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# *The Case of* Harold MAYNE-NICHOLLS*: A Relentless Pursuit*

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→ ***FIFA World Cup – Corruption – FIFA Regulations – Disciplinary litigation – FIFA proceedings – FIFA Ethics Committee – FIFA Appeal Committee – Court of Arbitration for Sport (CAS)***

*It is no secret that FIFA and FIFA associated football officials have been embroiled in a series of scandals over the course of the past several years. From the arrangement of television marketing rights through the* International Sport and Leisure Corporation *to the more current series of cases involving members of the FIFA Executive Committee selling their influence, the members of both the Investigatory Chamber of the FIFA Ethics Committee (FIFA Ethics Committee IC) and the Adjudicatory Chamber of the FIFA Ethics Committee (FIFA Ethics Committee AC) have been busy attempting to meet out football justice in the application of the FIFA Code of Ethics. This process has touched the highest offices in the football world; however, there is one particular case, that of Mr* Harold MAYNE-NICHOLLS*, that appears to be particularly different.*

## *Background*

Mr *MAYNE-NICHOLLS* is a Chilean national who has spent over 20 years in football administration. He has served as the President of the Chilean Football Federation and the Chilean National Professional Football Association and as a FIFA official. Most recently, Mr *MAYNE-NICHOLLS* was the chairman of the 2018 and 2022 FIFA World Cup Bid Evaluation Committee (the Bid Evaluation Committee). The Bid Evaluation Committee is the working group established by FIFA to visit each country submitting bids to host the World Cup and is responsible for the review and evaluation of those bids. The Bid Evaluation Committee does not select which countries will host the World Cup but focuses on determining whether the various bids are in fact as represented by the various countries in the official bid documents provided to FIFA and provides a report summarizing the bids to the FIFA Executive Committee, the ultimate deciding body.

The Bid Evaluation Committee visited Qatar in September of 2010 in order to conduct a technical inspection with respect to Qatar's bid for the 2022 World Cup. Included in the Bid Evaluation Committee's review of the Qatari bid was a visit to the *Aspire Academy for Sports Excellence* (*Aspire*) in Doha where the Bid Evaluation Committee met with Mr *Andreas BLEICHER*, *Aspire*'s Executive Director for International Football affairs.

Shortly after the visit to Qatar, Mr *MAYNE-NICHOLLS* sent an electronic correspondence to Mr *BLEICHER* requesting whether his son and nephew would be able to attend the *Aspire* academy and if he was aware of any opportunities for his brother-in-law to work as a tennis coach. After several correspondences back and forth between Mr *MAYNE-NICHOLLS* and Mr *BLEICHER*, the matter was not pursued, Mr *MAYNE-NICHOLLS*' son and nephew did not attend the *Aspire* academy and no opportunities were explored for the brother-in-law. It is worthy to note that Mr *MAYNE-NICHOLLS* did not request that Mr *BLEICHER* arrange that *Aspire* or any other organization or person incur expenses on behalf of his son, nephew or brother-in-law. Subsequently, the FIFA Executive Committee met in Zurich

on 2 December 2010 and voted to award the 2022 World Cup to Qatar.

## FIFA Proceedings against Mr MAYNE-NICHOLLS

Amid the suspicion of corruption, FIFA decided to investigate, through the FIFA Ethics Committee IC, the selection process of the 2018 and 2022 World Cups. This investigation resulted in FIFA producing the Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process, now famously known as the *GARCIA* Report, named after its principal author, Mr *Michael GARCIA*, who was then the Chairman of the FIFA Ethics Committee IC. The *Garcia* Report outlines the genesis of the referral from FIFA to commence the investigation as follows:[1]

> *"On November 18, 2012, the Sunday Times (of London) published an article alleging that the Qatar bid team paid $1 million to Samson Adamu, the son of FIFA Executive Committee member Amos Adamu, in the months prior to the vote for World Cup host. The newspaper stated the money was offered to* "sponsor" *an* "African [Football] Legends Dinner" *hosted by Samson ADAMU in Johannesburg before the World Cup in South Africa.*
>
> *In advance of publication, the Sunday Times forwarded to FIFA certain material in their possession, and FIFA in turn forwarded the same information to the Chair of the Investigatory Chamber. The communication from FIFA noted that the material was being forwarded for the Chair's "information and analysis."*
>
> *This referral to the Investigatory Chamber of specific allegations of misconduct by a bid team led to the initiation of a preliminary investigation."*

The investigation uncovered a systemic pattern of misconduct and violations of the FIFA Code of Ethics. It is worthy to note that this investigation resulted in the commencement of proceedings against some of the largest football officials in the world alleging that members of the Executive Committee were selling influence and colluded in the World Cup selection process. The relatively benign electronic correspondences between Mr *MAYNE-NICHOLLS* and Mr *BLEICHER* were included in this investigation.

