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The employment status of non-league footballers

Dan Chapman, Partner and Head of Sport at Leathes Prior, dissects the recent ruling by the London South Employment Tribunal in *Duncan Culley v. Whitehawk Football Club,* analyses the importance of the Tribunal's decision to hear Culley's complaint on the employment status of non-league footballers, and shares his views on the possible wider impact of the ruling.

The recent Employment Tribunal judgment in the case of *Duncan Culley v. Whitehawk Football Club*[1] understandably escaped the attention of the football press, focussed such are they on player/club disputes more of the Diego Costa magnitude, save for the coverage by the Brighton newspaper *The Argus*[2]. Duncan Culley is no doubt pleased at that - he presents as a very articulate, non-league footballer who would normally (most unkindly) be referred to as the archetypal 'journeyman.' His career has seen him play for many non-league clubs on the South Coast, including the likes of Shortwood, Farnborough, Hampton & Richmond, Lewes and then Whitehawk[3]. No doubt he courts no attention for his recent legal victory.

The lack of publicity surrounding the decision of the London South Employment Tribunal is no surprise; Employment Tribunal judgments - whilst publically available - are read by few and at first glance the *Culley* case would appear insignificant. That interpretation, however, would be a mistake. Theoretically the case could have major ramifications for non-league football (and indeed amateur sport) - perhaps in the way that the 'journeyman' footballer in Belgium, one Jean-Marc Bosman - changed the future of European football as a result of his legal action[4].

The *Culley* case principally concerned a player who believed (and the Tribunal agreed with him) that he was owed money by the football club that engaged him. There is nothing unusual about that and Culley would not have been the first footballer (and in particular, non-league footballer) to threaten or indeed bring legal proceedings against a club for recovery of monies owed. The unusual feature of Culley's case is that he chose to issue his proceedings not in the civil courts (the usual forum for a debt claim) but in the Employment Tribunal.

For the Employment Tribunal to have jurisdiction over Culley's claims (which were in the most part successful) they had to conclude that he was either an employee or a worker. If he were self-employed then the Tribunal could not consider his complaints, for that would be the domain of the civil courts.

The employment status of a footballer

The Courts have historically been called upon to determine the employment status of footballers. As long ago as 1910, the Court held in *Walker v. Crystal Palace*[5] that a professional footballer was an employee and that decision was further established by the *Eastham v. Newcastle United*[6] case in 1964. But what of the amateur or non-league footballer? Until now, the view of the Football Association ('FA') in England is that a football player is either a professional player and must be an employee, or he is amateur (and not an employee). There can be no dispute that any player within the Premier League or English Football League is an employee for he has to be engaged under the standard form employment contract that is the only document which can be used in order to register a player. But what of non-league clubs? The FA have issued guidance for what they refer to as 'semi-professional clubs'[7] stating that all contracted players must be employees of the club and can not be self-employed. Non-contract players however (who make up the significant majority of players in non-league) 'may or may not' be employees, and the FA advise that 'this will depend on the nature of the relationship between the Club and the player.' The FA go on to say that if a player is not an employee of his club it may be considered that he is 'playing for the love of the game.'

In essence, the FA's position was and is that if a footballer is either professional or contracted by his 'semi-professional' club to play for them until a specified date in return for a salaried amount then he is an employee; otherwise he is 'playing for the love of the game' as an amateur.

The *Culley* judgment

The decision of the Employment Tribunal has now created the spectre of a third category of footballer, plying his trade in the leagues that can interchangeably be described as non-league, semi-professional or amateur. That footballer is neither an employee of his club, but nor is he 'playing for the love of the game.' If Culley was doing merely the latter, the Tribunal had no jurisdiction to hear his complaint.

Whether or not Judge Hildebrand appreciated the significance of paragraph

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13 of his judgment I know not; he merely stated that he "found that the Claimant was a worker." Reciting the well traversed definition of a worker to be found at Section 230 of the Employment Rights Act 1996[8] the Judge was clear that Culley contracted personally with Whitehawk Football Club and that the club was not a client of his. This conclusion means that not only was Culley not merely 'playing for the love of the game' but he was not self-employed either.

What does it mean if a footballer is a worker?

A worker has significant rights that, whilst not as extensive as those enjoyed by employees, have had a major impact in a number of high-profile cases in 2017 (including Uber, Deliveroo and the so-called gig economy). The full list of rights enjoyed by workers is beyond the scope of this article, but of most relevance to the non-league footballer or club those rights would include:

- the right to receive paid annual leave;
- the right to be paid at least the National Minimum Wage ('NMW');
- possible pension rights under auto-enrollment provisions;
- protection against unlawful deduction from wages; and
- protection against unlawful discrimination under the Equality Act 2010.

