

# Gay footballers should not be ‘outed’ in order to prove that discrimination has not taken place

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Football and homophobia are unsurprising bedfellows. It is strongly argued that on the pitch, off the pitch and in the terraces, ‘gay bashing’ is rife.<sup>1</sup> Many footballers like other high profile sportsmen and women and those in the public eye do not disclose their sexual orientation in order to avoid homophobic discrimination from fans and employers alike.<sup>2</sup>

For some, the burden of living a double life is too much; Marcus Urban could no longer endure what he described as a prison of his mind and sacrificed his promising career as an East German footballer in order to live as an openly gay man;<sup>3</sup> only recently was Jason Collins the first US professional sportsman to come out;<sup>4</sup> and earlier this year Robbie Rogers left Leeds United and subsequently revealed he was gay and announced his retirement but has now found sanctuary playing for LA Galaxy.<sup>5</sup>

It comes as no surprise, therefore, that a Romanian appeal court referred to the Court of Justice of the European Union (CJEU, formerly the European Court of Justice) for guidance, amongst other questions, whether a football club could be permitted to disclose the sexuality of footballers it employs in order to defend allegations that the club had a homophobic recruitment policy, given that such disclosure would potentially infringe those footballers’ right to a private and family life.<sup>6</sup>

## Legislative context

In relation to *Asociatia Accept v Consiliul National pentru Combaterea Discriminariilor (Accept v CNCD)*,<sup>7</sup> the CJEU was asked to consider, with reference to a specific set of facts, the interpretation of Articles 2(2)(a); 10(1); and 17 of Council Directive 2000/78/EC8 (the Directive) as to

the meaning of, respectively, the concept of discrimination, the shifting of the burden of proof from the claimant to the respondent in prima facie cases of discrimination, and the requirement for sanctions to be effective, proportionate and dissuasive. The judgment of the CJEU in response to this referral is not confined in its importance to the scope of the right to a private and family life and the protection of that right in favour of a robust defence; the CJEU also made it clear that an organisation’s liability for potentially discriminatory statements goes beyond those made by its employees and can include liability for remarks made, and presumably the behaviour of, those closely and publicly associated with the organisation.

## ‘There’s no room for gays in my family’

The case involved remarks about the future recruitment (or not) of gay footballers by Romanian football club, FC Steaua (the ‘Manchester United’ of Romanian football clubs). Mr Becali, for a time the majority shareholder of the company governing FC Steaua, was a notable figure and perceived by many as a spokesperson for the club. Although not involved in recruitment, in a public statement made during an interview concerning the possible transfer of a player, Mr Becali declared that he would prefer to close the football club down rather than hire a gay footballer, claiming it ‘... would be better to play with a junior rather than someone who was gay’ on the basis that ‘there’s no room for gays in my family and [FC Steaua] is my family.’

### Questions referred to the CJEU

It was submitted by Asociația Accept in the main proceedings that FC Steaua had made no effort to distance itself from Mr Becali's remarks; Asociația Accept alleged that FC Steaua's lawyer '...confirmed that that policy had been adopted at club level for hiring players because 'the team is a family' and the presence of a homosexual on the team 'would create tensions in the team and among spectators'.<sup>9</sup> In response to Accept's initial complaint to the Romanian National Council for Combatting Discrimination (Consiliul Național pentru Combaterea Discriminării – CNCD), the CNCD had found that Mr Becali's remarks could not be regarded as emanating from an employer, its legal representative, or a person responsible for recruitment. However, the CNCD did find that the comments amounted to harassment and issued a warning, which was the only penalty available at that stage under Romanian law.