Subsequently, the FIFA Ethics Committee IC initiated an investigation where Mr *MAYNE-NICHOLLS* voluntarily attended a deposition in New York City where he answered the questions put to him by Mr *GARCIA* and subsequently provided further written answers to further questions.[2] The investigation was then referred to the FIFA Ethics Committee AC where Mr *MAYNE-NICHOLLS* attended the hearing and gave oral evidence. The FIFA Ethics Committee AC found that for these electronic correspondences with Mr *BLEICHER*, Mr *MAYNE-NICHOLLS* violated Articles 13 (general rules of conduct), 15 (loyalty), 19 (conflict of interest) and 20 (offering and accepting gifts and other benefits) of the FIFA Code of Ethics and that he is to be banned from participating in any football-related activity at a national or international level for a period of seven years.[3]

It must be noted that the FIFA Ethics Committee AC did not find that Mr *MAYNE-NICHOLLS* violated Article 18, the duty of disclosure, cooperation and reporting, nor Article 42, the general obligation to collaborate, further to the FIFA Code of Ethics. Subsequently, the FIFA Ethics Committee AC took over six months to issue the actual reasons behind the decision.[4]

Mr *MAYNE-NICHOLLS* appealed this decision to the FIFA Appeals Committee which reduced the sanction from seven years to three.[5] The FIFA Appeals Committee took approximately ten months to issue the full grounds of the decision after the initial decision was originally communicated.[6]

## Appeal to the Court of Arbitration for Sport

Mr *MAYNE-NICHOLLS* appealed the decision of the FIFA Appeals Committee to the Court of Arbitration for Sport (CAS). The CAS further reduced Mr *MAYNE-NICHOLLS*' ban from football-related activities to two years on the basis that there was no violation of Article 20 of the FIFA Code of Ethics, pertaining to the offering and accepting gifts and other benefits, and that such a sanction is proportionate in the circumstances. The CAS upheld the violations of Articles 13 (general rules of conduct), 15 (loyalty) and 19 (conflict of interest) of the FIFA Code of Ethics.

Four interesting and important legal issues, not just for Mr *MAYNE-NICHOLLS*, but for the football world, were born out during the course of this saga: (1) the delay of the FIFA

1 The Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process (the *GARCIA* Report), pp. 2-3.

2 CAS 2017/A/5996 *Harold Mayne-Nicholls v. FIFA*, p. 9, par. 29 to 32.

3 *Ibid.*, p. 10, par. 39.

4 *Ibid.*, p. 10, par. 41.

5 *Ibid.*, p. 15, par. 64.

6 *Ibid.*, p. 15, par. 64 to 65.

proceedings and the subsequent request for a stay of proceedings; (2) the production and publication of the *GARCIA* Report; (3) the application of the principle of *nullla poena sine legge praevia* as FIFA consistently applied the 2012 edition of the FIFA Code of Ethics to events that occurred in 2010; and (4) the ultimate proportionality of a two-year ban.

### *FIFA Delay and Request for Provisional Measures*

The FIFA Ethics Committee AC initially applied the seven year prohibition from football related activities *via* a decision dated 6 July 2015 where Mr *MAYNE-NICHOLLS* immediately requested the grounds of the decision the 8 July 2015.[7] Grounds for the decision of the FIFA Ethics Committee AC were finally delivered to the Appellant the 14 of January 2016, more than six months later after they were requested.[8] After hearing the appeal of that decision the FIFA Appeals Committee reduced the sanction to three years on 22 April 2016, however only communicated the grounds of that decision the 8 February 2017, almost nine and a half months later.[9]

At that point in time, Mr *MAYNE-NICHOLLS* was banned from football-related activities for 36 months, for which he has already served almost 20 months when he was able to file an appeal with the CAS. It must be noted that according to the timeline as described in the CAS award it is clear that the CAS arbitrators and the administrators did work quickly in order to resolve this dispute in a timely manner.

The issue, however, is that FIFA's inaction and delay appears to have caused Mr *MAYNE-NICHOLLS* to have served an ultimate sanction that was more than what was imposed, through no fault of his own. When initiating proceedings before the CAS, Mr *MAYNE-NICHOLLS* filed a consolidated statement of appeal and appeal brief 19 days after the grounds of the FIFA Appeals Committee decision was communicated, and at the same time he request a stay of the appealed decision further to Article 37 of the Code of Sports-related Arbitration (the CAS Code).[10]

Generally speaking, the following three factors must be cumulatively demonstrated in deciding to issue a stay of a decision: (1) whether the relief in necessary to protect the applicant from irreparable harm; (2) the likelihood of success on the merits of the claim; and (3) whether the interests of the appellant outweigh those of the respondent.[11] The President of the Appeals Division of the CAS rejected this request for provisional measures as it was determined that "*the Appellant has not evidenced any irreparable harm and therefore the first of the criteria for granting a stay of the decision under appeal was not made out.*"[12]

Given the circumstances of this case, it appears that the decision to refuse the request for a stay of proceedings may have been in a manner inconsistent with previous jurisprudence of the CAS defining irreparable harm. To satisfy the irreparable harm test, "*(t)he Appellant must demonstrate that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage.*"[13] This view is has been confirmed by the Swiss Federal Tribunal:[14]

"*Considering that according to the jurisprudence of the Swiss Federal Tribunal, there is irreparable harm when a final decision, even favourable to the applicant, would not completely remedy such harm (see ATF 126 I 207). The Swiss doctrine considers that* "the conservatory measure shall avoid a damage which shall be difficult to remedy if it was not ordered immediately" *(see HOHL F., Procédure civile, T. II, Berne 2002, p. 234).*"

