

The Cap that Doesn't Fit - Why Salary Caps Cannot Work in Football



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→ **Salary cap - Salaries - English Football League (EFL) - Professional Footballers Association (PFA) - Collective Bargaining Agreement (CBA)**

2021 has already seen the end of two very short-lived experiments with salary caps in football: one ending mid-season, the other before it even started. The reasons for the collapse of these experiments were different, but there are fundamental common problems with the concept of salary caps in football.

The first failed experiment was the English Football League's (EFL) *League 1* and *League 2* Salary Cap Rules - applying to the third and fourth tier of professional league football in England, just below the *Premier League* and *EFL Championship*. At the beginning of the 2020-2021 season, the EFL introduced the Salary Cap Rules limiting the amount each club could spend on salaries to GBP 2.5 million (approx. EUR 2,900,000) per season in *League 1* and GBP 1.5 million (approx. EUR 1,750,000) in *League 2*. Most of the clubs in the leagues had voted in favour of the controversial new rules, perhaps understandably given the terrible financial strain they had suffered as a result of the COVID-19 pandemic and its impact on football.

But there were a number of problems with the cap. First and foremost, it had been rushed through by the EFL with little consideration or consultation: in particular, the EFL failed to obtain, or even seek, the agreement of the those most affected by the cap, the players. The EFL refused to consult with the player's union, the Professional Footballers Association (PFA), despite many requests to do so. Second, the caps were set at the lowest level in each league, meaning that clubs that could afford to spend more money on salaries while still operating within their means were prohibited from doing so. The effect was to drag wages down to the lowest level and drag club spending down to reflect

the income of the lowest income-generating club. Not only did that infringe on competition between each club within the leagues, it meant that the gap between *League 1* and the *Championship* would be even greater, making it very difficult for promoted clubs from *League 1* to perform in the *Championship* or for clubs relegated from the *Championship* to adapt to the caps.

The PFA brought a claim against the EFL for breach of trade union and labour relations law: the Trade Union and Labour Relations (Consolidation) Act 1992, (the 1992 Act). The EFL, the *Premier League*, The Football Association (The FA) and the PFA had all agreed to a "collective bargaining agreement" as defined by the 1992 Act. The forum for this agreement is the Professional Football Negotiating and Consultative Committee (PFNCC), a body that meets on a regular basis and is comprised of representatives of each of the *Premier League*, EFL, The FA and the PFA. The PFNCC agrees to the terms of the mandatory standard playing contract between the clubs and players and various other related matters. Each of the parties to the PFNCC had agreed that there could be no "major changes to the regulations of the Leagues affecting a Player's terms and conditions of employment" without "full discussion and agreement in the PFNCC". The PFA claimed the imposition of EFL Regulations capping the amount of money a club could pay a player was a major change to a regulation that went to the heart of the terms and conditions of employment between players and clubs. The EFL tried to argue the change

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did not affect the terms of employment and there was, therefore, no duty to obtain the agreement of the PFA.

Perhaps unsurprisingly, the EFL's arguments were robustly dismissed by a very distinguished independent arbitral tribunal chaired by one of the most senior former employment judges in the land, Sir *Patrick ELIAS*, a former Court of Appeal judge and former President of the Employment Appeals Tribunal, and made up of one of the most senior sports arbitrators in the land (*Michael BELOFF QC*) as well as the leading expert in trade union and labour relations law, Lord *HENDY*.

The independent arbitral panel upheld the PFA's challenge to the Salary Cap Rules in early February 2021 in a very thorough comprehensive Award. Unfortunately, the EFL has continued to refuse to consent to the publication of the Award, so the wider public, and indeed even the clubs and players affected, shall not be able to read the reasons why the EFL's various arguments failed. But the decision itself was momentous. It led to the immediate scrapping of the salary cap by the EFL in the middle of the season, one of the first times a legal case has directly led to a major change in football regulation since the landmark *BOSMAN* case, and perhaps the only time it has done so in the middle of a season.

The other failed experiment was that of the ill-fated *European Super League* (ESL). Along with many of the other highly controversial proposals of the breakaway clubs, mainly revolving around an exclusive closed league without promotion or relegation consisting of the richest clubs in Europe was the idea of a salary cap - limiting clubs to spend no more than 55% of their income revenues on salaries, agent fees and transfers. The ESL's proposed salary cap was entirely to be expected. The concept of the ESL was to protect the economic interests of the richest clubs in the world from the competition. The ESL sought to create a "closed shop" for the elite club owners. Once they had created their closed shop, it was inevitable they would then want to limit the amount players could earn and increase the profits club owners could make while, at the same time, trying to make sure no one member of the elite ESL would obtain an advantage by spending significantly more on players. The experience of professional sport in the USA (where many of the protagonists of the ESL came from) was that closed shops and salary caps went well together. But the ESL collapsed before it had even begun, such was the combined reaction of all footballing authorities, clubs, fans, the wider public, press and even politicians to the controversial self-serving proposals.

