European Union, CJEU, C-157/15, Accept, Judgement of 25 April 2013

Deciding bodies and decisions

CJEU, C-81/12 - Asocia?ia Accept, Judgment of the Court (Third Chamber) of 25 April 2013

Area of law

Non-discrimination

Subject matter

Non-discrimination - discriminatory statements of the employer - prohibition of discrimination based on sexual orientation

Summary Facts Of The Case

The dispute arose from the homophobic public statements issued by Mr Becali, a former shareholder of the football club FC Steaua Bucure?ti, regarding the sexual orientation of a Bulgarian football player whom the team was considering signing. Mr. Becali declared that, as there were rumors that the player was homosexual, he would not have him in his future team, as he would prefer that the team be shut down or made up of junior players rather than including homosexual footballers. The Club has never distanced itself from Mr Becali's statements, on the contrary the representative lawyer publicly admitted that the Club shares Mr Becali's view. In December 2010, Asocia?ia ACCEPT, a Romanian NGO defending and promoting the rights of LGBT persons, instituted proceedings in front of the Bucharest Court of Appeal in order to partly repeal Decision no. 276 of 13 October 2010 of the Romanian National Council for Combating Discrimination (NCCD) which sanctioned the discriminatory statements of Mr Becali with a simple warning. Mr Becali, in spite of transferring his shares in the Football Club five days prior to the statements, still possessed a considerable power and influence over the decisions taken in the Club.

The NGO ACCEPT claimed in front of the NCCD that this declaration (i) directly discriminated on the basis of sexual orientation, (ii) violated the principle of equality regarding the hiring policy and brought an offense to the dignity of persons having a homosexual orientation. NCCD decided that Becali's statements (i) fell outside the scope of work relations, as referred to by Art. 5 and 7 of Government Ordinance 137/2000 regarding the prevention and sanctioning of all forms of discrimination (GO 137/2000), but that they (ii) fell under the scope of Art. 15 of the same act, as they represented a behavior whose purpose was to touch upon the human dignity of a certain group of persons or to create a degrading or humiliating environment for them, based on their sexual orientation. NCCD sanctioned Mr Becali with a warning, and not a fine as requested by the parties due to the expiry of the period of the 6 months period for liability punished by fine.

The Court of Appeal, seized of the challenge of this decision, raised a preliminary ruling to the

CJEU. It was aware of the existence of the *Firma Feryn* precedent, in which a similar statement by an employer, which was distinctly discriminatory on grounds of race, had been found to constitute direct discrimination under Art. 2(2) of the Racial Equality Directive 2000/43. However, due to the slight factual differences of the instant case (Mr Becali was not formally an employer, and the discriminatory conduct was based on sexual orientation rather than race), the Court of Appeal was not sure whether it would be distinguishable from the situation in *Firma Feryn*. It therefore asked whether Becali's statement could constitute direct discrimination under Art. 2(2) of Directive 2000/78 or, at least, a fact establishing a presumption of discrimination that was for the defendant to rebut.

The Court also asked whether shifting on the football club the burden of demonstrating the absence of discriminatory policies would yield unfair results, and whether the statutory limitation setting a 6-month period of limitation, after which no fine can be imposed for breach of the national provisions transposing the Directive, frustrates the correct enforcement of the rights protected therein.

On 25 April 2013, the CJEU delivered the preliminary ruling in the *ACCEPT* case. It confirmed at the outset that the finding on the alleged discrimination is only for the national court to make, without prejudice to the CJEU's power to provide national courts with helpful guidelines on how to reach such finding. It found that the *Firma Feryn* judgment does not establish a legal condition that discriminatory statements must come from persons who have a legal power to implement recruitment policies. The defendant is not spared from the burden of rebutting the presumption of having acted discriminatorily merely because the *prima facie* evidence (the statement) does not come from someone who can act on its behalf, also in light of the fact that the nature of the statement must be assessed bearing in mind its impact on society at large. The acceptance of *prima facie* evidence, pursuant to the modified evidentiary regime set by Directive 2000/78, moreover, does not have a disproportionate effect on the defendant, who can refute it through reasonably available evidence, for instance by proving that the employer had distanced itself from the homophobic statement.

Relation to the scope of the Charter

The case fell within the scope of the Charter pursuant Article 51(1) therein as it concerned the interpetation of EU non-discrimination directives in the area of employment and occupation

Notes on the remedies dimension

The CJEU recognized the member States' autonomy in setting the sanctions connected to discriminatory acts, but pointed out that merely symbolic sanctions cannot be deemed to satisfy the requirement of effectiveness, proportionality and dissuasiveness (para.64). In addition, the duty for national courts to interpret domestic legislation in conformity with directives (para. 71) might lead to the conclusion that the time-limit imposed for the imposition of the fine frustrates the purpose of the Directive and, therefore, must be interpreted out (set aside) in the main proceedings.