The result is that the determination of irreparable harm is a fact specific test that is analyzed within the context of the circumstances of each specific case. Here, Mr *MAYNE-NICHOLLS* was originally banned for seven years from all football-related activities on 6 July 2015, the ban was later reduced to three years and as of the date of the filing of the request for the stay almost 20 months of the total of this ban was served. There was a real possibility that if the request for the stay was denied and the sanction is further reduced that Mr *MAYNE-NICHOLLS* would serve a ban longer than the one imposed. This is precisely the type of irreparable harm "*that would be impossible, or very difficult, to remedy or cancel at a later stage*" specifically because it would have been too late to rectify the situation.[15] Relevant to this fact

7 *Ibid*., p. 10, par. 39 to 40.
8 *Ibid*., p. 10, par. 41.
9 *Ibid*., p. 15, par. 64 to 65.
10 *Ibid*., p. 19, par. 85.
11 CAS 2011/A/2479 *Sinkewitz v. UCI*, par. 4.
12 CAS 2017/A/5996 *Harold Mayne-Nicholls v. FIFA*, p. 19, par. 87.
13 CAS 2011/A/2479 *Sinkewitz v. UCI*, par. 4(a).
14 CAS 2011/A/2615 *Thibaut Fauconnet v. International Skating Union (ISU)* & CAS 2011/A/2618 *International Skating Union (ISU) v. Thibaut Fauconnet*.
15 CAS 2011/A/2479 *Sinkewitz v. UCI,* par. 4a).

specific enquiry are the details in the delay imposed by FIFA:

- 19 months elapsed from the time of the application of the original sanction until the FIFA Appeals Committee released the final grounds of the decision;
- 6 months and 1 week elapsed from the time that the full grounds of the decision of the FIFA Ethics Committee AC were requested and the time that they were released;
- 9 months and 3 weeks elapsed from the time that the full grounds of the decision of the FIFA Appeals Committee was requested and the time that they were released; and
- of the 19 total months of the FIFA procedure, 16 of them are solely and exclusively attributable to the time that both the FIFA EC AC and the FIFA AC took to release the grounds of the decisions.

This delay is particularly troubling if we compare the timeline to that of the *PLATINI* case. There, the FIFA Ethics Committee AC held its hearing on 18 December 2015, the decision was rendered that very same day, and communicated on 23 December 2015. The grounds were produced to the parties on 8 January 2016, a mere two weeks after the decision was initially communicated.[16] It is also notable that this period spanned over the Christmas holiday. In addition, the FIFA Appeals Committee *PLATINI* hearing was heard on 15 February 2016, the decision again rendered the very same day, and the final grounds communicated to the parties on 24 February 2016, 9 days later.[17] The *PLATINI* case and this one are comparable in that they both deal with issues arising under the FIFA Code of Ethics. Where they differ is that *PLATINI* had the ability to appeal his sanction to the CAS approximately two months and one week after the sanction was applicable, and Mr *MAYNE-NICHOLLS* was only able to do so almost 20 months later.

The result is that Mr *MAYNE-NICHOLLS* ended up serving a sanction longer than what was ultimately imposed which can be entirely attributable to the delays in receiving the full grounds of decisions of FIFA judicial bodies. CAS jurisprudence has been very specific on this point where it has stated that in cases where one can serve almost the entire suspension that it must be considered in as a factor to be recognized in assessing irreparable harm.[18]

Although it was only by a week it is unfortunate that Mr *MAYNE-NICHOLLS* served a longer sanction than that was ultimately decided.

### *The GARCIA Report*

The now infamous *GARCIA* Report was originally delivered to FIFA in September of 2014, however it was subsequently announced by Dr *Hans-Joachim ECKERT*, the Chair of the FIFA Ethics Committee AC that it would not be made public for legal reasons.[19] Dr *ECKERT* released a 42-page summary of his findings after reviewing the full *GARCIA* Report on 13 November 2014 which prompted Mr *GARCIA*'s resignation.[20]

It was only after German journalist *Peter ROSSBERG* announced that he had a copy of the *GARCIA* Report and that its contents would be disclosed to the public *via* the newspaper *Bild* the next day that FIFA unilaterally publicly disclosed the document in full. In relation to this case, the *GARCIA* Report was released by FIFA after the CAS hearing was concluded.

The issue in this case is that the investigation into the correspondences between Mr *MAYNE NICHOLLS* and Mr *BLEICHER* was initiated based on the information in the *GARCIA* Report. Mr *MAYNE-NICHOLLS* requested that this document be divulged to him before the FIFA Appeals Committee on the basis of Article 39(1) of the FIFA Code of Ethics that establishes the right to be heard:

> "*The parties shall be granted the right to be heard, the right to present evidence, the right for evidence leading to a decision to be inspected, the right to access files and the right to a reasoned decision.*"

FIFA refused this request and the same request was made before the CAS further to Article R44.3 of the CAS Code which was also denied. In hindsight, as the *GARCIA* Report is now public it appears that Mr *MAYNE-NICHOLLS* was indeed referred to in the report and his communication with Mr *BLEICHER* was a subject discussed in the *GARCIA* Report. Moreover, Article 39 of the FIFA Code of Ethics allows officials in proceedings "*the right for evidence leading to a decision to be inspected*" and "*the right to access files*" without the further caveat the basis of which was justified to deny its production.

