Jean-Marc Bosman challenged the system of transfer fees imposed by clubs on the cross-border transfer of players. Bosman's club effectively prevented him from moving to a French club by imposing an excessive transfer fee for his services. Bosman sued the Belgian and European football authorities, claiming that the imposition of transfer fees stopped EU citizens from giving the human right of freedom of movement in employment. In 1995, the European Court of Justice ruled in his favour, holding that the then existing football transfer rules contravened the European Union law on the free movement of workers.

The Bosman ruling resulted in players being able to move between clubs on the expiry of their contracts. This has provided footballers with the freedoms enjoyed by employees in other walks of life. There has not been "chaos" in the game as a result of this ruling and hysterical claims that any tinkering with Rule K5 will result in chaos of the "end of football as we know it" are viewed by the writers with derision. Rationalization and change to the Premiership rules will bring English football into the modern employment era to which it will quickly adapt.

There should be two overriding concerns. Whilst many Premiership footballers are highly paid, they nevertheless have the right to balanced and fair treatment so far as the protection by them of their future careers is concerned and the right to properly and appropriately seek future employment so as to maintain the continuity of what is ordinarily a short and intensive career. Secondly, where associations or governing bodies produce a system of rules whereby their members, as employers, restrict or govern the rights of their employees, they nevertheless have obligations not only to produce fair and balanced rules between employer and employee but also to ensure that the rules accord with the requirements of the broader domestic law.

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