

EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION IN PROFESSIONAL SPORTS

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Abstract: Discrimination in professional sports is a long-standing phenomenon as it concerns international and national governing bodies, sports organisations and players. The focus on discrimination in football is not only due to its tarnishing of the principles and essence of this popular sport, but also its direct confrontation with fundamental values such as integration, equality, dignity, and diversity - all crucial elements of fostering community cohesion.

The present paper aims to analyse a court case that centres around statements of a discriminatory nature targeting the sexual orientation of a professional player. After the National Council for Combating Discrimination (CNCD) analysed the case regarding the existence of acts of discrimination that had had as main source statements of a discriminatory nature concerning the sexual orientation of a professional football player, it issued a decision that was the subject of a complaint with the administrative court. The Court of Appeal submitted preliminary questions to the Court of Justice of the European Union (CJEU), regarding the application of Articles 2(2)(a), 10(1) and 17 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

The judgement of the court not only addresses the specific acts of discrimination aimed at a professional football player but also serves as a landmark moment in the ongoing battle for equal treatment in employment, regardless of one's sexual orientation. This situation also offered the opportunity to transpose the EU law in the national legislation and properly apply it to build a true Union of equality.

Keywords: *sports law; equal treatment in professional sports; discrimination in recruitment*

Introduction

In the realm of professional sports, where prowess on the field should be the sole measure of an athlete's worth, the unfortunate existence of discriminatory practices continues to cast a shadow over the spirit of equality, diversity and inclusion to ensure fair treatment and opportunity for all. This paperwork delves into an important court case that centers around statements of a discriminatory nature targeting the sexual orientation of a professional player. Such incidents raise critical questions about the broader issue of equal treatment in employment for individuals with diverse sexual orientations. This analysis seeks to unravel the complexities surrounding this case, targeting the legal intricacies, ethical considerations that emerge when discrimination infiltrates the world of sports and the actions through legislation against any form of discrimination.

As mentioned by Köseoğlu, N. A. (2020), the anti-discrimination law in Europe is based primarily on Article 14 of the European Convention on Human Rights (1950), Article 21 of the EU Charter of Fundamental Rights (2000) and Article 165 of the Treaty on the Functioning of the European Union (TFEU, 2012).

Regarding Article 165 (2) of TFEU, the Union promotes fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and protects the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen. Also, non-discrimination principles are provided by sources of EU secondary law. In 2000, two directives were adopted regarding labour law: the Racial Equality Directive 2000/43/EC which prohibits discrimination on the basis of race or ethnicity in the context of employment and in the context of accessing the welfare

system and social security, as well as goods and services; the Council Directive 2000/78/EC which establishes a general framework for equal treatment in employment and occupation, and prohibits discrimination on the basis of sexual orientation, religious belief, age and disability in the area of employment. As mentioned by Sonntag, A., Ranc, D. (2015) in a UNESCO Report on the fight against discrimination and racism in football, these directives are particularly important for football: the presence of football players with minorities' background is common in the European Union.

Kassimeris, C. et al. (2022) state that "there are regional and transnational projects, organizations, policies and campaigns, and the world's most powerful football authority FIFA (Federation Internationale de Football Association) have punishments for racial abuse". Even though the European Commission in the EU anti-racism action plan for 2020-2025 addresses both individual and structural forms of racism (also applicable in sports), and other sports organizations promote projects focused on aspects of inequality and exclusion in football, racism and discrimination have not disappeared. In the same UNESCO Report (2015), there have been identified three major forms of racism which football is concerned with: impulsive racism, instrumental racism and institutional racism. Impulsive racism is a rather uncontrolled, spontaneous unleashing of emotional impulses and it is based on general feelings of frustration and insecurity that have their origins outside of football, in economic distress or often irrational identity anxieties. On the other hand, instrumental racism is a conscious act, and it is a selective use of racist and discriminatory discourse that is not backed up by an ideological conviction or belief. Racist abuse becomes an instrument which is selectively directed against specific persons or groups in the logic of in-group consolidation by out-group denigration.

Then, institutional racism, xenophobia and discrimination refer to habits and practices that are often implicit and not necessarily intentional and to agreements applied within sports organisations that effectively block appropriate participation by minorities (Sonntag, A., Ranc, D. in UNESCO Report, 2015).

The European Commission and other EU institutions always encourage the Member States to set out series of measures to build a life free from racism and discrimination for all. As part of the dialogue for the development and implementation of policies to counter racism, the EU institutions and Member States need to bring a fresh approach to how they engage with civil society and ensure that the voices of people with a minority racial and ethnic background are heard (European Commission, 2020).