16 TAS 2016/A/4474 *Michel Platini c. FIFA*, par. 94 to par. 96

17 *Ibid.*, par. 100 to 103.

18 CAS 2015/A/3925 *Traves Smikle v. Jamaica Anti-Doping Commission (JADCO)*, par. 6.9.

19 *"FIFA prosecutor Michael GARCIA calls for World Cup report to be made public"*, The Guardian, 24 September 2014.

20 *"Michael GARCIA: FIFA investigator resigns in World Cup report row"*, BBC Sport.

### Nullla Poena Sine Legge Praevia

The FIFA Ethics Committee AC found that Mr *MAYNE-NICHOLLS* violated, *inter alia*, Article 20 of the 2012 edition of the FIFA Code of Ethics which is the prohibition of FIFA officials from offering and accepting gifts and other benefits.[21] It is necessary to note that the events took place in 2010. The decision noted that no actual benefits were received and the conditions of article 20 of the 2012 edition were not met. The FIFA Ethics AC, however, concluded that article 5(2) of the 2012 edition prohibits the "*attempt*" and found a violation of Article 20. This Article 5(2) is not present in the 2009 edition of the FIFA Code of Ethics and was only added in 2012.

This decision was appealed to the FIFA Appeals Committee on the basis of Article 3 of the 2012 edition, which embodies the principle of *nullla poena sine legge praevia*:

> "*This Code shall apply to conduct whenever it occurred including before the passing of the rules contained in this Code except that no individual shall be sanctioned for breach of this Code on account of an act or omission which would not have contravened the Code applicable at the time it was committed nor subjected to a sanction greater than the maximum sanction applicable at the time the conduct occurred.*"

Furthermore, it was argued before the FIFA Appeals Committee that the addition of prohibiting an "*attempt*" in Article 5(2) of the 2012 edition of the FIFA Code of Ethics is the precise change that renders it as "*an act or omission which would not have contravened the Code applicable at the time it was committed*" as specified in Article 3 of the 2012 edition. The FIFA Appeals Committee rejected this argument and determined that the FIFA Ethics Committee AC correctly applied the 2009 edition, despite that decision explicitly relying on Article 5(2) of the 2012 edition. The FIFA Appeals Committee again relied on the 2012 edition of the FIFA Code of Ethics.

That decision was subsequently appealed to the CAS on the exact same basis, that FIFA incorrectly applied the 2012 edition to events that occurred in 2010.[22] The CAS Panel agreed with Mr *MAYNE-NICHOLLS* and quashed the violation in relation to the prohibition of FIFA officials from offering and accepting gifts and other benefits.

The Panel's decision specifically rejected FIFA's argument that the circumstances in this case amounted to Mr *MAYNE-NICHOLLS* "*accepting*" a benefit.

Moreover, the Panel agreed with the argument that the 2009 edition of the FIFA Code of Ethics is the applicable law because the 2012 edition is wider in scope as a result of the addition of Article 5(2) of the 2012 edition where the operation of Article 3 of the 2012 negates its application. This is notable because this argument was made before the FIFA Appeals Committee where it was entirely rejected. This is significant when viewed in light of the 16 months of delay that accumulated during the period that Mr *MAYNE-NICHOLLS* was waiting for the grounds of the two FIFA decisions. The concept of *nullla poena sine legge praevia* is fundamental in all legal systems. For someone to be prohibited from working in their chosen field and be forced to wait for such a long period of time for the opportunity to have the decision reviewed by an independent panel aggravates the circumstances tremendously.

### *Proportionality*

The CAS upheld the contraventions of Articles 13 (general rules of conduct), 15 (loyalty) and 19 (conflict of interest) of the FIFA Code of Ethics where the Panel ruled that the *nullla poena sine legge praevia* argument did not apply as the corresponding articles in the 2009 and 2012 editions are fundamentally the same.[23] Moreover, the CAS reasoned that the sanction imposed by FIFA in this case is disproportional in light of those sanctions to other cases that merited a three or four year ban from football related activity and reduced the ban to two years. In this sense the CAS identified three mitigating factors in favour of Mr *MAYNE-NICHOLLS*: (1) a long and distinguished career in football; (2) Mr *MAYNE-NICHOLLS* was contrite and sincere; and (3) Mr *MAYNE-NICHOLLS* was honest and cooperative.

With respect to the application of a two-year ban it may be arguable that the CAS could have exercised its discretion to further reduce the sanction, considering there was no violation of accepting or receiving gifts. In any event, the CAS does retain correct discretion in the application of a sanction. In this sense, we note two of the more notorious CAS cases.

21 CAS 2017/A/5996 *Harold Mayne-Nicholls v. FIFA*, p. 10, par. 39.

22 *Ibid*., p. 23, par. 103 to 104.

23 *Ibid*., p. 23, par. 196.

