

## Sexual orientation discrimination in sport

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A few weeks ago, for the first time, a professional American sportsman from one of the four major team sports in the US (basketball, baseball, American football and ice hockey) publicly announced that he is gay. Jason Collins, an NBA basketball player, said in a recent interview: "I'm a 34-year-old NBA center. I'm black. And I'm gay". It is fair to say that the reaction to this news has not been unequivocally supportive.

One correspondent working for ESPN (one of the world's leading sports broadcasters), Chris Broussard, himself appeared in the headlines after stating during a TV interview that Collins was "openly living in unrepentant sin", "walking in open rebellion to God", and that he (Broussard) had personally heard "some players say that they would be uncomfortable with a gay player in the locker room, particularly showering" (though he did not identify the source of these alleged homophobic comments). In response to these comments, ESPN promptly issued its own statement, insisting that "ESPN is fully committed to diversity and welcomes Jason Collins' announcement".

## ACCEPT v Consiliul Național pentru Combaterea Discriminării

The serious issue of homophobia in European football (soccer) has recently been thrust back into the spotlight by the decision of the European Court of Justice ("the ECJ") in *ACCEPT v Consiliul Național pentru Combaterea Discriminării*. This decision follows hot on the heels of the (astonishing) events of December 2012, when a fans' group of Russian club Zenit St Petersburg stated in an open-letter (entitled 'Selection Manifesto 12') that gay players were "unworthy of our great city" (and, in order to further demonstrate their discriminatory credentials, also suggested that black players were "forced down Zenit's throat"). The publication of this 'Manifesto' was seemingly triggered by Zenit's purchase, in September 2012, of Brazilian striker Hulk and Belgian midfielder Alex Witsel – ensuring that Zenit were no longer the only top flight Russian side to compete without a black first team player in their ranks.

The ECJ's decision also follows the recent announcement, by US international Robbie Rogers, of his retirement (at the age of 25) from professional football – at the same time as publicly announcing his homosexuality. Writing on his blog in February 2013, Rogers spoke candidly about a "...Fear that judgment and rejection would hold me back from my dreams and aspirations..." and, in a subsequent newspaper interview, explained why he had felt unable to come out as gay during his footballing career (which included representing teams in the US, Dutch and UK leagues); Rogers stated (amongst other matters) that he had been "very fearful" of how his team mates would react. However, shortly after announcing his retirement (and one day after Jason Collins' public announcement of his homosexuality), Rogers commenced training with Major League Soccer team LA Galaxy, and made his debut for the club on 26 May 2013 (thereby becoming the first openly gay male athlete to play in a professional American sporting match). Rogers attributed his change of heart to addressing an LGBT youth forum in Portland, stating: "These kids are standing up for themselves and changing the world, and I'm 25, I have a platform and a voice to be a role model. How much of a coward was I to not step up to the plate?"

With regard to the ECJ proceedings under consideration in this article, the dispute concerned the prospective transfer of a professional footballer (X) to a Romanian club, Steaua Bucharest; and alleged homophobic comments made by a shareholder of the club (Mr Becali) in relation to the player. In an interview concerning the possible signing of X, Mr Becali had reportedly made statements which were offensive and highly dismissive of gay footballers, stating that he would rather the club sign a player from the junior team than a homosexual. In order to fully comprehend the level of offensiveness, the precise comments are reproduced below:

*"Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Obviously people will talk, but how could anyone write something like that and, what's more, put it on the front page ... Maybe he's [the football player X] not a homosexual ... But what if he is? I said to an uncle of mine who didn't believe in Satan or in Christ. I said to him: "Let's say God doesn't exist. But suppose he does? What do you lose by taking communion? Wouldn't it be good to go to Heaven?" He said I was right. A month before he died he took communion. May God forgive him. There's no room for gays in my family and [FC Steaua] is my family. It would be better to play with a junior rather than someone who was gay. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose."*

*"Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Maybe he's not a homosexual. But what if he is? There's no room for gays in my family, and [FC Steaua] is my family. Rather than having a homosexual on the side it would be better to have a junior player. This isn't discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whoever I choose. Even if God told me in a dream that it was 100 percent certain that X wasn't a homosexual I still wouldn't take him. Too much has been written in the papers about his being a homosexual. Even if [player X's current club] gave him to me for free I wouldn't have him! He could be the biggest troublemaker, the biggest drinker ... but if he's a homosexual I don't want to know about him."*

Perhaps unsurprisingly, ACCEPT believed that the player's sexual orientation (or suspected sexual orientation) had operated as a bar to a transfer and caused the club not to offer him a contract of employment. Accordingly, it issued a complaint on X's behalf against both Mr Becali and the club. ACCEPT is a non-governmental organisation whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights. Consiliul Național pentru Combaterea Discriminării ("the CNCD") is the Romanian National Council for Combating Discrimination.

