

DISCRIMINATION BY ASSOCIATION IN EUROPEAN LAW

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Abstract

The European law prohibit direct and indirect discrimination and harrasment on grounds of sex, racial or ethnic, religion or belief, disability, age or sexual orientation. The question is what is the situation when someone is discriminated on can claim to be the victim of unlawful discrimination because he or she is associated with another person who has the protected characteristic. The the Court of Justice of the European Union's judgment in Coleman v Attridge Law and Steve Law confirms, for the first time in European law, the existence of the concept of discrimination by association. In this article I examine the implications of this case on all conceps of discrimination concepts of discrimination in European law (direct discrimination, indirect discrimination and harassment). I also examine the application of discrimination by association to grounds other than disability.

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JEL Classification: *K33, K31*

1. Introduction

According to article 2 of the Treaty of European Union the values on which European Union is founded are the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society in which non-discrimination, solidarity and equality between women and men prevail.

One of objectives of EU is to combat social exclusion and discrimination. This objective may be achieved, inter alia, through the implementation of the principle of equal treatment and prohibition of discrimination based on various grounds.

EU legislation adopted under article 19 of the Treaty of European Union established a general framework in respect of equal treatment in employment. The purpose of the Directive 2000/78 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. In other words the Directive offer protections to employees from the discriminatory acts of the employer on grounds of religion or belief, disability, age or sexual orientation.

The recital of the Directive 2000/43 and Directive 2000/78 states that the right to equality before the law and protection against discrimination constitutes a universal right, and that the Directives are one means of protecting this right. Moreover, it is recognised that discrimination may undermine the achievement of the objectives of the Treaty, in particular the attainment of a high level of employment and social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity.

The European law recognise sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation as grounds of discrimination. Also the EU Directives prohibit discrimination on grounds of sex, racial or ethnic, religion or belief, disability, age or sexual orientation. So there is obvious that individuals who have those characteristics are protected against discrimination.

The applicable EU legislation on discrimination covers both direct and indirect discrimination, harrasment and instruction to discriminate. The question is what is the situation when someone is discriminated on can claim to be the victim of unlawful discrimination because he or she is associated with another person who has the protected characteristic. At first reading, the Directives does not confer a protection to those who are associated with another person who has the protected characteristic. In the case law of the Court of Justice of the European Union was introduced another notion, discrimination by association.

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In *Coleman v. Attridge Law and Steve Law* (hereafter *Coleman*) the Court of Justice of the European Union (hereafter the Court or CJEU) had to rule if the prohibition of discrimination contained in the Directive covers cases where an employee is treated less favourably than her colleagues because, although not herself disabled, she is associated with a disabled person.

2. Case Coleman – the facts

Ms Sharon Coleman, worked from January 2001 as legal secretary for Attridge Law. In 2002 she gave birth to a son who is disabled. His condition required specialized and particular care. Ms Coleman was his primary carer. On 4 March 2005, Ms Coleman accepted voluntary redundancy, thereby bringing her contract of employment with her former employer to an end. On 30 August 2005 she brought a claim for constructive dismissal and disability discrimination against her former employers, arguing that they treated her less favourably than employees with non-disabled children and subjected her to conduct that created a hostile atmosphere for her. Among the examples of discriminatory treatment that she alleges she has suffered are that her employers refused to allow her to return to her existing job after coming back from maternity leave; they called her 'lazy' when she sought to take time off to care for her son and refused to give her the same flexibility as regards her working arrangements as those of her colleagues with non-disabled children; they said that she was using her 'fucking child' to manipulate her working conditions; they subjected her to disciplinary action; and they failed to deal properly with a formal grievance she lodged against her ill treatment.

The Employment Tribunal, London South made a preliminary ruling to the Court of Justice. In essence, the Employment Tribunal asked whether the Directive 2000/78 prohibited direct discrimination and harassment against employees who, although not themselves disabled, are subject to the less favourable treatment on the grounds that they associate with a person who is disabled.

3. Discrimination by association

In his opinion Advocate General says that 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.

In *Coleman* the Court states that direct discrimination is not limited only to people who are themselves disabled, but also encompasses the persons that associated with a disabled person.

The discrimination by association means treating a person differently because this person associates with somebody who is part of a group with protected characteristic. That concept broadens the scope of non-discrimination law. Not only does it protect the person with a protected characteristic (race, sex, disability), it also shields somebody who does not but is associated with such a person.

In literature this form of discrimination has been named in several ways: transferred discrimination², associative discrimination³, or discrimination in a triangular relationships⁴.