## Corruption & Match-Fixing

In CAS 2011/A/2426 *Amos ADAMU v. FIFA*, the CAS affirmed that a ban from taking part in any football-related activity for a period of three years as well as a fine of CHF 10,000 (approx. EUR 8,800) was appropriate. There, the Appellant was a member of the FIFA Executive Committee, the President of the West African Football Union, an executive member of the Confederation of African Football, the Chairman of the CAF Ethics Committee and the former Director General of Sports in Nigeria. In his capacity as a member of the FIFA Executive Committee, Mr *ADAMU* was caught on audio and video tape by two journalists soliciting bribes in the hundreds of thousands of U.S. dollars for the Nigerian Football federation in exchange for supporting the U.S. bid for the 2022 World Cup. Mr *ADAMU* was found to have violated the general rules; loyalty and confidentiality rules and the bribery rules of the old version of the FIFA Code of Ethics. It would appear that the *ADAMU* case worse in terms of the seriousness of the violations given the amount of money involved and the convincing nature of the evidence. We also note that Mr *MAYNE-NICHOLLS* received a fine of CHF 20,000 (approx. EUR 17,500), twice as much as Mr *ADAMU*.

Moreover, in TAS 2011/A/2433 *DIAKITE c. FIFA*, the CAS affirmed a two-year ban. The facts in *DIAKITE* are similar to the *ADAMU* case where he was a member of the FIFA Executive Committee and was caught on tape soliciting bribes in relation to the voting of the decision to award the 2018/2022 World Cups. A general reading of these decisions perhaps suggests that if FIFA did not unilaterally impose this delay that perhaps the CAS would have had the ability to consider a lower sanction.

### Conclusion

Ultimately, Mr *MAYNE-NICHOLLS* suffered through a legal saga of two years fighting for the ability to work in his chosen profession. The delay of this case had not only wide ranging effects on this ability to work, but had serious ramifications on the legal issues.

The effect of the delay was exacerbated by rejection of his several applications for the stay of the decision. In addition, the delay contributed to the occurrence that his sanction would be in the area of two years no matter the result of any dispute resolution process, as he was already sanctioned for 20 months at the time Mr *MAYNE-NICHOLLS* was able to appeal to the CAS.

Hopefully, going forward, sporting bodies, when taking fundamental decisions with respect to someone's right to work, will issue swift and decisive decisions so that the pursuit of meaningful legal recourse is guaranteed.

# *The SEMEDO Case: Does a Players' Arrest Authorize Clubs to Terminate their Employment Contracts with Just Cause?*


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→ ***National Law – Criminal Law – Player contract – Breach of contract – Just cause***

*On 14 July 2017,* Villarreal CF *transferred-in the Portuguese player* Ruben SEMEDO *(*SEMEDO*) from* Sporting CP *paying EUR 15 million. Afterwards,* SEMEDO *was firstly accused of aggression in October 2017, was detained for a few hours for threats in November 2017 and, following a third episode occurred on 22 February 2018, he was detained, being accused of attempted murder, injury, kidnapping, criminal possession of weapons and robbery.*

*Ruben SEMEDO*, *Aleksandr KOKORIN*, *Pavel MAMAEV*, *Arda TURAN* and *Nicklas BENDTNER* represent the most recent examples of football players facing criminal charges.

Besides the criminal repercussions connected with these crimes, football players could face additional employment-related consequences. In this sense, does a players' arrest authorize clubs to terminate their employment contracts with just cause?

First of all, it should be noted that every national law is different. Therefore, *Villarreal CF*, *Zenit Saint Petersburg, Başakşehir*, and *Rosenborg BK* could come to different decisions in accordance with the respective national legislations.

With reference to Spanish Law, a distinction should be made between pretrial custody and final prison sentence.

On the one hand, during the players' pretrial custody the impossibility for the players to perform their work is justified and therefore clubs may impose fines and suspend employment contracts, which cannot be, in any case, terminated with just cause. In this sense, Article 45.1.g) of the Spanish Workers' Statutes states that "*The employment contract could be suspended for the following reasons … g) The worker's privation of liberty, while no condemn exists […].*"

If/once the pretrial custody terminates, Article 48.1 of the Spanish Workers' Statutes grants players the right to be reincorporated in their working place. At the opposite, in case clubs decided to terminate players' employment contracts it would represent a termination without just cause, in accordance with the above Article 45.1.g).

As a necessary requisite, players shall have previously notified clubs of their pretrial custody. If they had not done so, the impossibility to perform their work will be considered as unjustified and clubs will have the right to terminate said employment contracts with just cause.

As a general rule, clubs do not have the power to terminate employment contracts with just cause as a consequence of players' crimes or misconducts which are not directly related to the working activity or committed during the working time. This is without prejudice to those crimes that indirectly affect the players' performance or the clubs' image (clubs' internal regulations and players' employment contracts play an important role in determining which the punishable conducts are).

On the other hand, if and once players were sentenced to prison by a final decision, Article 54.2.a) of the Spanish Workers' Statutes regulates the termination of

employment contracts for disciplinary reasons, sanctioning the "*Repeated offences, and unjustified absences or lack of punctuality at work.*" In this sense, the decision dated 24 April 2018 of the Spanish Supreme Court, Social Chamber[1], confirmed that when workers are sentenced to prison by a final decision, the absence from work allows employers to terminate employment contracts for disciplinary reasons. Furthermore, said absence may also be considered as tacit dismissal[2], in accordance with Article 49.1.d) of the Spanish Workers' Statutes, which justifies the employers' absence of compensation. At the opposite, clubs can request compensation for damage due to the termination of the working relationship attributable to players, in accordance with Article 15.2 of the Spanish Royal Decree 1006/1985.