Four points were referred by the Romanian appeal court to the CJEU for consideration. The first question related to whether remarks made to the mass media by a shareholder of the football club who was not involved in recruiting players could fall within the provisions protecting individuals from less favourable treatment in the field of employment, including recruitment.<sup>10</sup>

Secondly, the CJEU was asked to address to what extent the comments made might amount to facts from which it could be presumed that direct or indirect discrimination had occurred. In relation to the first and second points, a similar issue had previously been addressed by the then European Court of Justice (the ECJ) in the case of *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV (Feryn)*.<sup>11</sup> The facts in *Feryn* related to a Belgian firm that fitted garage doors. The employer had made a public statement implying he would not recruit fitters from ethnic minorities because his clients would not be happy having such workers in their homes. The ECJ was asked to consider whether Article 2(2) of the Directive was engaged given that there was no specific identifiable victim of the remarks made. Article 2(2) refers to direct

discrimination as being a situation in which 'one person is treated less favourably than another is [due to one of the protected characteristics]' (emphasis added). This might indicate a need for there to be a particular person(s) specifically subjected to less favourable treatment and/or a person or person(s) making a complaint about the (potential) impact upon them personally of such general remarks. However, the ECJ highlighted that the purpose of the Directive as stated in its preamble was 'to foster conditions for a socially inclusive labour market' and as such, there was no requirement for an identifiable victim of the discrimination complained of. A key difference between *Feryn* and *Accept v CNCD* was that in the latter the statement was made by an individual that was not an employee and, in particular, played no role in the actual recruitment of players.

The third question before the CJEU in *Accept v CNCD* was whether the burden of proof under article 10 of the Directive could be reversed. The requirement for the respondent to prove there had been no breach of the principle of equal treatment could lead FC Steaua to disclose the sexuality of its footballers, thereby breaching the right of those footballers to a private and family life. Finally, and of lesser relevance from a UK perspective, would a court declaration sufficiently satisfy the requirements of the Directive that sanctions be 'effective, proportionate and dissuasive' given that Romanian domestic legislation meant the claim for pecuniary compensation was out of time.

### Findings of the CJEU and their implications

The CJEU indicated that Mr Becali's comments could fall within the remit of article 2(2)(a) of the Directive despite his lack of involvement in recruitment and the fact that he was not an employee of the club. It found that there was nothing in *Feryn* to suggest that statements had to be confined to those with authority to recruit; that the perception of the public or social groups concerned may be relevant for the overall assessment of the statements at issue; and further, that it was open to the domestic court to

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take into consideration the attempt, or lack thereof, by an organisation to distance itself from such remarks. Secondly, the comments made by Mr Becali were deemed to be sufficient to amount to facts from which direct or indirect discrimination could be presumed, even though no individual complaint had been raised.

Thirdly, the CJEU was of the opinion that FC Steaua would not need to provide evidence that it *had* recruited gay footballers in the past. To do so would have led the club to disclose the sexuality of its footballers, and interfere with those individuals' right to privacy. In this situation an organisation finds itself stuck between a rock and a hard place; remarks have been made by someone arguably 'on a frolic of their own' and there is tangible evidence to counter subsequent allegations, but that evidence cannot be disclosed. All the more reason to ensure that those in the public eye are fully briefed as to what is and is not appropriate, especially when they might be perceived to be speaking or acting on behalf of an organisation that is not their direct employer.

The final aspect of the CJEU's judgment has limited application to the UK. Under the Equality Act 2010, there is no differentiation between the limitation period and the remedy available, although before making an order for compensation a tribunal needs to have first considered whether to make a declaration and/or recommend action to be taken.<sup>12</sup> Nonetheless, the guidance from the CJEU in *Accept v CNCD* should be heeded: a declaration may not be a sufficient remedy in instances of serious cases of discrimination and might fall foul of the Directive by failing to amount to a sanction that is effective, proportionate and dissuasive.

