JUDGMENT OF THE COURT (Grand Chamber)

16 March 2010 *

In Case C-325/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (France), made by decision of 9 July 2008, received at the Court on 17 July 2008, in the proceedings

Olympique Lyonnais SASP

v

Olivier Bernard,

Newcastle United FC,

* Language of the case: French.

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts and P. Lindh, Presidents of Chamber, C.W.A. Timmermans, A. Rosas, P. Kūris, E. Juhász, A. Borg Barthet and M. Ilešič (Rapporteur), Judges,

Advocate General: E. Sharpston,
Registrar: M.-A. Gaudissart, Head of unit,

having regard to the written procedure and further to the hearing on 5 May 2009,

after considering the observations submitted on behalf of:

— Olympique Lyonnais SASP, by J.-J. Gatineau, avocat,

— Newcastle United FC, by SCP Celice-Blancpain-Soltner, avocats,

— the French Government, by G. de Bergues and A. Czubinski, acting as Agents,

— the Italian Government, by I. Bruni, acting as Agent, and D. Del Gaizo, avvocato dello Stato,

— the Netherlands Government, by C.M. Wissels and M. de Grave, acting as Agents,

— the United Kingdom Government, by S. Ossowski, acting as Agent, and D.J. Rhee, Barrister,

— the Commission of the European Communities, by M. Van Hoof and G. Rozet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns Article 39 EC.

2 The reference has been made in the course of proceedings brought by Olympique Lyonnais SASP ('Olympique Lyonnais') against Mr Bernard, a professional football player, and Newcastle United FC, a club incorporated under English law, concerning the payment of damages for unilateral breach of his obligations under Article 23 of the Charte du football professionnel (Professional Football Charter) for the 1997-1998 season of the Fédération française de football ('the Charter').

Legal context

National law

3 At the material time in the main proceedings, employment of football players was regulated in France by the Charter, which had the status of a collective agreement. Title III, Chapter IV, of the Charter concerned the category known as 'joueurs espoir,' namely players between the ages of 16 and 22 employed as trainees by a professional club under a fixed-term contract.

4 At the end of his training with a club, the Charter obliged a 'joueur espoir' to sign his first professional contract with that club, if the club required him to do so. In that regard, Article 23 of the Charter, in the version applicable at the material time in the main proceedings, provided:

'…

On the normal expiry of the ["joueur espoir"] contract, the club is then entitled to require that the other party sign a contract as a professional player.

…'

5 The Charter contained no scheme for compensating the club which provided the training if the player, at the end of his training, refused to sign a professional contract with that club.

6 In such a case, however, the club which provided the training could bring an action for damages against the 'joueur espoir' under Article L. 122-3-8 of the Code du travail (Employment Code) for breach of the contractual obligations flowing from Article 23 of the Charter. Article L. 122-3-8 of the French Code du travail, in the version applicable to the facts in the main proceedings, provided:

'In the absence of agreement between the parties, a fixed term contract may be terminated before the expiry of the term only in the case of serious misconduct or *force majeure*.

…

Failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 During 1997, Olivier Bernard signed a 'joueur espoir' contract with Olympique Lyonnais for three seasons, with effect from 1 July of that year.

8 Before that contract was due to expire, Olympique Lyonnais offered him a professional contract for one year from 1 July 2000.

9 Mr Bernard refused to sign that contract and, in August 2000, signed a professional contract with Newcastle United FC.

10 On learning of that contract, Olympique Lyonnais sued Mr Bernard before the Conseil de prud'hommes (Employment Tribunal) in Lyon, seeking an award of damages jointly against him and Newcastle United FC. The amount claimed was EUR 53 357.16 — equivalent, according to the order for reference, to the remuneration which Mr Bernard would have received over one year if he had signed the contract offered by Olympique Lyonnais.

11 The Conseil de prud'hommes in Lyon considered that Mr Bernard had terminated his contract unilaterally, and ordered him and Newcastle United FC jointly to pay Olympique Lyonnais damages of EUR 22 867.35.

12 The Cour d'appel, Lyon, quashed that judgment. It considered, in essence, that the obligation on a player to sign, at the end of his training, a professional contract with the club which had provided the training also prohibited the player from signing such a contract with a club in another Member State and thus infringed Article 39 EC.