Both these failed experiments with salary caps help reveal why they are unfit for football. It's precisely because they can and do work well in closed leagues in North America, where there is collective bargaining setting the level of the cap, revenue sharing and fairer distribution of income, in addition to being based within a domestic national economy, that they do not fit well with football which is a truly international sport based on a competitive pyramid system.

There are important legal challenges to salary caps in football. Professional football players have a limited lifetime in which they can earn a living from playing football. Furthermore, they do not have the same freedom to move between employer as most employees do: they are subject to a transfer system which effectively means they can only exit a relatively long fixed-term contract (considering the overall playing lifetime of a player) if their employing club no longer wants their services or obtains a substantial fee to release them. To add a salary cap to this arrangement, preventing a player from earning his or her potential would involve a serious restraint of trade.

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European competition law is most likely to be engaged too. The salary cap would constitute an agreement between undertakings (the clubs formed together in leagues) to apply price-fixing to the costs of player services. Lawyers for some of the leagues and federations have been unduly relaxed about their prospects of defending competition law challenges to measures like the salary cap (as the EFL's lawyers were in the English Salary Cap case) because of the fact there have been a number of unsuccessful competition law challenges to financial fair play regulations in football or salary caps in other sports. But they should be more concerned when it comes to football salary caps. Many of those previous challenges fell down on the facts of the case or were not well-argued. So, a salary cap in football will be far harder for the regulators to defend than the easy rides they have been given in some of the other cases to date.

That is partly because a salary cap just does not fit in football for a number of reasons.

First, football is a truly international sport, unlike some of the sports in which salary caps have worked, mainly in North America, such as the competitions run by the *National Basketball Association* (NBA), *National*

Football League (NFL) and *Major League Baseball* (MLB), or even a sport like a rugby union (where salary caps exist in the *English Premiership* and the *Top 14* organised by the French *Ligue Nationale de Rugby*). Football operates across many different countries and continents with vastly different standards of living, minimum wages, industrial relations laws, tax laws and financial and accounting disclosure requirements and standards. It would be almost impossible to set salary caps internationally and inconceivable that they could be effectively monitored or enforced. And the same is true even across Europe, where those competing in UEFA competitions, for example, come from countries with very different economies and laws.

Second, football is based on a pyramid system with promotion and relegation and open competitions. Salary caps work best in closed competitions. A salary cap in the English *Championship* (that had any effect) would be at a significantly lower level than the average salary a *Premier League* could earn, but if salary caps meant that *Championship* clubs could not afford to employ *Premier League* players, what happens when they are promoted? Must they replace all of their players with new ones? And how could they attract *Premier League* players to 2-3+ year contracts if they insisted they would only pay a premier league if they were not relegated, knowing promoted clubs have a high risk of relegation? The reality is a salary cap would make the difference between clubs competing in each league even greater than it is and likely lead to the same three clubs being promoted and relegated each year.

Third, salary caps are, as FIFPRO's General Secretary, *Jonas BAER-HOFFMANN*, has said, "*philosophically and economically incompatible with a transfer fee system.*" Sports which have adopted salary caps by and large do not have anything like a transfer system. They justify salary caps in part because they are seen as a measure to guarantee an equal distribution of talent between competing clubs, preventing some clubs from out-bidding others by paying more for player services. But in football, one of the main ways by which clubs compete for talent is *via* the transfer system. A cap on what clubs could pay by way of salaries without a cap on transfer fees would mean that wealthier clubs could out-bid other clubs simply by paying much greater transfer fees, leading to an even greater concentration of the best players at fewer clubs. On the other hand, if capped transfer fees were also capped, then smaller development clubs who often only survive by nurturing homegrown talent and selling on would have no viable business model.

Salary caps are also ethically incompatible with the transfer system in the way they restrain players' ability

to sell their services to the highest bidder whilst, at the same time, tying them to a contractual system that allows the employing club to trade them for the highest fees.

Fourth, salary caps are successful in sports where there is a significant degree of revenue sharing of broadcasting, sponsorship and merchandising income. If *Manchester United* had to share a far more significant amount of its income with *Burnley*, for example, a salary cap, fixed at a higher level than it would be absent such sharing, might work. But the very same football club owners who embraced the concept of revenue sharing and salary caps in a closed elite league were driven by an antagonism to sharing their income with other clubs outside their narrow circle.

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Fifth, where salary caps have been successful, they have been the product of collective bargaining, with players' unions playing a significant role not only in setting the cap but also in monitoring and negotiating the distribution of club income. Indeed, that is a principal reason why courts have not found such caps to be a breach of anti-trust law. Without players union being instrumental in the design and implementation of a salary cap, which is unlikely to happen in football as it is currently organised, such caps would be far more vulnerable to legal attack.

The finances of many football clubs were stretched even before the COVID-19 pandemic. They are now near breaking point in many countries and at many levels. There is an urgent need for better football regulation, for fairer distribution of income and for rational cost control measures that do not infringe competition or discourage investment. But salary caps don't begin to offer the solution in football, and the sooner that is understood, the sooner football can work towards better, fairer and more rational financial regulation.