### Tackling homophobia

Practical guidance can be taken from this case as to how football clubs should tackle the issue of recruitment and homophobia, and the broader issue of homophobia in afield which remains inextricably linked to homophobia. Football clubs and other sporting organisations should:

- ensure that policies relating to equality and diversity are robust, up to date and make specific reference to the protected characteristics identified in the Equality Act 2010;<sup>13</sup>

- review equality and diversity policies to make sure they refer to all stages of the employment process including recruitment and termination and that they include codes of behaviour to be observed by employees and also, importantly in the light of *Accept v CNCD*, individuals that are associated with the organisation, particularly those in the public eye;
- bring such policies and codes expressly to the attention of all employees of the club and those closely linked to the organisation;
- respond proactively to any incriminating statement that is made, or discriminatory behaviour demonstrated, be that by an employee or other key individual, in order to immediately distance the club; and
- remember that a defence that there is no identified or identifiable 'victim' of the discrimination will most likely fail, thus making it harder to rebut the presumption of discrimination or discriminatory policies being in force – so be warned...

### Final thoughts

As host to 'the world's only national LGB&T [lesbian, gay, bisexual and transgendered] football league'<sup>14</sup> there are grounds to argue that the UK is a trailblazer when it comes to addressing head-on the issue of football and homophobia. Nonetheless, despite the efforts of straight footballers appearing on the front cover of the gay magazine *Attitude*, in an apparent bid to encourage their peers to feel confident about coming out,<sup>15</sup> it is evident that the beautiful game needs to improve conditions in and outside of the locker room before gay footballers feel safe enough to be open about their sexuality. ■ **BASL**

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- 1 Alex South 'Brighton Fans Report Homophobic Abuse to FA', *BBC Online*, <http://www.bbc.co.uk/sport/0/football/21988433> accessed 15.05.13.
- 2 Mark Townsend, 'Eight footballers say 'we're gay' but keep quiet in fear of fans' *The Observer*, 5 May 2013, <http://www.guardian.co.uk/world/2013/may/05/gay-footballers-fear-reaction-of-fans> accessed 15.05.13.
- 3 Tom McGowan, 'The Gay footballer who chose Freedom over Constructed prison' *CNN* <http://edition.cnn.com/2013/05/14/sport/football/urban-homophobia-gay-footballer/> accessed 15.05.13.
- 4 Jason Collins, with Franz Lidz, 'Why NBA mid-center Jason Collins is coming out now', *Sports Illustrated*, 29 April 2013, <http://sportsillustrated.cnn.com/magazine/news/20130429/jason-collins-gay-nba-player/> accessed 15.05.13.
- 5 Tom Jenkins, 'Robbie Rogers: why coming out as gay meant I had to leave football' *The Guardian*, 29 March 2013 <http://www.guardian.co.uk/football/2013/mar/29/robbie-rogers-coming-out-gay> accessed 15.05.13; 'Robbie Rogers on his return to competitive action with LA Galaxy - video' *The Guardian*, 28 May 2013 <http://www.guardian.co.uk/football/video/2013/may/28/robbie-rogers-la-galaxy-video> accessed 13 June 2012
- 6 *Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (European Convention on Human Rights), Article 8.*
- 7 *Asociația Accept v Consiliul Național Pentru Combaterea Discriminării*, Case C81/12, 25 April 2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0081:EN:HTML>, accessed 01.05.13. *Asociația Accept* is an organisation in Romania with capacity pursuant to Article 9 of the Directive to ensure the provisions under the Directive are complied with. The reference to the CJEU was made by Curtea de Apel București (Romania)
- 8 *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)*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>
- 9 *Accept v CNCD (n7) at paragraph 27.*
- 10 Pursuant to article 2(2)(a) of *Council Directive 2000/78/EC (n7)*
- 11 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV (C-54/07)[2008] All E.R. (EC) 1127.*
- 12 *Equality Act 2010, section 123.*
- 13 See *Equality Act 2010, section 4: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.*
- 14 See the *Gay Football Supporters network* <http://gfsn.org.uk/> accessed 15.05.13.
- 15 Anthony Bond, 'West Ham star becomes third footballer to appear on Attitude cover as he tries to crush one of game's last stigmas' *Mail Online*, 4 January 2013, <http://www.dailymail.co.uk/news/article-2257057/West-Ham-star-footballer-appear-gay-magazine-cover-tries-crush-games-stigmas.html> accessed 15.05.13.

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