In Romania, the National Council for Combating Discrimination (CNCD, 2023) is "the guarantor of the respect and application of the principle of non-discrimination, in accordance with the domestic legislation in force and with the international documents to which Romania is a party". CNCD is "the autonomous state authority, under parliamentary control, which carries out its activity in the field of discrimination" (CNCD, 2023). The Regulation on the organization and functioning of CNCD mentions that it is organized and it operates according to Government Decree no. 137/2000 on the prevention and sanctioning of all forms of discrimination, republished (in 2014), with subsequent amendments and additions.

According to the same Government Decree, in article 19 (1), the main tasks of the CNCD are: "prevention, mediation, investigation, detection, and sanctioning of acts of discrimination; monitoring cases of discrimination; providing specialized assistance to victims of discrimination". Paragraph 2 of the same article stipulates that the exercise of powers begins upon notification by a natural or legal person, or *ex officio*.

The history of the CJEU Case C-81/12 on equal treatment in employment and occupation in professional sports

The National Council for Combating Discrimination was notified in March 2010 regarding the existence of acts of discrimination that had had as main source statements of a discriminatory nature concerning the sexual orientation of a professional football player, as well as the breaching of the principle of equal treatment in employment of persons who have a different sexual orientation (Decision no. 276/2010).

In this case, the plaintiff, Association A., claimed that the defendant, Mr. B - a shareholder of an important football club, through statements made in the media, “directly discriminates on grounds of sexual orientation, breaching the principle of equal treatment in employment and violating the dignity of homosexuals in Romania” (paragraph 5.1.4 of Decision no. 276/2010).

Also, the plaintiff requested the introduction of the football club in the proceedings - as defendant - since the club did not distance itself from those discriminatory statements. The defendants claimed that the statements represented “an exercise of the right to freedom of opinion and expression, [and that the statements] were not likely to demonstrate the existence of a rule or constant practice concerning the employment of football players [...] based on a discriminatory criterion regarding the sexual orientation of the players” (paragraph 5.2.1 of Decision no. 276/2010).

Moreover, regarding the plaintiff’s request to include the football club in the proceedings, it was stated that “the burden of proof rested on the plaintiff, and from the analysis of the content of the request, through which the inclusion of the club was requested, the plaintiff did not prove the existence of any rules or constant practices of the club (approved by its management), which refer to a discriminatory criterion based on sexual

orientation” (paragraph 5.2.4 of Decision no. 276/2010).

The CNCD established that in this case, the situation was not about a specific employment relationship, and the defendant’s statement could not be assimilated to that of an employer, even if he was holding the capacity of a shareholder at that time. In addition, the club did not initiate the negotiation process for employment, which excludes employment conditioning elements or discriminatory refusal (paragraph 6.20 of Decision no. 276/2010).

Regarding the defendant’s statements, the CNCD admitted that they “met the elements of a form of discrimination, in terms of Government Decree no. 137/2000” (paragraph 6.34 of Decision no. 276/2010) - respectively harassment, and ordered the defendant to be sanctioned with a warning because the limitation period of 6 months from the date of the discriminatory act was exceeded (for the fine); the CNCD also ordered the case closure.

Against Decision no. 276/2010, the plaintiff Association A. filed a complaint with the administrative court, seeking the annulment of the decision, “arguing that the illegal acts fell within the field of employment [...], that the existence of facts supporting direct or indirect discrimination had been proven; that the imposition of a fine was necessary instead of a warning” (Bucharest Court of Appeal, Court Report - 12th October 2011).

Additionally, the plaintiff requested the submission of questions to the CJEU regarding the application of the directive. CNCD requested the rejection of the CJEU referral on the grounds that the request did not meet the conditions of Article 267 TFEU, it was not imperative, and the formulated questions were unnecessary since the dispute was not related to the application of European legislation, but the application of internal legislation. However, the Court of Appeal found that the request for submitting preliminary

questions to the CJEU was in accordance with Article 267 TFEU and useful in order to resolve the case.

Equal treatment in employment and occupation in professional sports – Case C-81/12

Case C-81/12 consisted of the decision of The Court of Justice of the European Union on a preliminary ruling based on Article 267 Treaty on the Functioning of the European Union concerning the interpretation of Articles 2(2)(a), 10(1) and 17 of Council Directive 2000/78/EC (27 November 2000) establishing a general framework for equal treatment in employment and occupation. The purpose of this directive is “to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment” (Article 1 of Directive 2000/78).

