

Welsh Rugby Union new selection policy: indirect age discrimination?

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The Welsh Rugby Union have scrapped the so called ‘Gatland’s Law’ with the result that a number of star players may miss out on future international fixtures, including the 2019 Rugby World Cup.

Under the old selection policy, which has been in force since last year, no players who were signed with a team outside of Wales were eligible to be chosen for international games. An exception to this applied to players who had entered into a contract with a foreign team *prior* to the imposition of that policy, and out of those players, the head coach was allowed to pick three players to play internationally. This was known as ‘Gatland’s law’, named after the Wales head coach.

The new selection policy provides that, to qualify for selection, players outside Wales must have amassed at least 60 caps (an international match) to qualify to play for Wales. This model is similar to that adopted by Australia. The policy will be implemented immediately

The rationale behind this rule is simple- to keep talented players in Wales. After all, the pull of better remuneration outside Wales is a strong one. However a number of big names in Welsh rugby currently play in the Aviva Premiership, such as Liam Williams, Taulupe Faletau, George North and Dan Biggar (who will join Northampton next season) such that the new selection policy will not achieve the desired effect in respect of these players.

For leading Premiership players such as Bath back-row Taulupe Faletau and Harlequins centre Jamie Roberts the new selection policy will not affect them as they have already surpassed the 60-cap threshold. Dan Biggar (Ospreys) is currently on 56 caps but should amass enough appearances over the upcoming November internationals to be eligible before his move to England next summer – assuming he is selected and doesn’t get injured!

Whilst other younger players who are currently playing for non-Welsh teams will remain eligible for selection until their current contracts expire, such as 25 year-old Exeter Chiefs prop Tomas Francis (23 caps), others have not been so lucky. In particular, Rhys Webb. The 28 year-old scrum-half has to date only accumulated 28 international caps and therefore if

his lucrative move to French side Toulon goes ahead next summer he would be ineligible for future internationals, including the 2019 World Cup. At the point at which he entered into a contract with Toulon there was no indication that the selection policy was about to change so dramatically, and given the dire consequences for him of missing out on the opportunity to play for his country, who knows if his decision may have been different. This will no doubt be a huge blow for the first choice Welsh number 9, but New Zealander Gatland has suggested that Webb may be able to opt out of his decision to join Toulon to save his international future. Webb has responded to the situation and is said to be 'heartbroken' but has refuted suggestions that he would play anywhere other than Toulon next season. Despite this admission Webb has been selected in the Wales squad for the upcoming autumn internationals.

Other key players such as Gloucester flanker Ross Moriarty (aged 23, 17 caps) and Saracens back Liam Williams (aged 26, 43 caps) will be permitted to see out the rest of their contracts with their current Premiership clubs but will be forced to consider a return to Wales once they expire in order to secure their long-term international futures.

Age discrimination?

On the face of it, there is a prima facie argument that this new selection policy is discriminatory on the basis of age. Whilst it is a blanket policy which applies equally to all players and thus does not constitute direct age discrimination, the issue is not so clear in relation to indirect age discrimination. Part 5 of the Equality Act 2010 provides that, in relation to work, an employer or principal must not discriminate against an individual by not allowing the worker to do, or to continue to do, the work. Section 19 of the Act provides that a policy will be indirectly discriminatory if it puts individuals with a protected characteristic at a 'particular disadvantage'. To use a simple example: if an organisation applies a policy that they will only admit people who are 6 feet tall or over, this will place women at a particular disadvantage as there are only a small proportion of women who will be able to satisfy this criteria, whereas a much larger proportion of men would qualify. This would therefore constitute indirect sex discrimination.

Quite clearly, the younger a player is, the less chance they will have had to tot up international matches. Players at the start of their career will simply not have had sufficient opportunity to reach the required 60 caps. Looking at the current Welsh squad, only 2 players aged 26 or under have amassed 50 caps or more, where for those aged 28 and over, 8 have achieved 50 or more caps. Thus there is a clear correlation between age and the number of caps attained.

However a policy will not be discriminatory if it can be justified. The WRU would need to show that they were seeking to protect a 'legitimate aim', and that their selection policy was a proportionate means of achieving this aim. Whilst the aim of seeking to persuade Welsh players to remain playing for Welsh teams is no doubt a noble one, is the specific policy that has been implemented proportionate? It is not sufficient for the policy maker to show that they considered their reasons to be adequate. What is required is an objective balance to be struck between the discriminatory effect of the requirement or condition and the reasonable needs of the person who applies it. If it could be shown that there was another way in which to achieve the aim which would not cause such hardship for the younger players, this might well go some way to showing that the policy could not be justified. Whilst a blanket ban on foreign players being selected for Wales would get rid of any discriminatory element, this would clearly not assist those players, such as Rhys Webb, who have already signed contracts outside Wales.

13 November 2017



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