

## Coleman: the emerging philosophy of the Employment Framework Directive 2000/78

1. In this presentation I will examine the Coleman v Attridge Law preliminary ruling.
2. Discrimination can sometimes occur because of an assumption about another person, which may or may not be factually correct; e.g. that a woman is a lesbian. Alternatively, a person may face discrimination because they associate with persons of a particular characteristic; e.g. a non-Roma man may be denied admission to a bar because he is with friends who are from the Roma community.
3. It is likely that there will be references from other member states on the question of whether incorrect perceptions of a characteristic can result in a finding of direct discrimination. The law is reasonably settled in the UK. "On the grounds of" covers any direct less favourable treatment resulting **from the characteristic** whether that characteristic is actually that of the individual concerned.
4. The only areas where this principle may not hold good are disability and age in the UK.

### Coleman v Attridge Law

5. In *Coleman v Attridge Law*, Case C-303/06 the ECJ considered the questions set out below concerning the implementation of the Framework Directive 2000/78 in the Disability Discrimination Act 1995

(as amended) (“DDA”). This Act had stated that disability discrimination rights were (with the exception of victimization) solely those of the disabled person.

### **Facts**

6. **Coleman** was employed as a legal secretary by a firm of solicitors. She has a disabled son, born in 2002 and who is subject to apnoeic attacks and congenital laryngomalacia and bronchomalacia requiring specialised and particular caring requirements.

7. She alleges that she was subjected to unfair treatment by her employers on grounds that she had a disabled son. She tried to bring a disability discrimination claim, relying on EU law, arguing that protection against discrimination “on grounds of disability” provided for by the Framework Employment [Directive 2000/78](#) meant that the Disability Discrimination Act must be interpreted purposively so as to cover discrimination by reason of the claimant's association with a disabled person.

### **The Referring Tribunal**

8. An employment tribunal, at a pre-hearing review, noted that on a literal reading, such “associative discrimination” is not covered by the DDA. However, the tribunal concluded that it was not “acte clair” that the Directive could not be interpreted so as to cover associative discrimination, and that it was possible that the DDA could be read purposively in such a way as to accord with such an interpretation of EU law. This meant that the tribunal took the view that it was

arguable that the Directive required the DDA to be read so as to extend protection to those who are associated with a disabled person and whose discrimination is on the grounds of the protected characteristic of that other person, namely disability.

### **The questions**

9. The employment tribunal referred the following questions to the European Court of Justice for a preliminary ruling:

“1. In the context of the prohibition of discrimination on grounds of disability, does the Directive only protect from direct discrimination and harassment persons who are themselves disabled?

2. If the answer to question 1 above is in the negative, does the Directive protect employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled?

3. Where an employer treats an employee less favourably than he treats or would treat other employees, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that treatment direct discrimination in breach of the principle of equal treatment established by the Directive?

4. Where an employer harasses an employee, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that harassment a breach of the principle of equal treatment established by the Directive?”

### **An appeal against the reference**

10. The Employment Appeal Tribunal dismissed the appeal against this reference stating that the Disability Discrimination Act is capable of interpretation so as to include associative discrimination without

distorting the words of the statute and consistent with the domestic court's responsibility to arrive at a construction which ensures that the Directive is fully effective.

### **The Advocate General's opinion**

11. The Advocate General ("AG") of the European Court of Justice gives an opinion on cases referred to the Court. The Advocate General's opinion is usually, but not always, followed by the European Court of Justice.

12. The Advocate General gave his opinion in *Coleman* to the effect that the Directive must be construed so as to extend protection to those who are treated less favourably on the grounds of disability even where it is another person's disability which causes the less favourable treatment.

13. The opinion is short, and clear. The AG thought that the four questions referred to the Court by the Employment Tribunal boil down to a single issue of law: "does the Directive protect non-disabled people who, in the context of their employment, suffer direct discrimination and/or harassment because they are associated with a disabled person?"

### **The emergent philosophy**

14. The AG reasons from the basis of the Directive. It was adopted under Article 13 EC which was added to the EC Treaty by the Treaty of Amsterdam and reads as follows:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

15. There are in other words specific grounds of discrimination treated as suspect grounds and the target of Community anti-discrimination legislation. The Directive must be interpreted in the light of the goals pursued by Article 13 itself. The AG noted that Article 13 EC is an expression of the commitment of the Community legal order to the principle of equal treatment and non-discrimination.

16. The background of the Court's case-law on these principles is therefore relevant. Equality is not merely a political ideal and aspiration but one of the fundamental principles of Community law. As the Court held in the *Mangold* case on age, the Directive constitutes a practical aspect of the principle of equality.