The writer's experience is that almost all (if not all) non-league footballers who are not treated as employees do not receive paid annual leave and, certainly, there is either non-payment of NMW or non-compliance with the record keeping requirements that a club would need to rely upon to prove compliance. If one were advising a club in regards to both holiday pay and NMW, consideration needs to be given as to when in fact the worker (the player) is working? Do training sessions count as work? Is it only the games that are played? Is it work when one is travelling to and from a game? Is one working from arrival at a ground at 1.30pm on Saturday, or does work commence at kick-off? Is the player who did not make the match-day squad or the unused substitute working?

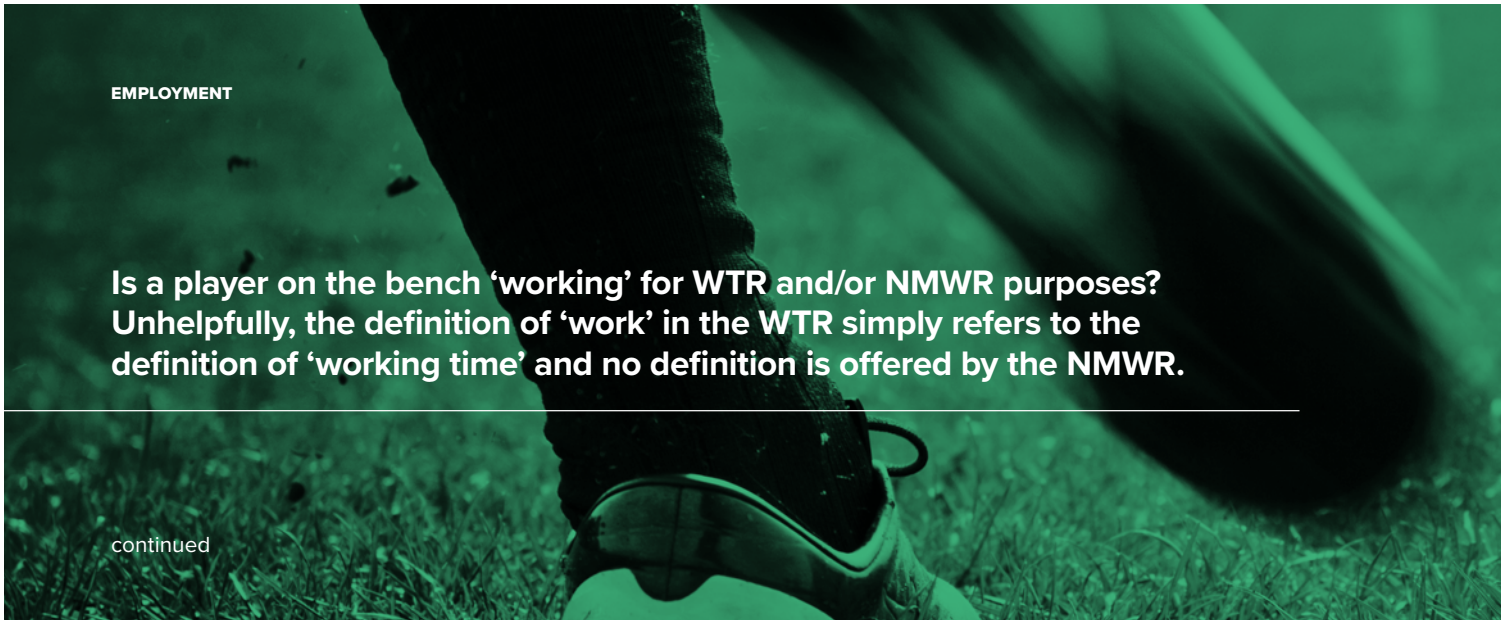
It is possible to very quickly envisage the arguments that a club might deploy to suggest that a player's 'work' is limited to a few hours per week; equally as easy to see how one can contend that a player may be working some 20 or so hours per week, and in some cases more. Those arguments, of course, will drive to the heart of this matter and will be key to how significant the *Culley* judgment might ultimately be - the financial burden upon clubs to comply with paid holiday and NMW will be vast (before one considers the possibility of retrospective claims) if the wider interpretation of what constitutes work is taken.

Working time

In terms of calculating working time, the two key provisions are the Working Time Regulations 1998 ('WTR') and the National Minimum Wage Regulations 2015 ('NMWR'). For these purposes the former govern holiday pay entitlement whilst the latter concern the number of hours for which the National Minimum (or National Living) Wage[9] is payable. The WTR define working time as 'any period during which the [worker] is working, at his employer's disposal and carrying out his activity or duties, any period during which he is receiving relevant training, and any additional period which is to be treated as working time for the purpose of [the WTR] under a relevant agreement[10].'

