SUMMARY

ECJ 25 April 2013, case C-81/12 (Asociatia ACCEPT - v - Consiliul National pentru Combaterea Discriminarii), Sexual orientation discrimination

Facts

Mr Becali was the owner of FC Steaua, a Romanian football club. On 8 February 2010 he sold his shares, but he continued to be widely regarded as the owner and leading manager ("patron") of FC Steaua. On 13 February, in a television interview, he made discriminatory statements about another club's football player, who was rumoured to be homosexual, and about homosexuals in general, such as, "Not even if I had to close down [FC Steaua] would I accept a homosexual on the team". The management of FC Steaua made no effort to distance itself from these remarks. On the contrary, the club's lawyer confirmed that the club had adopted a policy of not recruiting homosexual players.

On 3 March 2010, ACCEPT, a non-governmental organisation whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights, lodged a complaint against Mr Becali and FS Steaua before the National Council for Combatting Discrimination "CNCD". By decision of 13 October 2010, it issued a warning against Mr Becali (not a fine, because under Romanian law the limitation period for imposing a fine for administrative offences is six months from the date an which the offence took place, and more than six months had passed since 13 February 2010). As for Steaua, the CNCD considered that Mr Becali's statements would not be regarded as emanating from an employer and that therefore those statements did not fall within the scope of a possible employment relationship.

National proceedings

ACCEPT appealed to the Curtea de Apel Bucaresti. It referred four questions to the ECJ. The first two questions sought to determine whether Articles 2(2) and 10(1) of Directive 2000/78 must be interpreted as meaning that facts such as those at issue are capable of amounting to "facts from which it may be presumed that there has been discrimination", even though the statements at issue come from a person lacking the legal capacity to represent the employer. The third question was whether, if the answer to the previous question is affirmative, the modified burden of proof laid down in Article 10(1) of the Directive would not require evidence impossible to adduce without interfering with the right to privacy (essentially, that FC Steaua has in the past recruited homosexual players). The fourth question was whether national law may provide that the only penalty for discrimination, following six months after the transgression, is a warning.

ECJ's findings

First and second question

• Directive 2000/78 applies to "all persons […] in relation to conditions for access to employment […] including recruitment conditions […]". It is irrelevant that the system of recruitment of professional football players is not based on direct negotiation requiring the submission of applications (§ 44-45).

• The Feryn case (C-54/07) concerned statements by a director who was authorised to represent his company. However, that ruling does not suggest that in order to establish a presumption of discrimination it is necessary that a statement be made by someone legally authorised to do so. An employer cannot deny the existence of presumptively discriminatory facts merely by asserting that a statement was made by a person who was not legally capable of binding it in recruitment matters. A court may take into account the fact that such an employer has not distanced itself from the statement. Public perception may also be relevant (§ 46-51).

• The fact that a football club might not have started any negotiation with a view to recruiting a player does not preclude the possibility that the club has been guilty of discrimination (§ 52).

Third question

• Where the burden of proof has shifted to the employer, it may refute the alleged discrimination by any legally permissible means. It is not necessary, in a case such as the present one, for the employer to prove that it has in the past recruited homosexual players, as such a requirement is apt, in certain circumstances, to interfere with the right to privacy.

Evidence refuting a presumption of discrimination may, for example, include a reaction by the employer clearly distancing itself from public statements or the existence of clear recruitment policy provisions aimed at ensuring compliance with the principle of equal treatment (§ 54-59).

Fourth question

• Directive 2000/78 confers on Member States responsibility for determining the rules on sanctions applicable to infringements of the principle of non-discrimination. Those sanctions must be effective, proportional and dissuasive. A purely symbolic sanction is not sufficient (§ 60-64).

• It is possible under Romanian law that, even where a complaint of discrimination is lodged well within the six-month period following the discriminatory event, the CNCD does not deliver its decision until after the expiry of that period, by which time any other penalty than a warning is no longer possible. It is for the referring court to determine whether this fact might make victims of discrimination or organisations such as ACCEPT so reluctant to bring proceedings as to make the sanctions not genuinely dissuasive (§ 65-72).

Ruling

Articles 2(2) and 10(1) of Council Directive 2000/78 [...] must be interpreted as meaning that facts such as those from which the dispute in the main proceedings arises are capable of amounting to "facts from which it may be presumed that there has been ... discrimination" as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.

Article 10(1) of Directive 2000/78 must be interpreted as meaning that, if facts such as those from which the dispute in the main proceedings arises were considered to be "facts from which it may be presumed that there has been direct or indirect discrimination" based on sexual orientation during the recruitment of players by a professional football club, the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.

Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at

issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date in which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret the national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

Creator: European Court of Justice (ECJ)
Verdict at: 2013-04-25
Case number: C-81/12