17. Thus far the opinion is technical and legalistic. However the AG then departs into a discussion of the underlying philosophical values that underpin equality law: human dignity and personal autonomy. The discussion of these values points to why the interpretation of the Directive has to be broad enough to include associative discrimination. In essence without that scope it would fail to protect the disabled person by permitting their dignity and autonomy to be

treated as less significant than that of a non-disabled person. The AG stated:

“At its bare minimum, human dignity entails the recognition of the equal worth of every individual. One's life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another”.... “Therefore, individuals and political institutions must not act in a way that denies the intrinsic importance of every human life.”

18. The value of dignity requires equality to ensure equality of value of a human life. The AG continued:

“A relevant, but different, value is that of personal autonomy. It dictates that individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options. The exercise of autonomy presupposes that people are given a range of valuable options from which to choose. When we act as autonomous agents making decisions about the way we want our life to develop our 'personal integrity and sense of dignity and self-respect are made concrete'.”

19. The AG stated “Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being

means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably.”

20. It is worth noticing that the AG did not distinguish age from this list. Contrast the difficult approach of the AG in the “*Heyday*” case where, whilst trying to reject the idea of a hierarchy in the Article 13 grounds, the AG effectively places age at the bottom of a hierarchy on the basis that it is “less suspect” than the other grounds.

21. Having considered and explained the ways in which discrimination undermines the dignity and autonomy of a disabled person the AG in *Coleman* then turns to the issue of whether the discrimination must always be targeted specifically at the disabled person. It should be remembered that his reasoning also applies to the other characteristics such as (in particular) age.

“Yet, directly targeting a person who has a particular characteristic is not the only way of discriminating against him or her; there are also other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should

also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications.”

22. The AG noted that the dignity of the person with the characteristic is just as much affected by seeing someone else suffer discrimination merely by virtue of being associated with him.

“Furthermore, this subtler form of discrimination undermines the ability of persons who have a suspect characteristic to exercise their autonomy. For instance, the autonomy of members of a religious group may be affected (for example, as to whom to marry or where to live) if they know that the person they will marry is likely to suffer discrimination because of the religious affiliation of his spouse. The same can happen, albeit to a lesser extent, with individuals who are disabled. People belonging to certain groups are often more vulnerable than the average person, so they have come to rely on individuals with whom they are closely associated for help in their effort to lead a life according to the fundamental choices they have made. When the discriminator deprives an individual of valuable options in areas which are of fundamental importance to our lives because that individual is associated with a person having a suspect characteristic then it also deprives that person of valuable options and prevents him from exercising his autonomy. Put differently, the person who belongs to the suspect classification is excluded from a range of possibilities that would otherwise have been open to him.”



### **How the Directive operates**

23. The AG then turns to how the Directive in article 2 ensures that the protective aims of the Directive are met. The AG stated: “The important words here are 'on the grounds of'.”

“ ...the Directive performs an *exclusionary* function: it excludes religious belief, age, disability and sexual orientation from the range of permissible reasons an employer may legitimately rely upon in order to treat one employee less favourably than another. In other words, after the coming into force of the Directive it is no longer permissible for these considerations to figure in the employer's reasoning when she decides to treat an employee less favourably.”

24. In direct discrimination cases (and harassment) “The discriminator relies on a suspect classification in order to act in a certain way. The classification is not a mere contingency but serves as an essential premise of his reasoning. An employer's reliance on those suspect grounds is seen by the Community legal order as an evil which must be eradicated. Therefore, the Directive prohibits the use of those classifications as grounds upon which an employer's reasoning may be based.

25. The AG concluded that “including discrimination by association in the scope of the prohibition of direct discrimination and harassment is the natural consequence of the exclusionary mechanism through which the prohibition of this type of discrimination operates”.

26. Significantly therefore the AG recognised that discrimination by association will only arise where direct discrimination or harassment is relied upon. It will not therefore be possible for the employee to rely on apparently neutral practices policies or criteria which have a consequence for them because of an association with a disabled person.