Diagram

Case timeline representation

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Impact on Jurisprudence

I. Impact in the case referred:

The CJEU issued its clarifications in C-81/12 in its first case on discrimination in recruitment on grounds of sexual orientation.

Interestingly, the Court of Appeal of Bucharest, resuming the main proceedings in light of the preliminary ruling, found no discrimination.[1] The Romanian court performed a comprehensive analysis of the facts (as per the CJEU's encouragement) but partially disregarded the CJEU's instructions on the law. It ignored the CJEU's confirmation of *Firma Feryn* (which establish liability of the employer for acts committed by a person without hiring power) and stretched the "effective remedy" instruction to find that the warning was sufficient and proportionate.

ACCEPT brought the case before the High Court of Cassation and Justice as the last remedy available. In its decision 2224, the High Court of Cassation and Justice rejected the appeal filed by ACCEPT against the decision of the Bucharest Court of Appeal. In the reasoning, the High Court only mentions C-81/12 just to underline that even CJEU in its preliminary ruling recognized that the competence for assessing the facts in the case belongs exclusively to the national court. There is no analysis or incorporation of the substantive guidance provided by the CJEU in the case. In regards of the warning applied to Mr. Becali as sanction in first instance, which was challenged by the complainant as not being dissuasive, proportionate and adequate enough for a case of discrimination, the High Court stated: "contrary to the statements of the complainant, warning (as sanction) is not incompatible with Art. 17 of Directive 2000/78/EC and cannot be considered de plano as a purely symbolic sanction.

The decision also states that "the High Court also concludes that the complainant association cannot justify the infringement of a legitimate public interest, under the meaning of Art. 2 (1) letter r of Law 554/2004 (Legea Contenciosului Administrativ), given the fact that the NCCD issued a

warning for George Becali and not an administrative fine.

The follow-up to the preliminary ruling of the CJEU is instructive: because the CJEU is unable to invalidate State measures and national practices, the national court has the last word. Also, because the **proportionality test** indicated by the CJEU is handed over to the national judge, even in a straightforward case can the CJEU's guidelines be stretched so as to confirm the legality of the national practice preceding the preliminary question. Only through further litigation and clarification by the CJEU can a (unintended or deliberate) misunderstanding like the one upheld by the Romanian Court of Appeal and confirmed by the High Court of Cassation and Justice be eliminated in the future.[2]

[1] See Court of Appeal of Bucharest, judgment of 23 December 2013, see http://www.non-discrimination.net/content/media/RO-116-CAp%20Buch%20Accept%20v%20Becali%20reasoning.pdf.

[2] For details see http://www.equalitylaw.eu/downloads/3632-romania-high-court-confirms-rejection-of-the-action-of-accept-in-the-case-based-on-cjeu-c-81-12-pdf-97-kb

II. External impact

Firma Feryn and Accept are being cited in national courts of other EU member states through consistent interpretation.

In Croatia in 2010, four human rights organisations filed a joint action against Z.M., executive manager of the most popular football club and vice president of the Croatian Football Association, because of his public statement that gay people could not play in his national football team. Following a long string of national decisions the Supreme Court based its decision on the "Feryn case", finding the facts in the two cases to be the similar. 2 The Court found that Z.M. had such a reputation and public authority that his statement could encourage others to treat gay persons with prejudice. The Court concluded that his statement was an act that could place a person (a gay man) in a less favourable position than other persons (a heterosexual man) in a comparable situation and was therefore direct discrimination. The Court further stated that statements can be acts of discrimination in spite of the constitutional freedom of expression.[1]

In Italy in 2014 a renowned lawyer in an interview broadcasted in a radio show, declared that he would never hire a gay lawyer in his legal firm. The court considered that even if the legal firm had not issued any announcement of selection, the statement is discriminating on the ground of sexual orientation because discourages homosexuals from applying for those positions. In doing so, the Court cited Article 9 of Directive2000/78/CE, case Associatia Accept C-81/12; case Feryn NV C-54/07.[2]

[1] For more details see Supreme Court of the Republic of Croatia, Rec-300/13, judgment of 17 June 2015 information available at http://www.equalitylaw.eu/downloads/3693-croatia-new-case-law-on-discriminatory-public-statements-pdf-76-kb

[2] Italy, Court of Appeal of Brescia, decision 11.11.2014, appellate instance. For more information on this case see our database.

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Sources - CJEU Case Law

- Case C?163/10 *Patriciello* [2011] ECR I-7565, par. 21
- Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008] ECR I-5187
- Case C?470/03 *AGM-COS.MET* [2007] ECR I?2749, paragraphs 55 to 58.