Michael Gruenberger⁵ consider discrimination in a triangular relationships is a distinct concept in non-discrimination law. A triangular relationship is involved if six criteria are met: (1) a

² Pilgerstorfer, Marcus, Forshaw, Simon Transferred Discrimination in European Law: Case C-303/06, *Coleman v Attridge Law* [2008] ICR 1128, [2008] IRLR 722 (ECJ), *Industrial Law Journal*, no. 37(4), 2008, pp. 384-393

³ Connor, Tim, Discrimination by association: a step in the right direction, *Journal of Social Welfare and Family Law*, no. 32:1, 2010, pp. 59-69

⁴ Gruenberger, Michael, *The Principle of Equal Treatment in Triangular Relationships*, 2009

party allegedly discriminates based on one or more suspect classifications; (2) the injured party is subject to that discrimination; but (3) does not carry the characteristic that may not be discriminated against upon which the act was based; and (4) a third person; (5) actually holding the characteristic at issue; and (6) with whom the injured party is associated.

The prohibition against discrimination on certain grounds applies not to a particular category of persons but by reference to the prohibited grounds. May the victim of a discriminatory act be the person who has the particular characteristic, may she be a third person, not belonging to that group but associating with one of its members, as long as the act is justified by reference to a suspect classification, the right not to be discriminated against on such grounds is infringed. The right not to suffer discrimination should not be infringed upon by the injured party's personal absence of the protected trait⁶.

4. Direct discrimination

Direct discrimination will occur if there is less favourable treatment than that given to another in a comparable situation on the grounds of disability.

In its judgment, the Court began by presenting the purpose of the Directive. This is to lay down a general framework for combating discrimination on the grounds of disability as regards employment and occupation. Following its Advocate General, it noted that the principle of equal treatment applies not to a particular category of person but by reference to the grounds mentioned in Article 1. This was interpreted⁷ as a broadly reading of the principle of equal treatment as not to apply merely to a particular category of persons (narrow reading) but by reference to the proscribed suspect classifications (broad construction).

The Court continued by considering the argument that the objectives and effectiveness of the Directive would be undermined if an employee in Ms. Coleman's position cannot rely on the prohibition of direct discrimination.

The Court concluded that, when an employee suffers direct discrimination on the grounds of disability, an interpretation of the Directive which limited its application only to people who had a disability themselves is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee. So the prohibition of direct discrimination is not limited only to people who are themselves disabled. And when 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 is contrary to the prohibition of direct discrimination.

The CJEU therefore ruled that direct discrimination based on disability includes discrimination by association.

EU law requires that the person alleging direct discrimination is compared to another person. In order to establish direct discrimination, it must be shown that one person is treated less favourably than another is, has been or would be treated in a comparable situation. If direct discrimination by association is interpreted in the same way as common direct discrimination, an employee would need to show the less favourable treatment arose because of the associated individual's disability and not because of related matters. If it is applied in the same way as ordinary direct discrimination rules, an employee claiming to have suffered less favourable treatment by association should be compared to another employee who is not associated to a disabled person whose relevant circumstances are otherwise the same or not materially different.

One can wonder how often a carer alleging direct discrimination will be able to identify an appropriate comparator. Whilst Ms. Coleman was in the fortunate position of having a good set of

⁵ Idem

⁶ Idem

⁷ Idem

comparators, namely parents of young children without disabilities who, presumably, were equivalently effected by their caring responsibilities and who allegedly received better treatment at the hands of their employer, it is doubtful if most carers will be in this position. If Ms. Coleman had needed, for example, more time off work than parents of non-disabled children, and this was because of the disability of her child, her situation could have been very different. In such a case the employer could have argued that Ms. Coleman was not in a comparable position to other parents, and that any employee who took so much time off work would have been sanctioned. It would be left to a court to determine in how far workers were in a comparable position, and in how far the characteristics of the recipients of care, and the level of care needed, were comparable and, ultimately, if the facts justified a claim of direct discrimination at all. The reality may be that employers may not choose to differentiate between carers or will differentiate, but on the basis of factors such as availability for work, which is not a characteristic directly related to an attribute of either the carer or the recipient of the care⁸.

5. Harassment

Harassment shall be deemed to be discrimination when an unwanted conduct related to racial or ethnic origin, religion or belief, disability, age or sexual orientation takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

In the matter of harassment, the Court applied a similar line of reasoning as with regard to direct discrimination, and concluded that the protection from harassment is not limited to people who are themselves disabled, but also applies when harassment is based on the disability of the employee's child, whose care is provided primarily by the employee.