Under the NMWR, the number of hours counted for the purposes of calculating minimum wage will depend on the type of contract: salaried hours work, time work, output work or unmeasured work. Time work (where a worker is paid by reference to the hours they actually work) and output work (such as where a worker is paid solely by reference to commission) would clearly not be appropriate here.

For a player's work to be categorised as 'salaried hours work' they must be entitled to a salary based on a set number of hours and must usually be paid in equal monthly or weekly instalments. As most non-contract players are only paid during the season, and the contractual arrangements do not include basic fixed hours, these players are likely to be treated as working in the fourth category: 'unmeasured time.' An unmeasured time worker is entitled to be paid for the time they have 'worked,' or are treated to have worked under



Is a player on the bench 'working' for WTR and/or NMWR purposes? Unhelpfully, the definition of 'work' in the WTR simply refers to the definition of 'working time' and no definition is offered by the NMWR.

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the NMWR[11], which we will return to later in terms of travelling and training.

So what time spent by a non-contract footballer could reasonably be considered working time? It is useful to group the time spent by such a player into the following categories:

- (A) matches;
- (B) training; and
- (C) travelling.

If, for example, only attendance on a match-day constituted 'working time' a player may work as few as two or three hours per week. In this situation most non-contract players would already be paid over the NMW or Living Wage and any holiday accrual would be minimal. However, if all of the above count as 'working time,' a player may be due minimum wage for each of their 20-25 hours of training, travelling and playing every week at great expense to the club.

Matches

It is useful to start with perhaps the most obvious example of a player's working time. From the moment players walk on to the pitch for a match, they are expected to be wearing the correct kit, to follow the manager's instructions and obey the laws of the game. If a player is substituted they must leave the pitch; it is not open to that player to continue playing. A player not following these rules could be disciplined by the referee, the club, or both. During matches the players on the pitch appear to satisfy the working time definitions; they are 'working,' at the disposal of the club, and carrying out their duties. It seems likely that players on the bench also satisfy this test. In the same way as the players on the pitch have been told to play, those on the bench have been told to sit (or warm up) and wait for their chance. A player on the bench is not free to go and if he is told he is being subbed on, he must play. He is therefore at the disposal of the club and carrying out the club's activities.

Is a player on the bench 'working' for WTR and/or NMWR purposes? Unhelpfully, the definition of 'work' in the WTR simply refers to the definition of 'working time' set out above and no definition is offered by the NMWR. The Employment Appeal Tribunal ('EAT') has held that working time should not be defined narrowly, but in line with the principles of the WTR[12]. Where a player has been named as in the match-day squad, they are performing a role for the club; albeit that role is sitting on the bench. Interpreting the word 'work' broadly, it appears that this would qualify as work.

Whilst league and FA rules govern what happens during matches, pre- and post- match routines differ from club to club. If a club requires the whole team to arrive at the ground an hour before kick-off to get their kit on, warm up and discuss last minute tactics, this too will likely satisfy the definition. Players are working (preparing for or discussing the match), at the disposal of the club and carrying out whichever elements of their duties the club, the manager and coaches demand of them. Where clubs have less prescriptive pre- or post- match routines, for example allowing players to come and go as they please before and after the match, it may be that this lacks the necessary requirement for players to be 'at the disposal' of the club for it to amount to working time. Subject to this caveat, match-day preparation, and the match itself, are likely to qualify as working time.

Training

The NMWR provide that hours spent training will be treated as hours of work[13]. Whilst the WTR also contain a specific provision which deals with 'relevant training,' training sessions operated by clubs for players may also fall within the same definition of working time as applied above to matches. When a player turns up to training, he will be expected to carry out whatever 'activities and duties' the manager and coaching staff require of him. If he refuses he may be sanctioned or left out of the match-day squad. The work done by players in training (with the aim of improving individually and as a team) will almost certainly fall within the broad definition of 'work' developed in the *Edwards* case[14].

A club may argue that attendance at some or all training sessions is optional. To the extent that this is true, this would be a good way of showing that the players were not 'at the disposal' of the club, but instead were there 'for the love of the game.' However, in most circumstances it seems likely that there will be some negative consequences for missing training (such as not being selected for the first team). On this basis, it would seem difficult for a club to argue that mandatory training sessions do not form part of a player's working time. Whilst optional training sessions may in theory offer an alternative, it would be for the club to convince the Employment Tribunal that these sessions were truly optional.

