

THE RIGHT TO NON-DISCRIMINATION IN EMPLOYMENT

Background

European Union rules require national parliaments to pass laws that prohibit discrimination on the grounds of sexual orientation. While national courts should then enforce and interpret the laws passed by the national parliament, because the laws originate from the European Union rules and it has a duty to make sure that its rules are applied consistently, cases can be referred to the European Court of Justice when the original rules are considered unclear.

It was due to a lack of clarity on rules prohibiting discrimination on the grounds of sexual orientation involving a football club, that this case was referred from the Romanian courts to the European Court of Justice.¹

Case

The case was brought by Accept, a Romanian NGO that works to protect and promote the rights of LGBT people against the Romanian National Council against Discrimination (CNCD).

The case began with the comments of Mr Becali, shareholder and manager of FC Steaua football club, who during an interview referring to the possibility of transferring a professional footballer of alleged homosexual tendencies to his team, announced that he would never allow his team to hire a homosexual player. Mr Becali justified his argument by claiming that it was not about discrimination and that no one could force him to hire a specific person.

The football team did not disassociate itself from these comments and the player in question never signed the contract.

Process

Mr Becali's comments were referred to the CNCD by Accept, who alleged equality in recruitment and direct discrimination based on sexual orientation.

The CNCD investigated the case and determined that the case in question did not fall within the scope of an employment relationship since Mr Becali was not an employer nor was he in charge of hiring players at FC Steaua. They did however find that Mr Becali had issued statements that could cause harassment, but taking into account that the events had occurred six months previously, they just issued him with a warning.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0081:EN:HTML>

Accept appealed this decision to the Bucharest Court of Appeal, who referred the case to the European Court of Justice. The main questions it asked were:

- Can the equal treatment directive be applied in cases where statements come from a shareholder of a football team who, despite being perceived as the “main leader”, does not legally have the right to decide who to hire and who not to?
- To what extent can Mr Becali’s statements be considered a form of direct or indirect discrimination?
- To what extent does FC Steaua have to prove there was no discrimination?
- How does the time period affect the decision?

Decision

On the 25 April 2013 the European Court of Justice ruled on a number of points:

The player in question did not need to bring the case himself. Accept had a legitimate interest in bringing the case, as discrimination does not need to be directed at a specific person

- The facts of the case indicate direct discrimination took place. Direct discrimination is where one person is treated less favourably than another is, has been or would be treated in a comparable situation on the grounds prohibited in the EU directive
- The status of Mr Becali as the ‘patron’ of the club, even though he didn’t have hiring power, means that the anti-discrimination rules apply, especially as the football club did not distance itself from the remarks
- An employer is required to show that it does not discriminate on the basis of sexual orientation when a complaint is raised

Assessment

This decision made it clear that the European Union rules prohibiting discrimination on the grounds of sexual orientation in employment apply even when if a statement is made only at the abstract level, which prevents or makes it more difficult access to employment.

An example of the results of this is a case brought to the Italian Court of Bergamo, Employment Division, of August 6, 2014 by from the Association Advocacy for LGBT Rights Rete Lenford.² In this case, a lawyer made a statement on a radio show that he would never hire homosexual workers in his firm. In the proceedings, he claimed that this statement was ‘purely abstract’ and he had uttered the statements as a private citizen and not as an employer. The judge used the Asociația Accept case to

² <http://www.altalex.com/download.php?idnot=68849&idstr=0&n=0&t=pdf>

help clarify EU law and found that the lawyer's statement was direct discrimination in access to employment and against EU rules on discrimination. The judge reiterated that discrimination is not affected by the lack of a person and that the lawyer's arguments were not enough to prove his innocence.