Why the Rooney Rule matters

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The Malky Mackay texts controversy, and subsequent comments emanating from the League Managers’ Association, brought the question of race in professional football firmly back into the spotlight. Following Chris Powell’s recent appointment as manager of Huddersfield earlier this month, there is currently only one black manager in all of the 92 league clubs in England. Does English football have a race problem, particularly in relation to management and coaching positions? If so, what can be done about it?

The Rooney Rule

Perhaps the answer lies in America, where the National Football League (NFL) has taken a novel approach, through its use of the “Rooney Rule”, to the discrepancy between the number of black players compared to black coaches and managers. However, would the Rooney Rule work here?

The Rooney Rule was established in 2003 and was named after Dan Rooney, the owner of the Pittsburgh Steelers and the chairman of the NFL’s diversity committee. The rule originally required teams in the NFL in the US to interview at least one ethnic minority candidate for head coaching posts and was then expanded out in 2009 to apply to both head coaching and general manager or equivalent positions.

The rule was introduced as, in the period from the NFL's establishment in 1920 to 2003, only seven coaches from ethnic minorities had ever held head coaching roles (indeed in the period from 1920 to 1979 only one had done so).

Following the introduction of the rule in 2003:

- twelve coaches from ethnic minorities have been hired into head coaching roles;
- Super Bowl XLI in 2007 became the first to be contested between two black coaches; and
- at least one team in seven of the last eight Super Bowls have had either a head coach or general manager from an ethnic minority background.

The rule has therefore clearly had an impact and there has been further pressure to expand the rule to cover assistant head coaches, coordinators and club presidents. However, in March 2013, Roger Goodell, the NFL Commissioner, confirmed that the rule would not be expanded, at least in the near future.

In addition to the introduction of the Rooney Rule, the NFL has also taken a number of “additional steps” to develop and expand talent. For example, it has restored its annual three-day Career Development Symposium at the University of Pennsylvania for aspiring coaches and front office executives (of whatever ethnic background) and it has created a career development advisory panel to help identify worthy candidates for head coach and general manager positions.

The position in the UK

So why is the Rooney Rule relevant to the situation here? Well, Chris Powell’s appointment as Huddersfield’s manager, which lifts the number of black league club managers in England to 1 out of 92, is alarmingly under-representative.

This issue has, as you would expect, resulted in significant commentary by the PFA, in the press and in wider sporting circles in relation to equality and football. However, whilst football has come in for particular attention, there are, undoubtedly, numerous other sports where coaches and management teams are not representative of the diversity of participants in their sport and certainly not of the diversity within the country as a whole. Cricket is an obvious
example. Given this lack of black managers in football, and other sports, would the introduction of the Rooney rule be lawful?

The legislation

Whether or not the Rooney Rule would be lawful here effectively comes down to whether it would be viewed as positive discrimination, which is unlawful, or as positive action, which, in certain circumstances, can be lawful.

The Equality Act provides for two potential lawful types of positive action, one of which is a general provision and one of which is specific to recruitment.

In relation to the general positive action provision and of most relevance to the Rooney Rule, a party is permitted, under section 158 of the Act, to:

- take steps which are a proportionate means of enabling or encouraging persons with a particular protected characteristic to participate in an activity, where participation in that activity by persons with that protected characteristic is disproportionately low.

For participation to be “disproportionately low”, participation must be low compared with the local population and/or the level of participation that could be reasonably expected.

In the football context, clearly the number of black managers participating in football management is currently disproportionately low, as compared to the population of the country as a whole. However, the question then is whether the application of the Rooney Rule would be a proportionate means of encouraging participation and it seems clear that, without further legislative change, the shortlisting for interview of a candidate based on their ethnic origin, rather than the merits of their application, would not be deemed to be proportionate.

This is because there are almost certainly less discriminatory ways to try and achieve the same aim, for example by ensuring that black managers are completing their coaching badges and are entering the talent pool. This view is arguably supported by Chapter 12 of the EHRC Code, which gives the following examples of positive action which could fall within section 158 of the Act:

- setting targets for increasing participation of the targeted group;
- providing bursaries to obtain qualifications in a profession for members of the group whose participation in that profession are disproportionately low;
- outreach work to raise awareness;
- reserving places on training courses for people with the protected characteristic;
- targeted networking opportunities; and
- mentoring.

Notably, the Code does not refer to priority shortlisting, which is effectively what the Rooney rule amounts to.

Whilst the Rooney rule would not be lawful under the terms of the Equality Act, the Act does contain a very much watered down version of the rule. Section 159 of the Act allows employers to choose a job applicant with a protected characteristic over another applicant where:

(i) participation in the activity by persons sharing that protected characteristic is disproportionately low;
(ii) the two candidates are equally qualified;
(iii) the employer does not have a policy of treating persons with the relevant protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it;
(iv) taking the action in question is a proportionate means of achieving the increase in participation.

There is, however, an inherent risk involved in seeking to rely on section 159. If the employer gets it wrong and, for example, the candidate is not “equally qualified”, it will have appointed based on an individual’s ethnic origin and will then almost certainly be guilty of positive discrimination. As a result, employers have been very reluctant to rely on section 159.

Comment

In the UK, it seems that a certain amount of political will is required to push through legislation incorporating our own Rooney Rule. To do nothing is certainly not an option. Indeed, Cyrus Mehri, the lawyer responsible for drafting the Rooney Rule said recently “The friend of racism is inertia. The enemy of opportunity is complacency”. However, given that the Rule is akin to positive discrimination, it may make sense to only turn to the Rule should, following further concerted effort, all reasonable avenues based on positive action fail. It is recognised, though, that there will be those in and outside of sport who, not unreasonably, feel that we have reached the point to enact the Rule now.

INN OUR VIEW:- Lindsay Cunningham, solicitor in the Property team says “South Africa to beat New Zealand when they meet in the Ruby Internationals at Ellis Park early next month. After being close to breaking New Zealand’s five year unbeaten home record in their 10-14 defeat in Wellington last week, I think the Boks could pull off a victory”.

If you require further information on anything covered in this briefing please contact David Hunt (david.hunt@farrer.co.uk; 020 3375 7214) or Udo Onwere (udo.onwere@farrer.co.uk; 020 3375 7439) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the Employment pages on our website.

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