In support of ACCEPT's complaint against the club, it was argued that at no stage had the club sought to distance itself from Mr Becali's public statements; and that the club's lawyer had himself stated that "the team is a family" and the presence of a homosexual on the team "would create tensions in the team and among spectators".

By a decision of 13 October 2010, the CNCD held, inter alia, that Mr Becali's statements could not be regarded as emanating from the club, its legal representative, or a person responsible for recruitment, notwithstanding the fact that Mr Becali, when he made those statements, was a shareholder of the

club. It followed that Mr Becali's remarks could not, in the CNCD's view, give rise to a valid complaint of discrimination against the club (though it did find Mr Becali himself guilty of harassment and issued him with a warning).

On a reference from the Romanian national court, the ECJ had to decide (amongst other matters) whether the comments of Mr Becali could give rise to a prima facie case of sexual orientation discrimination against Steaua Bucharest, having regard to the fact that whilst Mr Becali presented himself and was perceived in the media and the public as playing a leading role in the club, he was not employed by the club, nor did he necessarily have legal authority to bind the club or represent it in recruitment matters.

By way of background, European discrimination law encompasses a principle known as the 'modified burden of proof'. Put simply, provided a complainant is able to prove a prima facie case of unlawful discrimination (in other words, facts from which a Court or Tribunal could properly and fairly conclude, in the absence of any other explanation, that the less favourable treatment complained of was because of a 'protected characteristic' such as sexual orientation), then the burden of proof shifts to the respondent / defendant to prove that it has not discriminated against the complainant. In UK domestic law, this important principle is reflected in section 136 of the Equality Act 2010.

In *ACCEPT v CNCD*, the ECJ was quick to emphasise that the system of recruiting professional (or indeed semi-professional) footballers is subject to the full force of European anti-discrimination law. Individuals who are in "gainful employment or provide a remunerated service" will, in principle, be protected. On the particular question whether Mr Becali's comments could in principle establish a prima facie case of discrimination against the club, the ECJ answered in the affirmative, stating that:

*"...a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters".*

The tacit approval of such comments (through lack of condemnation) is likely to be a highly relevant factor in assessing whether the club / employer itself operated a discriminatory recruitment regime. The ECJ observed that:

*"...the fact that such an employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts".*

Adopting what may be considered a somewhat surprising stance (given its role as a National Council for Combatting Discrimination), the CNCD argued before the ECJ that the fact Steaua Bucharest had not yet commenced any formal negotiations to sign X precluded the possibility of establishing facts from which it could be inferred that the club itself had been guilty of discrimination. The ECJ gave this argument short shrift. It is a well-established principle of European discrimination law that both workers and prospective workers are protected against unlawful discrimination. It would be a bizarre state of affairs if a football club / employer had an absolute defence to a complaint of discrimination (regarding a refusal / reluctance to employ a particular individual) by showing that no negotiations regarding the possible employment of that individual had actually taken place (in circumstances where the complaint, in essence, is that such negotiations were never going to happen – on account of the employer's discriminatory recruitment policy).

However, factors such as whether the player's current club would have been willing to sell him (and at what price), whether the prospective club would have been willing to meet the transfer fee and the player's wage demands, and whether the player would actually have been willing to move clubs (in the absence of any discriminatory recruitment policy), are likely to be relevant to the issue of precisely what detriment(s) are suffered by the player, and/or the assessment of remedy – i.e. what financial loss the player has suffered – as a consequence of the discriminatory conduct in question.

Demonstrating what may be viewed as a startling lack of awareness of discrimination law principles, the referring court also asked the ECJ to rule on whether the modified burden of proof would "not require evidence impossible to adduce without interfering with the right to privacy". The question appeared to be, in essence, 'if a club may only prove that they haven't discriminated against a gay (or suspected gay) footballer by proving that they do in fact employ gay footballers, and that fact can only be proved by disclosing sensitive personal data and/or breaching the privacy of those other players, how does that fit with the Equal Treatment Directive?'. The obvious answer, given by the ECJ, was that this is plainly not the only way in which an employer may rebut a prima facie case of discrimination; on this point, it stated as follows:

*"In the overall assessment carried out by the national body or court hearing the matter, a prima facie case of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence. As Accept has, in essence, submitted, such a body of evidence might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment..."*

These remarks highlight the importance of clubs (and employers generally) having in place, and effectively operating in practice (through, for example, proper training, monitoring and review processes) a robust equal opportunities policy; and unambiguously distancing themselves from any remarks which may be viewed as discriminatory, and which may (by virtue of the association / nexus between the perpetrator of the remarks and the employer) 'taint' the perception of the employer.