Analyzing a concrete case, on 14 July 2017, *Villarreal CF* transferred-in the Portuguese player *Ruben Semedo* from *Sporting CP* paying EUR 15 million. Afterwards, *Semedo* was firstly accused of aggression in October 2017, was detained for a few hours for threats in November 2017 and, following a third episode occurred on 22 February 2018, he was detained, being accused of attempted murder, injury, kidnapping, criminal possession of weapons and robbery.

On 23 February 2018, *Villarreal CF* "*decided to suspend the player's employment and salary until a definitive resolution has been reached for the disciplinary inquiry that is in process*"[3], therefore in accordance with the abovementioned Article 45.1.g) of the Spanish Workers' Statutes.

Following more than 140 days under pretrial custody and two rejected requests of release, on 13 July 2018, the judge granted *Semedo* the conditional release on bail. On the same day, *Villarreal CF* decided to close the employment-related internal disciplinary proceedings by imposing a fine against the player. Five days later, *Semedo* was transferred on a yearly loan to *SD Huesca*, where he is regularly performing his duty while waiting for the sentence. In case *Semedo* were sentenced to prison by a final decision, *Villarreal CF* would have the option of terminating his employment contract with just cause, in accordance with the abovementioned Article 54.2.a) of the Spanish Workers' Statutes.

Nevertheless, when the final decision will be rendered, *Semedo*'s employment contract with *Villarreal CF* could be naturally expired[4], or he could be definitely transferred to another club, which both options rendering *Villarreal CF*'s termination with just cause impossible (which would be valid for the purchasing club). At the opposite, if the final decision imposed *Semedo* to serve a period in jail and at that time he will still be contractually bound to *Villarreal CF*, the latter would have the opportunity of terminating said working relationship with just cause.

However, *Villarreal CF* should take several factors into consideration if/when terminating said employment contract. Indeed, such decision should consider that the rules of the Spanish Football Association do not allow the possibility of registering new players out of the transfer windows.[5] Therefore, if *Villarreal* fired *Semedo* outside the transfer windows, it would be prevented from registering a substitute. Moreover, terminating the *Semedo*'s employment contract would entail economic and financial negative consequences, where *Villarreal CF* would lose the chance to count on or transfer a player paid EUR 15 million in July 2017, but having the possibility to file a claim requesting compensation for damage, as explained above.

In view of the foregoing, *Villarreal CF* could terminate *Semedo*'s employment contract if/once he is sentenced to prison by a final decision and said employment contract will still be in force at that time. However, *Villarreal CF* should take into consideration also the sporting and financial consequences of such termination.

1 www.poderjudicial.es

2 It is considered as a tacit dismissal also when workers had simply notified the final decision and his arrest because, as the Spanish Supreme Court established, the working relationship cannot be based on a mere notification, which does not justify the workers' absence.

3 www.villarrealcf.es

4 It will naturally expire on 30 June 2022.

5 The only two exceptions are represented by free agent players (Article 124.2 of the General Regulations of the Spanish Football Association) and substitutes of players injured for more than five months, when an ITC shall not be requested (Article 124.3 of the General Regulations of the Spanish Football Association).

## *Did the IOC lie about the denial of Kosovan athletes' visas in Spain?*

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→ ***Foreign players – Nationality – Visas***

Pere Miró *(picture), Deputy Director of the International Olympic Committee, declared that "*Spain is the only country with which there is no solution on Kosovo. We have two years and two different governments with this. (...) If the Spanish Government is not in the conditions to guarantee the access not only to Kosovo but to every athlete to compete, we should warn all IFs that, until this is solved, they should not hold international competitions there*."*

In a joint statement on 14 November 2018[6], the International Olympic Committee (IOC) and the Spanish Olympic Committee "*publicly expressed their deepest satisfaction*" with a commitment from Spain's foreign affairs minister *Josep Borrell* to allow athletes from Kosovo to use their national symbols, anthem, and flag while participating in international sporting events being held in the country.

However, hours later through a press release, the Spanish Minister of Foreign Affairs, *Josep Borrell*, said that the Spanish Government will raise a formal complaint to the IOC to denounce what he considers "*false information coming from a high-level IOC position*", which is groundless, "*and will transfer them*" the profound malaise that these statements have caused to the Spanish executive. In its statement, the Spanish government states that "*Spain has allowed and facilitated the participation of Kosovar athletes in these competitions, granting visas when requested, always in accordance with the Olympic chart and allowing the use of its symbols, flags and hymns according to the Olympic protocol*."

It also ensures that, in the future, they will continue with this "*without prejudice*" scheme for their political position not to recognize "*the independence of Kosovo.*"

The point that most annoys the Foreign Ministry is that of granting visas: "*We deny the reiterated statements by a senior official of the International Olympic Committee, according to which Spain would have denied the granting of visas to the Kosovars who participated in the World Karate, given that they did not request visas from the Spanish authorities.*"

The problem emerged at the World Karate Championships in Madrid, held at the beginning of November 2018, a competition in which the Kosovo team participated in under the banner of the International Federation, unlike the Mediterranean Games in Tarragona, where the athletes of that country competed under the flag and the anthem of the Kosovar Olympic Committee, almost equal to those of the country.

It was *Pere Miró*, Deputy Director of the International Olympic Committee, who stated that in the Karate World Championships, the Kosovar karateka had to ask for a visa to France, a country that does recognize its independence, because Spain did not grant it.