So the Court explicitly states that harassment by association on the grounds of disability in the context of employment is prohibited. The only requirement is that the harassment is related to the disability of the person associated with the victim.

6. Indirect discrimination

In the Coleman direct discrimination and harassment by association are unlawful, but article 2 of Directive 2000/78 prohibits indirect discrimination. The Court did not rule on whether indirect discrimination by association was prohibited by the Directive.

Some of the treatment which Ms. Coleman alleged she experienced, such as punishment for arriving late and being refused permission to take time off work, would, in other circumstances also be regarded as indirect, where that treatment was not directly related to her caring tasks but the objective fact of late arrival or limited availability. The employer's alleged behaviour only became direct discrimination, because it was explicitly linked to the disability of Ms. Coleman's child. But most adverse treatment experienced by carers will be of the nature described above, and therefore only be indirectly related to the age or disability of the person they care for.

In the line with the broad propose of the Directive 2000/78 that 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 can infer that discrimination by association applies to indirect discrimination.

The definition of indirect discrimination states that it occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons. The definition provide protection form indirect discrimination to persons having a particular disability and not as in the case of direct discrimination or harassment. Literal

⁸ Waddington, Lisa, *Carers, gender, and employment discrimination –What does EU Law offer Europe's Carers?* Maastricht Faculty of Law Working Paper No. 2010-3

interpretation of those provisions make difficult to argue that article 2(2)(b) of Directive 2000/78 provides protection from indirect discrimination to someone that is associate with a person that have these characteristics.

At the present tere is a proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. According to this indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation, or persons who are or who are assumed to be associated with such persons, at a particular disadvantage compared with other persons. So this establishes the prohibition of indirect discrimination by association.

Even if the provisions on the prohibition of indirect discrimination could be interpreted, in line with the broad propose of the Directive 2000/78, as covering those who experience discrimination on the grounds that they associate with a disabled person, the literal interpretation of those provisions can not lead at the same conclusion. The fact that there is a proposal for a directive that indirect prohibits discrimination by association leads to the conclusion that in the near future discrimination by association will apply to all forms of discrimination.

7. Discrimination by association applied to other grounds

In Coleman the concept of discrimination by association has been firmly established in disability discrimination law. The question must then arise if the concept of discrimination by association could be applied with respect to the application of other EU equality directives, more wider than disability. The CJEU jurisprudence does not answer to this question.

Article 19 of Treaty applies to discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. More the anti-discrimination directives have similar provisions to Directive 2000/78 with respect to the prohibition of direct discrimination and harassment.

Recital 11 of Directive 2000/78 provides that discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the Treaty.

At the present tere is a proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. The proposed article provides that direct discrimination shall be taken to occur where one person, or persons who are or who are assumed to be associated with such a person, is treated less favourably than another is, has been or would be treated in a comparable situation, on one or more of the grounds referred to in Article 1.

Only case where is not applicable the discrimination by association is the same-sex marriage cases because the persons are discriminated on grounds of their own characteristic, that is sexual orientation, and not on the grounds of their respective partner's sex⁹.

In conclusion EU legislation does not yet confer protection against discrimination by association for reasons other than disability, but Member States could adopt more favourable measures to confer protection against discrimination by association for reasons other than disability.

8. Conclusions

The decision of Court of Justice of European Union in *S. Coleman v Attridge Law and Steve Law* it is an important decision in discrimination field. The judgment is important for the introduction in EU legislation the concept of discrimination by association. This case represent a fundamental change in EU equality law because it extends the protection on grounds of disability to the association with a person who is disabled.

⁹ Gruenberger, Michael, *The Principle of Equal Treatment in Triangular Relationships*, 2009

In the realm of European equality law, the judgment in *Coleman* is as radical as it is innovative. It is radical in that it aligns employer liability to the commission of the act of discrimination; it is innovative in that it gives recognition to the concept of discrimination by association.¹⁰

In *Coleman* the Court refers to the prohibition of direct discrimination and harassment by association only related to disability. In the application of the concept of discrimination by association at the concept of indirect discrimination can not conclude that European legislation would prohibit such behavior. Neither related to discrimination by association on other grounds than the disability can not conclude that the current legislation would prohibit such behavior.

The fact that there is a proposal for a Directive prohibits direct and indirect discrimination and harassment by association on grounds of religion or belief, disability, age or sexual orientation leads to the conclusion that in the near future discrimination by association will apply to all forms of discrimination.

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¹⁰ Connor, Tim, *Discrimination by association: a step in the right direction*, Journal of Social Welfare and Family Law, no. 32:1, 2010, pp. 59-69