



Homophobic statements by the ‘patron’ of a professional football club may shift the burden of proof on to the club to prove that it does not have a discriminatory recruitment policy

The appearance of discrimination on ground of sexual orientation may be refuted by a body of consistent evidence

The directive on equal treatment in employment and occupation¹ lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. Pursuant to that directive, where facts from which it may be presumed that there has been discrimination are established before a court or another competent authority, the burden of proof shifts to the defendants concerned who must prove that, notwithstanding the appearance of discrimination, there has been no breach of the principle of equal treatment.

On 3 March 2010, Accept, a non-governmental organisation whose aim is to promote and protect lesbian, gay, bisexual and transsexual rights in Romania, lodged a complaint before the National Council for Combatting Discrimination (CNCD) against SC Fotbal Club Steaua București SA (‘FC Steaua’) and Mr Becali, who presents himself as being the ‘patron’ of that club. Accept claims that the principle of equal treatment was breached in recruitment matters. In an interview concerning the possible transfer of a professional footballer, Mr Becali had stated essentially that he would never hire a homosexual player. As regards the other defendant before the CNCD, FC Steaua, Accept maintains that the club has at no time distanced itself from Mr Becali’s statements. The CNCD held, in particular, that since Mr Becali’s statements could not be regarded as emanating from an employer or a person responsible for recruitment, those circumstances did not fall within the sphere of employment. However, the CNCD took the view that those statements constituted discrimination in the form of harassment² and gave Mr Becali a warning. That penalty was the only one then possible under Romanian law, since the CNCD’s decision had been given more than six months after the date on which the facts complained of occurred. Accept brought an action against that decision before the Curtea de Apel București (Court of Appeal, Bucharest, Romania), which referred questions for a preliminary ruling to the Court of Justice on the interpretation of the directive.

In today’s judgment, the Court observes that the directive applies to situations such as those on which the dispute in the main proceedings before the Curtea de Apel București is based, which involve statements concerning the conditions for access to employment, including recruitment conditions. The Court states that the specificities of the recruitment of professional footballers are irrelevant in that regard because sport constitutes an economic activity which is covered by EU law.

As regards the position of FC Steaua in the case in the main proceedings, the Court points out that the mere fact that statements such as Mr Becali’s do not come directly from a given defendant is

¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

² According to that directive a form of discrimination within the meaning of paragraph 1, when unwanted conduct related, in particular, to sexual orientation takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

not necessarily a bar to establishing, with respect to that defendant, the existence of 'facts from which it may be presumed that there has been ... discrimination' within the meaning of the directive. Consequently, **a defendant employer cannot deny the existence of facts from which it may be presumed that it has a discriminatory recruitment policy by asserting that the statements indicative of a homophobic recruitment policy come from a person who, while claiming to play an important role in the management of that employer and appearing to do so, is not legally capable of binding it in recruitment matters.** According to the Court, the fact that that employer might not have clearly distanced itself from those statements may be taken into account in the appraisal of its recruitment policy.

Furthermore, the Court states that **the burden of proof, as modified by the directive, does not require evidence which is impossible to adduce** without interfering with the right to privacy. **The appearance of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence**, without the defendant having to prove that persons with a specific sexual orientation have been recruited in the past. That evidence may include, in particular, distancing itself from discriminatory public statements and the existence of express provisions in its recruitment policy aimed at ensuring compliance with the principle of equal treatment.

Finally, the Court observes that the directive precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation, it is only possible to give a 'warning' after the expiry of six months from the date on which the facts occurred, if that penalty is not effective, proportionate and dissuasive. However, it is for the Romanian court to determine if that is the situation in the present case.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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