



Football in Focus

Issue 10 March 2008

Webster CAS ruling can be of no surprise to football

The decision of the Court of Arbitration for Sport ("CAS") passed on 30 January 2008 ordering Andrew Webster and Wigan Athletic FC to pay Heart of Midlothian the sum of £150,000 in compensation in respect of Webster's unilateral termination of his playing contract without just cause, has prompted much debate within the football world. In this edition of Football in Focus we analyse the key elements of the CAS decision and consider some of the possible legal and commercial consequences which arise.

Background

Webster entered into his first playing contract with Hearts on 31 March 2001 having transferred from Arbroath for the sum of £75,000. Webster entered into a second contract with Hearts on 1 July 2003 with a term until 30 June 2007 (the "Contract"). Hearts sought to re-negotiate the Contract in January 2006. Webster however experienced certain problems with Hearts between January and May 2006 after the negotiations stalled. Webster was not selected for Hearts and was criticised in the media by the Club.

Webster therefore first served a notice to unilaterally terminate the Contract with just cause on 4 May 2006, citing a total breakdown in trust and confidence due to the treatment he

had received. Thereafter, Webster revoked the first notice and served a second notice on 26 May 2006 to unilaterally terminate the Contract without just cause under Article 17(3) of the FIFA Regulations for the Status and Transfer of Players (the 'Regulations') after the expiry of the third season of the Contract. This was thus outside the Protected Period of the Contract (i.e. three seasons/years whichever came first, since the entry into force of the Contract as Webster was below 28 when he signed it). Webster left Hearts with effect from 30 June 2006 and signed for Wigan on 9 August 2006.

Hearts commenced proceedings before FIFA against Webster and Wigan. Hearts requested that Webster be banned from playing for a period of two months and Wigan be banned from registering players for one transfer window. Hearts also claimed compensation of over £4 million representing, inter alia, Webster's transfer market value.

Wigan and Webster argued that no sanctions should be imposed as Webster had terminated the Contract in accordance with Article 17(3). Furthermore, if compensation were to be awarded to Hearts, given that this termination occurred outside the Protected Period, compensation should be limited to the residual value of the Contract.

DRC Decision

In April 2007, the Dispute Resolution Chamber ("DRC") determined that Webster had unilaterally and without just cause terminated the Contract outside the Protected Period. No Sporting Sanctions could therefore be imposed but the DRC imposed "disciplinary measures" of a two week playing ban because Webster had served his notice four days outside the fifteen day timeframe after the last game of the league championship - Webster had in fact served his notice within fifteen days of Hearts' final match of the season, being the

Sports Law Specialists



Edward Canty
Partner



Matthew Bennett
Partner

Contact Details:

Brabners Chaffe Street LLP,
55 King Street, Manchester, M2 4LQ
telephone 0161 836 8800
email: football@brabnerscs.com



SFA Cup Final (the revised Regulations which came into force on 1 January 2008 now includes cup games). The DRC did not impose Sporting Sanctions against Wigan as it held that Wigan had not induced Webster to breach the Contract.

In addition, the DRC held Wigan and Webster jointly and severally liable to pay compensation. In calculating compensation, the DRC took into account the objective criteria detailed in Article 17(1) and the "specific knowledge of the world of football as well as the experience that the Chamber itself has gained throughout the years". The DRC held that Wigan and Webster were liable to pay to Hearts £625,000 in compensation without stating expressly how it had calculated this sum. It did state that "as a general rule, a player cannot, at any time and under any circumstances 'buy out' an employment contract by simply paying to his club the remaining value of his contract."

All parties appealed the DRC decision to the CAS on the issue of compensation (the two week playing ban could not be appealed due to its length).

CAS Decision

The CAS set aside the DRC decision and criticised its lack of reasoning stating, "it is in the interests of the football world that the criteria applicable in a given type of situation and therefore the method of calculation of compensation be as predictable as possible".



Application of Article 17 to the assessment of compensation

The CAS confirmed that Webster had unilaterally and without just cause terminated the Contract outside the Protected Period and thus compensation was payable as a matter of principle. The CAS assessed the amount of compensation to be paid by applying the factors and criteria set out in Article 17(1) which provides:

"In all cases, the party in breach shall pay compensation...unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period".