However in relation to direct discrimination "...the effect of the Directive is that it is impermissible for an employer to rely on religion, age, disability and sexual orientation in order to treat some employees less well than others. To do so would amount to subjecting these individuals to unjust treatment and failing to respect their dignity and autonomy. This fact does not change in cases where the employee who is the object of discrimination is not disabled herself. The ground which serves as the basis of the discrimination she suffers continues to be disability. The Directive operates at the *level of grounds of discrimination*. The wrong that it was intended to remedy is the use of certain characteristics as grounds to treat some employees less well than others; what it does is to remove religion, age, disability and sexual orientation completely from the range of grounds an employer may legitimately use to treat some people less well. Put differently, the Directive does not allow the hostility an employer may have against people belonging to the enumerated suspect classifications to function as the basis for any kind of less favourable treatment in the context of

employment and occupation. As I have explained, this hostility may be expressed in an overt manner by targeting individuals who themselves have certain characteristics, or in a more subtle and covert manner by targeting those who are associated with the individuals having the characteristics. In the former case, we think that such conduct is wrong and must be prohibited; the latter is exactly the same in every material aspect. In both cases, it is the hostility of the employer towards elderly, disabled or homosexual people or people of a certain religious persuasion that leads him to treat some employees less well.”

“What is important is that that disability in this case the disability of Ms Coleman's son was used as a reason to treat her less well. The Directive does not come into play only when the claimant is disabled herself but every time there is an instance of less favourable treatment because of disability”.

27. The AG recommended that the Court should answer the question of the Employment Tribunal as follows:

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation protects people who, although not themselves disabled, suffer direct discrimination and/or harassment in the field of employment and occupation because they are associated with a disabled person.

### **The Court's judgment.**

*The first part of Question 1, and Questions 2 and 3*

28. The Court treated these as asking whether Directive 2000/78 must be interpreted as prohibiting direct discrimination on grounds of disability only in respect of an employee who is himself disabled, or whether the principle of equal treatment and the prohibition of direct discrimination apply equally to an employee who is not himself disabled but who, as in the present case, is treated less favourably by reason of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition.

29. It noted that under Article 2(2)(a), direct discrimination is to be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds, *inter alia*, of disability. It noted the scope of operation of the Directive under article 3. It then went on in paragraph 38:

38. Consequently, it does not follow from those provisions of Directive 2000/78 that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability within the meaning of the directive. On the contrary, the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1. That interpretation is supported by the wording of Article 13 EC, which constitutes the legal basis of Directive 2000/78, and which confers on the Community the competence to take appropriate action to combat discrimination based, *inter alia*, on disability.

30. The Court then dealt with the different provision that exists in relation to the idea of reasonable accommodation in article 5 of the Directive. Such accommodations are only available to disabled persons themselves. It noted the limitations on that concept both in article 5 and in article 7(2) of the Directive.

31. The United Kingdom, Greek, Italian and Netherlands Governments contended that because of these and recitals 16, 17 and 27 in the preamble to Directive 2000/78, the prohibition of direct discrimination laid down by the directive could not be interpreted as covering a situation in which the claimant is not disabled.

32. However the Court stated that these provisions relate “specifically to disabled persons either because they are provisions concerning positive discrimination measures in favour of disabled persons themselves or because they are specific measures which would be rendered meaningless or could prove to be disproportionate if they were not limited to disabled persons only. Thus, as recitals 16 and 20 in the preamble to Directive 2000/78 indicate, the measures in question are intended to accommodate the needs of disabled people at the workplace and to adapt the workplace to their disability. Such measures are therefore designed specifically to facilitate and promote the integration of disabled people into the working environment and, for that reason, can only relate to disabled people and to the obligations incumbent on their employers and, where appropriate, on the Member States with regard to disabled people.” (para 42).

33. It did not follow therefore that direct discrimination needed to be confined in the same way. Moreover it noted that “recital 6 in the preamble to the directive, concerning the Community Charter of the Fundamental Social Rights of Workers, refers both to the general combating of every form of discrimination and to the need to take appropriate action for the social and economic integration of disabled people.”

34. The United Kingdom, Italian and Netherlands Governments relied on the judgment in Case C-13/05 *Chacón Navas* [\[2006\] ECR I-6467](#) that the scope *ratione personae* of Directive 2000/78 must be interpreted strictly to support their argument.

35. The Court stated that it does not follow from the interpretation in *Chacon Navas* that the principle of equal treatment defined in Article 2(1) of that directive and the prohibition of direct discrimination laid down by Article 2(2)(a) cannot apply to a situation such as that in the present case, where the less favourable treatment which an employee claims to have suffered is on grounds of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition.

36. Although the scope of Directive 2000/78 cannot be extended beyond the discrimination based on the grounds listed exhaustively in Article 1 of the directive, so that a person who has been dismissed by his employer solely on account of sickness cannot fall within the scope of the general framework established by Directive 2000/78, the Court rejected the proposition that the principle of equal treatment

and the scope *ratione personae* of that directive must be interpreted strictly with regard to those grounds.

37. The Court noted that the Directive sets down a general framework and also referred to recital 37 in the preamble to the directive that the Directive has the objective of creating within the Community a level playing field as regards equality in employment and occupation.