*Pere Miró*, also declared that "*Spain is the only country with which there is no solution on Kosovo. We have two years and two different governments with this. But the World Karate the truth that is the straw that broke the camel's back. If the Spanish Government is not in the conditions to guarantee the access not only to Kosovo but to every athlete to compete, we should warn all IFs that, until this is solved, they should not hold international competitions there.*"

Mr *Miró*'s reaction, who put himself forward for *Convergència i Unió* (the *Puigdemont*'s Catalan party) at the local elections in 1987, seems a bit histrionic. An IOC General Director should be more prudent and less passionate about politics.

Kosovo, which declared its independence from Serbia in 2008, was recognized as a member of the International Olympic Committee (IOC) in 2014, receiving the right to participate in international sports events as an independent state, but is not yet a member of the United Nations.

The present situation will not be rectified until Kosovo and Serbia, the core republic of former Yugoslavia, defy apparently insurmountable differences and come to a settlement aided by the United Nations Interim Administration Mission in Kosovo (UNMIK).

6 Joint statement of the IOC and the Spanish Olympic Committee, 14 November 2018 www.olympic.org

To date, 110 countries of the 193 United Nations members recognize Kosovo as an independent country. However, of the ten most populous countries in the world, seven did not recognize the unilateral declaration of independence of the southern Serbian province, including powers such as China, India, Indonesia, Brazil, Nigeria, Russia, and Mexico.

On 18 February 2008, Spanish Foreign Minister *Miguel Ángel Moratinos* said that Spain would not recognize Kosovo because the declaration of independence did not respect international law. He also said that the independence of Kosovo would only be legal if it was the result of an agreement by all sides involved or if there had been a UNSC resolution. This position seems to be quite respectful to international law and UN resolutions.

The argument that "*the creation of States is a matter in principle governed by international law and not left to the discretion of individual States*" may be widely accepted in international legal circles. The radical divergence of third States in terms of their reactions to the Kosovo Declaration would be explained as the result of a deliberate decision of a considerable number of States to simply ignore its principles and rules, without suffering any kind of sanction as a result.

Politics and political banishment in the Olympics date back to its ancient Greek version. The city-state of Elis, which controlled the ancient games, remained neutral in disputes and wars. But during the Peloponnesian War in 424 B.C., Elis sided with Athens and banned Athens's rival, Sparta, from competing in the 89th Olympiad. Given that history, it may be that there never was hope of an Olympic Games devoid of politics.

The IOC has its own skeletons in the closet, as discussed below.

By the time the *Olympics* kicked off in October 1968 in Mexico City, Dr *Martin Luther King Jr.* had been gunned down in April, setting off riots and halting the Civil Rights Movement in its tracks. On the morning of 16 October, US athlete *Tommie Smith* won the 200-meter race with a world-record time of 19.83 seconds and the US's *John Carlos* won third place with a time of 20.10 seconds. They took their first and third-placed podiums barefoot and, during the playing of the US national anthem, raised a single black glove while bowing their heads.

The then IOC President *Avery Brundage* had supported the inclusion of apartheid-era South Africa in the Olympics and had fought against proposed boycotts of *Hitler*'s 1936 Games. But after *Carlos* and *Smith* raised their fists, it was the black American athletes, not the IOC President, who faced serious consequences.

They were banned from further Olympic activities by the IOC and the U.S. Olympic Committee. *Brundage* ordered *Smith* and *Carlos* be suspended from the US team and banned from the Olympic Village. When the US Olympic Committee refused, *Brundage* threatened to ban the entire US track team. This threat led to the expulsion of the two athletes from the Games.

*Brundage*, who was president of the United States Olympic Committee in 1936, had made no objections against Nazi salutes during the Berlin Olympics. He argued that the Nazi salute, being a national salute at the time, was acceptable in a competition of nations, while the athletes' salute was not of a nation and therefore unacceptable.

*Brundage* remained IOC President until 11 September 1972 and was appointed Life Honorary President until his death in 1975.

An official document about *Brundage* at the IOC website (Historical Archives-Olympic Studies Centre) only says about the above-mentioned facts: "*Several people criticised Brundage for being somewhat intransigent in his positions and in his way of leading the IOC during these crises. However, everyone agrees that he was always faithful to his convictions and to defending the two major Olympic ideals, i.e. amateurism and the non-politicisation of sport.*"

Let's go further in time. In its press release of 28 February 2017, the IOC communicated that, as part of the implementation of Olympic Agenda 2020, it is making specific changes to the 2024 Host City Contract with regard to human rights, anti-corruption and sustainable development. On this occasion, IOC President *Thomas Bach* stated that "*this latest step is another reflection of the IOC's commitment to embedding the fundamental values of Olympism in all aspects of the Olympic Games*".

For the moment, the IOC has made no objections regarding 2022 World Cup in Qatar.

The abuses in Qatar amount to modern-day slavery, with almost one Nepalese immigrant dying each day during the summer of 2018 constructing the infrastructure for the 2022 World Cup. The International Trade Union Confederation (ITUC) has claimed that Qatar's construction frenzy ahead of the 2022 World Cup is on course to cost the lives of at least 4,000 migrant workers before a ball is kicked.