Transfer Market Value

The CAS rejected Hearts' claim for £4 million for its loss of the opportunity to sell Webster or alternatively, the cost of finding a replacement, and stated that any claim based upon estimated transfer value was irrelevant, unless this has been contractually agreed by the parties. The CAS noted that transfer market value was not a criterion to be taken into consideration in Article 17(1) and stated:

"Because of the potentially high amounts of compensation involved, giving clubs the regulatory right to the market value of players and allowing lost profits to be claimed in such manner would in effect bring the system partially back to pre-Bosman days when players' freedom of movement

was unduly hindered by transfer fees and their careers and well being could be seriously affected by them becoming pawns in the hands of their clubs and a vector through which clubs could reap considerable benefits without sharing the profit or taking corresponding risks. In view of the text and the history of Article 17(1) of the FIFA Status Regulations, allowing any form of compensation that could have such an effect would certainly be anachronistic and legally unsound."

Relevance of national law

The CAS concluded that whilst Scottish law was the relevant national law, it decided that "...Article 17(1) does not require that compensation be determined in application of a national law or that the rules on contractual damage contained in the law of the country concerned have any sort of priority over the elements and criteria listed in Article 17...". The CAS also held that "...it is in the interests of football that solutions to compensation be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country...".

Specificity of Sport

The CAS also held that its obligation to calculate compensation in accordance with the "specificity of sport" required it to reach a solution "for the football world which would enable those applying the provision to make a reasonable balance between the needs of contractual stability on the one hand and the needs of free movement of the players on the other hand." It will be interesting to see how future cases apply this principle.

Other objective criteria

The CAS then considered the other "objective criteria" set out in an Article 17(1) and concluded it had a substantial degree of discretion in respect of which objective criteria were relevant and that "...the criteria listed in article 17(1) are not designed to be



cumulative per se...". The CAS applied each criterion to the facts of this case as follows:

"The time remaining on the existing contract up to a maximum of five years"

The CAS noted that there was only one year remaining on the Contract and it was only in respect of this period that compensation would be awarded.

"Expenses paid or incurred by the Former Club (amortised over the term of the contract)"

Hearts could not recover any proportion of the fee it had paid for Webster in 2001 as this had been amortised over the term of Webster's first contract. This was not unsurprising, however, the CAS in fact went further and stated that "it is not convinced beyond the Protected Period it is admissible for a club to reclaim a portion of the engagement fee as compensation for unilateral termination unless such compensation is stipulated in the employment contract." This is a new approach which may concern clubs as conventional wisdom was that the unamortised amounts of a transfer fee would form part of the compensation, even after the Protected Period.

"Whether the contractual breach falls within a Protected Period"

Importantly, the CAS determined that with regard to terminations outside the Protected Period, subject to the parties reaching agreement to the contrary, compensation in such circumstances "...should not be punitive or lead to enrichment and should be calculated on the basis of criteria that tend to ensure clubs and players are put on equal footing...". The fact that a breach occurs outside the Protected Period is thus of fundamental importance in the assessment of damages.



"The remuneration and other benefits due to the player under the existing contract and/or the new contract"

The CAS concluded that in the case of a breach by a player, the remuneration due to the player under his new contract was not an appropriate criterion to apply as this would be "potentially punitive". Under this criterion, the CAS thus focused solely on the residual value of the Contract as, by utilising the residual value, the CAS had the advantage of "indirectly accounting for the value of the player, since the level of his remuneration will normally bear some correlation to his value as a player".

It was agreed that the residual value of the Contract was £150,000 so this ultimately formed the basis of the award in this case after the CAS had given due consideration of the other Article 17(1) criteria.

Aggravating factors /contributory negligence

The CAS rejected the arguments of both Hearts and Webster that the actions of the other were relevant and commented that it

was "not convinced that the concept of aggravating factors or of contributory negligence are legally relevant or applicable to the calculation of compensation under the criteria of Article 17(1)".

Article 17(2) - Joint and several liability

The CAS held that the application of the principle of joint and several liability was "...not conditional on fault..." and must be deemed to be a form of "...strict liability which is aimed at avoiding any debate and difficulties of proof regarding the possible involvement of the new club in a player's decision to terminate his former contract and as better guaranteeing the payment of whatever amount of compensation the player is required to pay to his former club..." .