13 Olympique Lyonnais appealed against that decision of the the Cour d'appel, Lyon.

14 The Cour de cassation considers that although Article 23 of the Charter did not formally prevent a young player from entering into a professional contract with a club in another Member State, its effect was to hinder or discourage young players from signing such a contract, inasmuch as breach of the provision in question could give rise to an award of damages against them.

15 The Cour de cassation points out that the dispute in the main proceedings raises a problem of interpretation of Article 39 EC since it raises the question whether such a restriction can be justified by the objective of encouraging the recruitment and training of young professional footballers in accordance with the judgment in Case C-415/93 *Bosman* [1995] ECR I-4921.

16 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the principle of the freedom of movement for workers laid down in [Article 39 EC] preclude a provision of national law pursuant to which a "joueur espoir" who at the end of his training period signs a professional player's contract with a club of another Member State of the European Union may be ordered to pay damages?

(2) If so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying such a restriction?'

Consideration of the questions referred for a preliminary ruling

17 By its questions, which should be examined together, the national court asks, in essence, whether the rules according to which a 'joueur espoir' may be ordered to pay damages if, at the end of his training period, he signs a professional contract, not with the club which provided his training, but with a club in another Member State, constitute a restriction within the meaning of Article 45 TFEU and, if so, whether that restriction is justified by the need to encourage the recruitment and training of young players.

Observations submitted to the Court

18 According to Olympic Lyonnais, Article 23 of the Charter is not an obstacle to effective freedom of movement for 'joueurs espoir' since they are free to sign a professional contract with a club in another Member State subject to the sole condition that they pay compensation to their former club.

19 On the other hand, Newcastle United FC, the French Government, the Italian Government, the Netherlands Government, the United Kingdom Government and the Commission of the European Communities argue that rules such as those at issue in the main proceedings constitute a restriction on freedom of movement for workers, which is, in principle, prohibited.

20 If it is held that Article 23 of the Charter constitutes an obstacle to freedom of movement for 'joueurs espoir', Olympique Lyonnais considers, on the basis of the judgment in *Bosman*, that that provision is justified by the need to encourage the recruitment and training of young players inasmuch as its only objective is to permit the club which provided the training to recover the training costs it incurred.

21 On the other hand, Newcastle United FC contends that the judgment in *Bosman* clearly placed any 'compensation fee for training' on the same footing as a restriction incompatible with freedom of movement for workers, since the recruitment of young players does not constitute an overriding reason in the public interest capable of justifying such a restriction. Moreover, Newcastle United FC contends that, under the rules at issue in the main proceedings, damages are calculated according to arbitrary criteria which are not known in advance.

22 The French Government, the Italian Government, the Netherlands Government, the United Kingdom Government and the Commission argue that, according to the judgment in *Bosman*, the fact of encouraging the recruitment and training of young footballers constitutes a legitimate objective.

23 However, the French Government argues that, under the rules at issue in the main proceedings, the damages that the club which provided the training could claim were calculated in relation to the loss suffered by the club rather than in relation to the training costs incurred. According to the French Government and also the United Kingdom Government, such rules do not meet the requirements of proportionality.

24 The Italian Government considers that a compensation scheme may be regarded as a proportionate measure to achieve the objective of encouraging the recruitment and training of young players in so far as the compensation is determined on the basis of clearly defined parameters and calculated in the light of the burden borne by the club which provided the training. The Italian Government states that the possibility of claiming a 'compensation fee for training' is of particular importance for small clubs, which have limited structures and a limited budget.

25 The French Government, the Italian Government, the United Kingdom Government and the Commission refer to the Regulations on the Status and Transfer of Players of the Fédération internationale de football association (FIFA), which came into force during 2001, after the material time in the main proceedings. Those regulations lay down rules for the calculation of 'compensation fees for training' which apply to situ-

ations in which a player, at the end of his training in a club in one Member State, signs a professional contract with a club in another Member State. According to the French Government, the United Kingdom Government and the Commission, those provisions comply with the principle of proportionality.

26 The Netherlands Government points out, in a more general manner, that there are reasons in the public interest, related to training objectives, which could justify rules by virtue of which an employer who provides training to a worker is justified in requiring the worker to remain in his employment or, if he does not do so, to claim damages from him. The Netherlands Government considers that, in order to be proportionate, compensation must fulfil two criteria, namely that the amount to be paid must be calculated in relation to the expenditure incurred by the employer in that training and account must be taken of the extent, and for how long, the employer has been able to enjoy the benefit of the training.