Of course, it would be perfectly possible for a club in Steaua Bucharest's position to rebut a prima facie case of discrimination by demonstrating one or a number of valid reasons for not signing or attempting to sign a particular player; for example if: (a) the club's manager / scouts did not genuinely consider he was good enough for the team (on footballing merit); (b) his medical condition was unsatisfactory; or (c) he was too expensive to make an offer worthwhile / feasible. However, the resolution of the question 'why did the club act in the manner it did?' will ultimately be a matter for determination by the national court or tribunal (on the factual evidence presented to it), rather than the ECJ.

Clearly, the notion that the only way to rebut an adverse inference of sexual orientation discrimination is by showing that the employer employs other gay workers, is considerably wide of the mark. However, the diversity of the employer's workforce is likely to be a relevant piece of the overall evidential picture; and in the author's experience difficulties frequently arise in practice regarding when and how personal sensitive data of persons (other than the complainant) may properly be disclosed in the course of internal grievance and/or legal proceedings (and in what form). Regrettably, in its judgment the ECJ did not specifically address this issue. Whilst a detailed consideration of privacy rights and the Data Protection Act 1998 is outside the scope of this article, there are legitimate 'halfway houses' which may be adopted by employers faced with such a disclosure dilemma, including the redaction or anonymisation of workers' names / other sensitive personal data (both during the course of the proceedings and in the body of the published judgment).

Finally, the ECJ turned to the question whether the Romanian national law which, by virtue of a limitation provision, only permitted Mr Becali to be issued with a warning in respect of his unlawful conduct (as opposed to being issued with a financial penalty), was compatible with European law – i.e. whether it amounted to an "effective, proportionate and dissuasive" remedy for a successful complainant. Whilst the ECJ confirmed that this question was ultimately a matter for the national court to determine (by reference to the applicable legal principles reiterated by the ECJ in its judgment), a fairly clear steer from the ECJ may be inferred from comments such as:

*"The severity of the sanctions imposed must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect"; and*

*"...if it were the case that, as Accept argues, the sanction consisting in a warning is generally only imposed in Romanian law for very minor offences, that fact would tend to suggest that such a sanction is not commensurate to the seriousness of a breach of the principle of equal treatment within the meaning of that directive".*

## A reminder to sports organisations

Whilst the decision of the ECJ in *ACCEPT v CNCD* is not a watershed moment in terms of European discrimination law jurisprudence, it does nevertheless serve as a valuable reminder that employers (whether they be professional football clubs, public sector organisations or private companies)

must not only act (and be able to show that they act) in accordance with well-established equality principles, but must also be alert to the perception of discrimination arising out of comments / conduct on the part of persons closely connected to their organisation; which comments / conduct may ultimately form the basis of an adverse finding against the employer (if no satisfactory explanation to the contrary can be established).

## Conclusion

On the broader issue of sexual orientation discrimination in sport, the absence (or low number) of openly gay players in professional sport is certainly not limited to the US. Whilst clearly an invaluable tool in the fight against discrimination at work, equal opportunities legislation can only go so far to change individual and collective behaviours and attitudes, which in certain sports or industries may prove particularly difficult to dislodge. It is to be hoped that the words and actions of players such as Collins and Rogers will constitute a significant step forward on the road to inclusivity and non-discrimination.

- 1 <http://www.washingtonpost.com/blogs/early-lead/wp/2013/04/29/jason-collins-comes-out-nba-player-says-in-gay/>
- 2 <http://variety.com/2013/tv/news/espn-chris-broussard-under-fire-over-homosexuality-comments-1200425834/>
- 3 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0081:EN:HTML>
- 4 <http://www.bbc.co.uk/sport/0/football/20770678>; <http://www.independent.co.uk/sport/football/european/luciano-smallleji-speaks-out-over-zenit-st-petersburg-manifesto-8423148.html>
- 5 <http://robbierogers.com/blog/2013/2/23/the-next-chapter>
- 6 <http://www.guardian.co.uk/football/2013/mar/29/robbie-rogers-coming-out-gay>
- 7 <http://edition.cnn.com/2013/05/25/sport/football/rogers-joining-galaxy>
- 8 <http://www.guardian.co.uk/football/2013/may/25/robbie-rogers-le-galaxy-soccer>

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