The proceedings were between Association A. and the National Council for Combatting Discrimination regarding the decision made by the latter which partially dismissed a complaint lodged by Association A., due to certain public statements made by a person (“Mr. B”) who was considered to have a leading role in a professional football club. This decision ruled out the recruitment, by the previously mentioned club, of a football player, due to his sexual orientation.

Association A. is the first non-governmental human rights organization which defends and promotes LGBTQIA+ (lesbian, gay, bisexual, transgender, queer, intersex, asexual) rights in Romania.

In 2010, this organization filed a complaint against Mr. B and his professional football club, claiming that the principle of equal treatment in terms of recruitment matters had been violated.

As mentioned in paragraph 26 of the case, Association A. submitted that Mr. B “directly discriminated on grounds of sexual orientation, breaching the principle

of equal treatment in employment and violating the dignity of homosexuals”, through the statements made by Mr. B during an interview. At the same time, the CNCD stated that the circumstances at issue did not fall within the scope of a possible employment relationship mainly because Mr. B was not considered a person responsible for recruitment even though he was a shareholder of that football club.

However, the CNCD held that the statements still constituted discrimination in the form of harassment, and that “the penalty imposed on him was a warning, the only penalty possible in accordance with Article 13(1) of Government Decree no. 2/2001 [of Romania], since the CNCD’s decision was given more than six months after the date on which the relevant facts had occurred” (paragraph 29 of Case C-81/12).

In this situation, Association A. decided to bring an action before the national court against the CNCD’s decision, seeking its annulment, “as well as a declaration that the relevant facts fell within the scope of employment matters and that it might be assumed from proven facts that there had been discrimination and, finally, the imposition of a fine instead of a warning” (paragraph 30 of Case C-81/12).

The national court decided to stay the proceedings and to refer questions to the CJEU for a preliminary ruling.

With regard to this matter, the first two questions were as follows: (1) “Do the provisions of Article 2(2)(a) of Directive 2000/78 apply where a shareholder of a football club who presents himself as, and is considered in the mass media as, playing the leading role of that football club makes a statement to the mass media that are capable of amounting to ‘facts from which it may be presumed that there has been discrimination?’” and (2) “To what extent may the abovementioned statements be regarded as ‘facts from which it may be presumed that there has been direct or indirect discrimination’ within the meaning of Article 10(1) of Directive

2000/78 as regards the defendant (the professional football club)?” (paragraphs 35 and 40 of Case C-81/12). In essence, the first two questions sought to determine whether Articles 2(2) and 10(1) of Directive 2000/78 had to be interpreted as meaning that the facts in the main dispute constituted “facts from which it might be presumed the existence of discrimination as regards a professional football club, even though the statements at issue came from a person presenting himself and being perceived in the media and by the public as playing a leading role in that club, without, however, necessarily having the legal capacity to bind it or to represent it in recruitment matters” (paragraph 40 of Case C-81/12).

First, the CJEU stated that under Article 267 TFEU, it did not have the jurisdiction to assess the facts of the main proceedings or to apply rules, and that these were matters for the exclusive jurisdiction of the national court. Also, the Court could not express itself if the circumstances highlight the existence of discrimination based on sexual orientation. It was also mentioned, in paragraph 42, that, “in accordance with the mechanism laid down in Article 10(1) thereof, if such facts were established, it was for the respondent to prove that there had been no breach of the principle of equal treatment within the meaning of Article 2(1)”.

According to the European legislation, “it follows from Articles 1 and 3(1)(a) of Directive 2000/78 that that directive applies in circumstances, such as those from which the dispute in the main proceedings arises, that involve, in employment and occupation, statements concerning conditions for access to employment including recruitment conditions” (paragraph 44 of Case C-81/12).

Second, as mentioned in paragraph 45 of Case C-81/12 and according to the settled case-law, sport is subject to European Union law to the extent that it constitutes an economic activity (see Case 13/76 Donà

ECR 1333, paragraph 12, and Case C-325/08 Olympique Lyonnais ECR I-2177, paragraph 27), and that is also the case as regards the activities of professional or semi-professional footballers where they are in gainful employment or provide a remunerated service (Case C-415/93 Bosman ECR I-4921, paragraph 73).

Last, the answer to the first and second questions was that Articles 2(2) and 10(1) of Directive 2000/78 must to be interpreted as meaning that the facts present in the main dispute “are capable of amounting to ‘facts from which it might be presumed that there had been discrimination’ as regards a professional football club, even though the statements concerned came from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club” (paragraph 53 of Case C-81/12). It can be noted that, unlike the Case C-54/07 Feryn (mentioned by the referring court), the Court emphasized that “the person who made the statements concerning the recruitment policy of a particular entity [does not] necessarily [need to] have legal capacity directly to define that policy or to bind or represent that entity in recruitment matters” (paragraph 47 of Case C-81/12).