Findings of the Court

The existence of a restriction on freedom of movement for workers

27 First, it is to be remembered that, having regard to the objectives of the European Union, sport is subject to European Union law in so far as it constitutes an economic activity (see, in particular, *Bosman*, paragraph 73, and Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991, paragraph 22).

28 Thus, where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen, it falls, more specifically, within the scope of Article 45

TFEU et seq. or Article 56 TFEU et seq. (see, in particular, *Meca-Medina and Majcen* v *Commission*, paragraph 23 and the case-law cited).

29 In the present case, it is common ground that Mr Bernard's gainful employment falls within the scope of Article 45 TFEU.

30 Next, it is settled case-law that Article 45 TFEU extends not only to the actions of public authorities but also to rules of any other nature aimed at regulating gainful employment in a collective manner (see *Bosman*, paragraph 82 and the case-law cited).

31 Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, a limitation of the application of the prohibitions laid down by Article 45 TFEU to acts of a public authority would risk creating inequality in its application (see *Bosman*, paragraph 84).

32 In the present case, it follows from the order for reference that the Charter has the status of a national collective agreement, and it thus falls within the scope of Article 45 TFEU.

33 Finally, as regards the question whether national legislation such as the legislation at issue in the main proceedings constitutes a restriction within the meaning of Article 45 TFEU, it must be pointed out that all of the provisions of the FEU Treaty relat-

ing to the freedom of movement for persons are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union, and preclude measures which might place nationals of the Member States at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, in particular, *Bosman*, cited above, paragraph 94; Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 25; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 31).

34 National provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute restrictions on that freedom even if they apply without regard to the nationality of the workers concerned (see, in particular, *Bosman*, paragraph 96; *Kranemann*, paragraph 26; and *ITC*, paragraph 33).

35 Rules such as those at issue in the main proceedings, according to which a 'joueur espoir', at the end of his training period, is required, under pain of being sued for damages, to sign a professional contract with the club which trained him are likely to discourage that player from exercising his right of free movement.

36 Even though, as Olympique Lyonnais states, such rules do not formally prevent the player from signing a professional contract with a club in another Member State, it none the less makes the exercise of that right less attractive.

37 Consequently, those rules are a restriction on freedom of movement for workers guaranteed within the European Union by Article 45 TFEU.

Justification of the restriction on freedom of movement for workers

38 A measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose (see, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; *Bosman*, paragraph 104; *Kranemann*, paragraph 33; and *ITC*, paragraph 37).

39 In regard to professional sport, the Court has already had occasion to hold that, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate (see *Bosman*, paragraph 106).

40 In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken, as the Advocate General states in points 30 and 47 of her Opinion, of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU.

41 In that regard, it must be accepted that, as the Court has already held, the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players (see *Bosman*, paragraph 108).

42 The returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club (see, to that effect, *Bosman*, paragraph 109).

43 Moreover, the costs generated by training young players are, in general, only partly compensated for by the benefits which the club providing the training can derive from those players during their training period.

44 Under those circumstances, the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club. In particular, that would be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport.

45 It follows that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally (see, to that effect, *Bosman*, paragraph 109).

46 It is apparent from paragraphs 4 and 6 of the present judgment that a scheme such as the one at issue in the main proceedings was characterised by the payment to the club

which provided the training, not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club.

47 As the French Government stated, pursuant to Article L. 122-3-8 of the French Employment Code, the damages in question were not calculated in relation to the training costs incurred by the club providing that training but in relation to the total loss suffered by the club. In addition, as Newcastle United FC pointed out, the amount of that loss was established on the basis of criteria which were not determined in advance.

48 Under those circumstances, the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities.

49 In view of all the foregoing considerations, the answer to the questions referred is that Article 45 TFEU does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

50 A scheme such as the one at issue in the main proceedings, under which a 'joueur espoir' who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unre-

lated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 45 TFEU does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

A scheme such as the one at issue in the main proceedings, under which a 'joueur espoir' who signs a professional contract with a club in another Member State at

the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

[Signatures]