Travelling

Players may get to away matches in a number of ways. The most structured of these is to require players to arrive at the training ground at an agreed time and board a team bus to the match. Another way is to organise for the team to get a train to the fixture, or alternatively (and perhaps uncommonly) a club may leave the means of transport in the hands of the players. In the recent *Uber* decision, as upheld

on 10 November by the EAT, it was decided that drivers 'working time' for WTR and NMWR purposes included time spent travelling from one job to another job within their territory[15]. Moreover, the Supreme Court has held that an employer's workplace responsibilities to a worker continue whilst they are travelling from one work place to another[16]. From these decisions it seems that, where a worker is travelling from one place of work to another place of work, travelling time will also count as working time. Therefore, where players are required to report to a location to be taken to an away match, this will likely qualify as working time.

Where players are to make their own way to an away match from home, the position is less clear. The European Court of Justice has held that, whilst generally time spent travelling between work and home was not working time, travelling from home to another location (in that case the premises of customers) did qualify[17]. By analogy, travelling to another ground to work will amount to working time; the nature of the journey has not been affected by the fact it starts at home rather than at the training ground. The position appears to be the same in the context of the NMWR, which provides that the hours spent travelling for the purposes of unmeasured work are treated as unmeasured work[18]. Travelling to and from the training ground, however, is unlikely to be working time either for the purposes of the WTR or the NMWR as set out in the *Tyco* decision.

Conclusions

Whilst the above is only a general overview of the possible legal position (and one must remember that *Culley* as a legal authority is not binding), and each case will turn on its own facts, it appears now to be arguable that many footballers who are not employees are in fact workers and that matches, training and travel to away matches could each form part of a player's working time. This means that players will be entitled to receive the NMW (or National Living Wage for players over 25) for these periods. They will also accrue paid holiday in respect of each hour worked.

Until such time as either a higher authority than *Culley* provides guidance, or the footballing authorities (to the extent that it would be relevant in any event) update their regulations and advice, football clubs would be well advised to identify which players might potentially be paid below minimum wage, and quantify the risk which they pose. Risk can be mitigated by introducing new procedures to ensure working time is recorded and players are, where possible, paid at least minimum wage. Where players are truly 'playing for the love of the game,' clubs should consider how and if they can best document that. Although it may be felt unlikely that players will pursue any action against their club, in light of not just *Culley* but the growing publicity surrounding worker status and the 'gig economy' it perhaps is only a matter of time before we see the first tranche of players asserting their worker's rights.

Might the FA (or the guardians of non-league football) take an active interest in this matter? For those who do, for the right reasons, wish to protect the sanctity of the 'playing for the love of the game' concept, such interest may well be advisable. The unfortunate worst case scenario is that smaller or less affluent clubs could be driven into insolvency by claims for backdated minimum wage and holiday pay. Clubs which are run as 'unincorporated associations' do not benefit from limited liability, and it is therefore the members, trustees or board of such a club who would have personal liability for any claim.

1. https://assets.publishing.service.gov.uk/media/59affbe840f0b6174109f63e/Mr_D_Culley_v_Whitehawk_Football_Club_2300793-2017_Preliminary.pdf
2. http://www.theargus.co.uk/news/15524979.Football_club_in_contract_row_ordered_to_pay_player___7_400/?ref=mr&lp=6
3. https://www.transfermarkt.co.uk/duncan-culley/profil/spieler/299848
4. http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61993CJ0415&from=EN
5. Walker v. Crystal Palace Football Club [1910] 1 KB 87 CA.
6. Eastham v. Newcastle United FC Ltd [1964] 1 Ch 413.
7. www.thefa.com/-/media/files/thefaportal/.../paye-and-semi-pro-final-feb-2013.ashx
8. "A worker is an individual who works under a contract of employment or any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business carried on by that individual."
9. National Minimum Wage (for players under 25) is £7.05 per hour. For players over 25 the National Living Wage applies, which set at £7.50 per hour.
10. Regulation 2(1) of the WTR.
11. Regulation 45(a) of the NMWR.
12. Edwards and Morgan v. Encirc Ltd [2015] IRLR 528, http://www.bailii.org/uk/cases/UKEAT/2015/0367_14_2302.html
13. Regulation 46 of the NMWR.
14. See footnote 12.
15. https://assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam_and_Others_UKEAT_0056_17_DA.pdf
16. Kennedy v. Cordia (Services) LLP [2016] ICR 325.
17. Federación de Servicios Privados del sindicato Comisiones Obreras v. Tyco Integrated Security SL: C-266/14.
18. Regulation 47 of the NMWR.