Impact of the CAS Decision - Practical and Commercial Considerations

The decision is not necessarily all bad for clubs or all good for players; it serves to clarify the application of a provision in the Regulations which has been in force since 1 September 2001. The decision turns upon the facts of this particular case and it does



not therefore act as a binding precedent to limit compensation in all Article 17(3) cases to the residual value of a player's contract.

Greater certainty in club / player relations

The DRC decision created confusion as it did not enable clubs and players to have any prior comprehension as to how compensation would be calculated in the event of a termination outside the Protected Period. We now have at least an idea of the principles which will be applied to determine compensation which will enable clubs to make informed decisions about how much they should invest in the acquisition of a player, the amount of salary to be paid, the length of contract, the inclusion of an express clause dealing with damages and when the contract should be renewed.

Contractual remedies

The CAS makes consistent references to the fact that matters may have been different had Hearts and Webster agreed upon the consequences of a unilateral termination. We can thus conclude that if Hearts and Webster had for example, agreed upon a specific amount of compensation to be paid in the event of the termination which occurred, whilst this may not have bound the CAS, it would have been a factor of considerable importance.

Clubs may therefore wish to consider the inclusion of contractual terms in playing contracts to deal with how compensation should be calculated in the event of unilateral termination without just cause by either party inside and outside the Protected Period. This could include a range of different approaches from specifying an exact sum to be paid to simply agreeing what factors should be taken into consideration including perhaps, the player's transfer market value. However, such clauses will not bind the decision-making

body and they have to be carefully drafted particularly in those jurisdictions where 'penalty clause' are unenforceable. Clubs must also consider whether the inclusion of such a clause actually constitutes a mutually agreed break clause in the playing contract, which may make it easier for a new club to unsettle and acquire a player. Any such clause may also be useful in attempting to recover any unamortised transfer fee beyond the Protected Period.

Consideration may also be given to the structuring of contracts with the inclusion of option clauses to trigger renewal of the Protected Period. Clubs may also seek to incentivise players to remain for the full term of the contract with enhanced salary and loyalty type bonus payments payable in the final years outside the Protected Period. It may also be possible to time a renewal of a contract to maximise the Protected Period given that an Article 17(3) termination cannot occur during a season.

Consideration must also be given to the treatment of image rights payments as it is questioned whether they will be deemed part of the residual value of the contract.

Practical Consequences

It must be remembered that whilst the Webster case may have initially caused shock waves around European football, this was in fact the first example of a player using Article 17 in the seven years of the provision being in the Regulations. Whilst we may therefore see more Article 17 cases in the future, (indeed, there is one currently before FIFA involving the player Matuzalem) it is arguable that such cases will not become the norm. Clubs and players will note that it took approximately 20 months for the case to be decided and they may be unwilling to become involved in protracted legal proceedings where there still remains no exact certainty of outcome.

Certain commentators regard Webster as the next step on from the Bosman case. It is however important to note that not only was Bosman a decision of the European Court of Justice (whereas Webster was decided by the CAS in the context of private dispute), there are practical differences which will naturally and inevitably serve to inhibit the number of Webster type cases going forward. Article 17 is only relevant on an international transfer and is not automatically binding at a national level - contrast this with Bosman which applies both to international and domestic transfers. Bosman cases arise following the natural expiry of a contract - in contrast, players who wish to follow Webster have to take a proactive step and unilaterally terminate their contracts at a specific point in time and run the risk of possible sporting sanctions and/or disciplinary measures if they get this wrong (as does the new club). Furthermore, the new club will be jointly and severally liable for compensation, the amount of which cannot be definitively predicted.

It is thus contended that mutually agreed transfers will remain the norm and the real effect of Webster will be to influence negotiations between clubs on transfer fees and between clubs and players' agents on the length and terms of playing contracts. The onus is thus on clubs and players to consider the Webster decision and react accordingly.

Matthew Bennett and Carol Couse of Brabners Chaffe Street LLP advised Wigan Athletic FC in the proceedings before the FIFA DRC and the Court of Arbitration for Sport. If clubs or players require further specific advice on the implications and issues arising from the Webster decision and/or how they should seek to address or amend their approach to negotiations and the content of playing contracts, then please contact us.