38. The Court agreed with Ms Coleman, the Lithuanian and Swedish Governments and the Commission maintain that those objectives, and the effectiveness of Directive 2000/78, would be undermined if an employee in the claimant's situation cannot rely on the prohibition of direct discrimination. The Court commented

49. In that regard, it follows from recital 11 in the preamble to the directive that the Community legislature also took the view that discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the Treaty, in particular, as regards employment.

50. Although, in a situation such as that in the present case, the person who is subject to direct discrimination on grounds of disability is not herself disabled, the fact remains that it is the disability which, according to Ms Coleman, is the ground for the less favourable treatment which she claims to have suffered. As is apparent from paragraph 38 of this judgment, Directive 2000/78, which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation,

applies not to a particular category of person but by reference to the grounds mentioned in Article 1.

39. Paragraph 50 is of particular significance. It is the characteristic rather than the person that brings into play the protection of the Directive against direct discrimination.

51. Where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.

### **Burden of proof**

40. The Court also referred to the burden of proof issues arising in these cases. Member States are required to 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 is for the respondent to prove that there has been no breach of that principle. According to Article 10(2), Article 10(1) does not prevent Member States from introducing rules on the burden of proof which are more favourable to plaintiffs.



41. It ruled therefore that the Claimant was required in accordance with Article 10(1) of Directive 2000/78, to establish, before that tribunal, facts from which it may be presumed that there has been direct discrimination on grounds of disability contrary to the directive.

54. In accordance with Article 10(1) of Directive 2000/78 and recital 31 in the preamble thereto, the rules on the burden of proof must be adapted when there is a prima facie case of discrimination. In the event that Ms Coleman establishes facts from which it may be presumed that there has been direct discrimination, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the respondents, who must prove that there has been no breach of that principle.

55. In that context, the respondents could contest the existence of such a breach by establishing by any legally permissible means, in particular, that the employee's treatment was justified by objective factors unrelated to any discrimination on grounds of disability and to any association which that employee has with a disabled person.

### **The Answer**

42. The prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less

favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).

### **Harassment**

43. The Court also considered whether the same principle of association applied to harassment. It said

58. Since, under Article 2(3) of Directive 2000/78, harassment is deemed to be a form of discrimination within the meaning of Article 2(1), it must be held that, for the same reasons as those set out in paragraphs 34 to 51 of this judgment, that directive, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as not being limited to the prohibition of harassment of people who are themselves disabled.

59. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the principle of equal treatment enshrined in Directive 2000/78 and, in particular, to the prohibition of harassment laid down by Article 2(3) thereof.

60. In that regard, it must nevertheless be borne in mind that, according to the actual wording of Article 2(3) of the directive,

the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

61. With regard to the burden of proof which applies in situations such as that in the main proceedings, it must be observed that, since harassment is deemed to be a form of discrimination within the meaning of Article 2(1) of Directive 2000/78, the same rules apply to harassment as those set out in paragraphs 52 to 55 of this judgment.

### **The impact of Coleman**

44. It is the characteristic that is protected under the Directive and must cause the less favourable treatment. If an employer does not grant flexible working it will not discriminate simply because the reason for the flexible working request is that the employee wants to care for a disabled person. However if the employer takes into account in refusing the request the fact that it is needed due to a disability (but would have granted it in other circumstances – for example so that the employee could care for a non-disabled sick person) then the carer will be protected.

45. There is another important implication which is yet to be explored in the field of disability discrimination. Various countries will have differing definitions of “disabled person” in their legislation. In the UK there is a requirement (in general) that the condition should have adverse effects on the person for more than 12 months. An employer who sees that a person has been off sick for some time but who has

not yet received a diagnosis stating that the condition will last more than 12 months may dismiss on account of that impairment without running the risk of a claim for disability discrimination. However it is clear that the characteristic, while not long lasting in the terms of the UK law, is the basis for the treatment.

46. Where a country has this type of threshold requirement, Coleman and cases like it suggest that persons discriminated against on the grounds of an emerging disability will be able to bring claims.

47. The philosophy which emerges from the AG's opinions in Coleman, and cases such as Bartsch is one in which the Directive is seen as supporting the personal autonomy of individuals and as supporting their dignity.

48. One area in which this philosophy is tested sharply is in the field of age discrimination.

49. The Opinion of the AG in the *Heyday* case suggests that whilst all are created equal some are more equal than others and that those who receive less favourable treatment on the basis of their age or that of another person may be met more often with the view that their treatment is justified despite the fact that on a personal level their dignity may be affected and, in the case of mandatory retirement, their personal autonomy is completely ignored.

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