FIFA is "*taking the matter seriously*" but has yet to reveal its own plans to monitor the issue. So far it seems its biggest concern has been the logistical nightmare of shifting to a winter schedule to avoid Qatar's searing summer temperatures, a trivial matter in comparison to the human lives exploited in the preparation for the event.

This matter seems a little more serious than the controversial recognition of a country unilaterally separated from another; Mr *Miró*, you have the floor...

## *Former* Real Madrid *President Sentenced to 3 years in Prison over Tax Fraud*

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→ ***National Law – Tax Law – Tax Fraud – Criminal Law – National courts***

*Audiencia Provincial de Madrid, section 5, 29 October 2018*

Mr *Lorenzo Sanz* (9 August 1943, Madrid), *Real Madrid*'s former president from 1995 to 2000 after losing the elections against Mr *Florentino Perez*, has been sentenced to three years in prison and the payment of a fine of EUR 1,250,000 for deceiving the Spanish Tax Agency (*Agencia Estatal de la Administración Tributaria* - AEAT) by failing to declare part of his earnings in his Personal Income Tax corresponding to the years 2008 and 2009.

The national courts in Madrid recently issued, on 29 October 2018, a decision considering that Mr *Sanz* "*intentionally*" failed to declare an income of almost EUR 6,000,000 in his declaration on the Personal Income Tax in the said two years *"to obtain an illicit tax benefit."*

The criminal acts proven by the Spanish Court reveal that *Sanz* and his wife, Ms *María Luz Durán Muñoz*, hid more than EUR 465,000 in labor income, EUR 5,300,000 in profits obtained from its assets and over EUR 250,000 that entered into his bank accounts and was never justified.

The Spanish courts mitigated the sentence due the fact that Mr *Sanz*, by establishing mortgages over the assets of his sons and daughters, "*tried its best efforts to repair the damage caused towards the Spanish tax authorities.*" However, the magistrates in question recognized that, although Mr *Sanz* admitted the facts and his fault, such fact could not be taken as a mitigating circumstance since "*a late confession used as a strategical argument of defense in order to mitigate a judgment, shall not be taken into consideration.*"

Ms *Durán* was also considered as directly responsible for the fraud committed by her husband, which is why the court ordered her to bear in equal shares the compensation of EUR 1,250,000 that Mr *Sanz* must pay to the Spanish Tax Agency. The court concluded that Ms *Durán*, being married to Mr *Sanz* under a profit regime, was directly benefitted from her husband's fraud, although she was only condemned to the payment of the economic penalty without imprisonment, since the magistrates discarded her being unaware of the defrauding attitude of her husband as well as her not having any decision-making capacity in the tax declarations of the years 2008 and 2009.

Mr *Sanz* and his wife have been facing a tough process, which began on 20 June 2014 and where the State's Attorney and the Prosecutor where requesting sentences of four and over five years of imprisonment, respectively.

As a final remark, it is worth recalling that another procedure has been opened against Mr *SANZ* for an alleged crime of insolvency punishable as well under the Spanish courts. It appears that the Unit of Economic and Fiscal Crime of the National Police (Udef) is investigating Mr *SANZ* for an alleged crime of money laundering, after detecting deviations of money to tax havens of more than EUR 13,000,000.

## *The Spanish Tax authorities consider the referees as employees*

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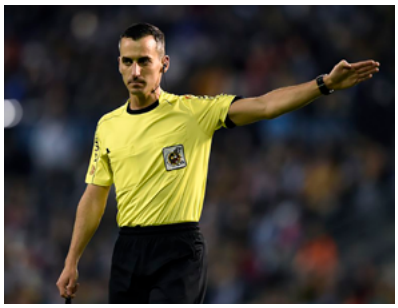
→ ***National Law – Tax Law – Referee***



The Spanish Tax Authorities have recently issued a document in the form of a consultation[7] where it responded to whether the football referees should be considered as employees or self-employed persons. The debates over this issue are ongoing in the Spanish legal society, however, the answer was given only for the purposes of the income tax of the referees.

It should be noted that the Tax Authorities did not consider the question of the employment of the referees in the context of their relationship with the correspondent sports association but rather from the point of view of the application of the law on the income tax to their remuneration and benefits in kind.

Thus, the Tax Authorities state that the Article 17.1 of the Law no. 35/2006, of 28 November 2006, on the Income Tax of natural persons defines the income from employment as *"all remuneration or income, whatever its denomination or nature is, monetary or in kind, that derives, directly or indirectly, from personal work or from the labour or statutory relationship and does not have the nature of the income from economic activities."*

The Tax Authorities note that, on the other hand, the Article 27.1 of the same Law conceptualizes the income from economic activities as *"the income that comes from combined personal work and capital, or from only one of these factors, and supposes from the taxpayer the correspondent orders on his own account of means of production and human resources or any of them, with the purpose of intervening in the production or distribution of goods or services."*

According to both legal definitions, the Tax Authorities qualify, again only for the purposes of the Personal Income Tax, as income from employment the remuneration earned by the referees of the corresponding sports federations for the realization of their functions, since the organization on their own account does not exist. The same applies for the means of production and human resources, or one of both, as the factor creating the income based on the economic activities.

Thus, at least in the eyes of the Tax authorities of Spain, the question to consider the referees as the employees is not controversial and is answered without doubts.

7 https://petete.minhafp.gob.es