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NEWS REPORT

Country:	Romania
Title:	High Court confirms rejection of the action of ACCEPT in the case based on CJEU C-81/12
Date:	8 January 2016
Expert:	Iordache, Romanița
Update of flash report nr:	1176-RO-111, 1015-RO-94, and Ro-116
<u>Context</u>	
Issue at stake:	Discriminatory statements regarding the prohibition to recruit homosexual players in football club made by the person known publicly as owner, discrimination in employment, warning as effective remedy Sexual orientation
Ground of discrimination:	
Source:	National court decision – High Court of Cassation and Justice of Romania decision 224 in file 12562/2/2010
Field:	Employment
Applicable law:	Art. 2,5,7,15,20,26 and 28 of the Governmental Ordinance 137/2000

Content

Case development: The High Court of Cassation and Justice finally communicated to the parties the reasoning in decision 224 in file 12562/2/2010 in which the court rejected ACCEPT's request to quash the decision of the national equality body as "unfounded." The High Court confirmed the legality of the decision of the Court of Appeal Bucharest from 23.12.2013.¹ The decision was issued in a case regarding discriminatory statements in relation to hiring policies in a football club and came after a preliminary ruling of the CJEU.² The decision is final.

In March 2010, ACCEPT Romania, a human rights NGO defending the rights of LGBT, lodged a complaint with the national equality body, the National Council for Combating Discrimination (NCCD) against George Becali and the football club *SC Fotbal Club Steaua București SA* ('FC Steaua'), claiming that the principle of equal treatment had been breached in regards of recruitment when Mr. Becali, who is publicly known and presenting himself as the owner of the club, made discriminatory statements regarding the prohibition to ever recruit gay men at FC Steaua. In its decision of 13 October 2010, the NCCD held, that the circumstances at issue in the main proceedings did not fall within the scope of a possible employment relationship. The national equality body sanctioned solely Mr Becali for his discriminatory statements understood by the NCCD as

¹ See RO-116-Flash report.

² See C-81/12. Judgment of the Court available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136785&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=642362>.

infringing human dignity. The sanction against Mr. Becali consisted in an administrative warning carrying no financial penalty.

ACCEPT brought an action before the Bucharest Court of Appeal against the NCCD decision, asking the court to acknowledge the responsibility of the club within a potential work relation, to force the NCCD to redo the investigation and to replace the warning with an adequate sanction.

Following ACCEPT's request, the Bucharest Court of Appeal (as referring court to the Court of Justice of the European Union), sought clarifications on the application of the judgment in Case C-54/07 *Feryn*,³ the interpretation of the burden of proof and adequate remedy under the Directive 2000/78/EC. The CJEU issued its clarifications in C-81/12 in its first case on discrimination in recruitment on grounds of sexual orientation.⁴ The Bucharest Court of Appeal rejected the appeal launched by ACCEPT as "unfounded" in a decision issued on 23.12.2013 in which the court failed to observe the guidance from C-81/12. ACCEPT brought the case before the High Court of Cassation and Justice as the last remedy available.

Decision of the Court: 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, thus maintaining the decision of the national equality body.

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. The decision mentions the submissions of the complainants indicating that the CJEU ruling had been misquoted by the NCCD and misinterpreted by the Court of Appeal but there is no following up.

Briefly dismissing the case, the High Court uses the conclusions of the Court of Appeal by stating that "it was correctly concluded by the first instance that there are no elements which would allow to find that the Football Club initiated any step, of any type, to contract the sportive services of the player I.I." The High Court follows: "In reality, the entire procedure had been launched based of purely speculative statements (of Mr. Becali)... even if the author of the statement is a person which cannot be dissociated in the public perception from the Football Club Steaua București, from this unique occurrence it cannot be drawn the conclusion that the complainant is laying its account for (bets), particularly given that during the entire procedure the Football Club Steaua București denied any connection with the statements and the lack of basic facts." Hence, the High Court decided that there are no elements suggesting that the Football Club Steaua București is liable for discrimination in employment on grounds of sexual orientation.

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 (Italics used by the Court). In applying this sanction the NCCD has a margin of appreciation under which it is assessing multiple elements, among which the context in which the deed was perpetrated, the effects or the outcome and the person of the perpetrator

³ Judgment of the Court (Second Chamber) of 10 July 2008 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*. Reference for a preliminary ruling: *Arbeidshof te Brussel* – Belgium available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-54/07>.

⁴ Judgment of the Court (Third Chamber) of 25 April 2013. *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*. Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136785&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=642362>.

played an important role. Not lastly, the publicity generated by the decision to sanction the author of the deed of discrimination who excessively exercised his freedom of expression played a dissuasive part in the society." 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."

Key points of analysis: The decision confirms the NCCD position that the discriminatory statements of the person notoriously known as the owner of the club do not amount to discrimination in employment. It also states the position of the Court that the administrative warning, a sanction not specifically provided in the Anti-discrimination Law but borrowed by the NCCD from the administrative law, is an adequate remedy in cases when discrimination is found. More worrying, is the statement of the Court that NGOs which are expressly granted locus standi under the Anti-discrimination Law "cannot justify the infringement of a legitimate public interest."

Internet link source: The text of the reasoning is available in Romanian for the parties only.