With regard to the third question, the referring court asked: “(3) To what extent would there be *probatio diabolica* if the burden of proof referred to in Article 10(1) of [Directive 2000/78] were to be reversed in this case and the defendant [the professional football club] were required to demonstrate that there has been no breach of the principle of equal treatment and, in particular, that recruitment is unconnected with sexual orientation?” (paragraph 35 of Case C-81/12). Article 10(1) of Directive 2000/78 states that the “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal

treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”.

In essence, as mentioned in paragraph 54, the referring court asked whether, if the facts present the dispute in the main proceedings were considered to be facts from which it might be presumed that there had been direct or indirect discrimination based on sexual orientation in 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. The Court stated, in paragraph 54, that to rebut the non-conclusive presumption that might arise under the application of Article 10(1), it was not necessary for a defendant to prove that individuals of a particular sexual orientation who had been recruited in the past, since such a requirement most certainly could interfere with the right to privacy.

The fourth question sent by the referring court was as follows: “Does the fact that it is not possible to impose a fine in cases of discrimination after the expiry of the limitation period of six months from the date of the relevant fact, laid down in Article 13(1) of Government Decree no. 2/2001 on the legal regime for sanctions, conflict with Article 17 of Directive 2000/78 given that sanctions, in cases of discrimination, must be effective, proportionate and dissuasive?” (paragraph 35 of Case C-81/12). In essence, as stated in paragraph 60 of the case, the referring court asked whether Article 17 of Directive 2000/78 must be interpreted as meaning that it precluded national rules by virtue of which, where there was a finding of discrimination on grounds of sexual orientation, it was possible only to impose

a warning, after the expiry of a limitation period of six months from the date on which the facts occurred.

In that regard, Article 13(1) of Government Decree no. 2/2001 states that “the limitation period for imposing a fine for administrative offences is six months from the date on which the events took place”; also, Article 17 mentions that the “Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied” (Directive 2000/78). However, this situation offered the opportunity to clarify the legal relation between the national legislation and the importance of the EU law. The Court stated that a purely symbolic sanction could not be considered compatible with the correct and effective implementation of Directive 2000/78. In these circumstances, in accordance with a consistent case law of the CJEU, when a situation falls within the scope of a directive, a national court is obliged, when applying national law, to interpret the latter, as far as possible, in the light of the wording and the purpose of that directive in order to achieve the result sought by it.

Consequently, the answer to the fourth question was that Article 17 of Directive 2000/78 must be interpreted as meaning that “it precluded national rules by virtue of which, where there was a finding of discrimination on grounds of sexual orientation, it was possible only to impose a warning such as that at issue in the main proceedings after the expiry of a limitation period of six months from the date on which the facts had occurred where, under those rules, such discrimination was not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive” (paragraph 73 of Case C-81/12). Moreover, the national court had to ascertain whether such was the case regarding the rules at issue and had to interpret the national law as far as possible

considering the wording and the purpose of the aforementioned directive.

Conclusions

The EU has legal instruments in place and a comprehensive policy to build a true Union of equality. This is now being reinforced in specific areas of equality. In this sense, the institutions of the European Union, including the CJEU, take measures to make sure that the EU Charter of Fundamental Rights is applied effectively in Member States and that charter rights, including equality and non-discrimination, are a reality for all (European Commission, 2020).

As mentioned by Neves, S. et al. (2023), citing Kolnes (1995) and Shaw (2019), “considering that sport is principally a sex-segregated social institution based on a gender order and heterosexuality tends to be central in social life, heteronormativity is a core value in judging players’ performance. In consequence, homophobia reflects the resistance of sport and football against the broader societal shifts concerning lesbian, gay, bisexual, trans, and queer people”.

The analysis of Case C-81/12 underscores the imperative for anti-discrimination measures within the sports industry. The verdict not only addresses the specific acts of discrimination aimed at a professional football player, but also serves as a landmark moment in the ongoing battle for equal treatment in employment, regardless of one’s sexual orientation. This situation also offered the opportunity to transpose the EU law in the national legislation and properly apply it in accordance with the EU policy.

By understanding the consequences of these types of acts and holding those responsible accountable, a new and safe way for the future is created, where athletes can thrive based on merit, free from situations of prejudice and discrimination. The effect of this case should resonate throughout the sports world, fostering an environment of inclusivity and respect for all.

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