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# Associative Discrimination in Britain and in the European Union: a still too Elastic Concept?

Pierre de Gioia-Carabellese, Robert J. Colhoun \*

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## 1. Introductory Remarks

Legislation governing the implied – if not the literal – existence of associative discrimination has dwelled within the confines of UK domestic law for a number of years before being dramatically thrust into the spotlight by the “long-running saga” of *Coleman v Attridge Law*<sup>1</sup> which has helped to raise the legal profile of discrimination by association<sup>2</sup>. In Britain, its genesis is the result of a certain amount of incongruity between the Sex Discrimination Act (SDA) of 1975<sup>3</sup> and the Race Relations Act of 1976<sup>4</sup> which was further perpetuated by the Disability Discrimination Act of 1995,<sup>5</sup> the Employment Equality (Sexual Orientation) Regulations of 2003, the Employment Equality (Religion or Belief) Regulations of 2003 and Employment Equality (Age) Regulations of 2006. Indeed, so discordant and fragmented has the dissemination of these sections of legislation been, that the courts were obliged to rule on the basis of

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<sup>1</sup> *Coleman v Attridge Law* (2010) 1 C.M.L.R., 28.

<sup>2</sup> D. Christie, *Discrimination by Association and the Equality Act 2010*, 35 Scots Law Times 194, 2010.

<sup>3</sup> Henceforth also the SDA 1975.

<sup>4</sup> Henceforth also the RRA 1976.

<sup>5</sup> Henceforth also the DDA 1995.

unintended<sup>6</sup> subtle differences in language until the referral of *Coleman* to the Court of Justice of the European Union (CJEU) for clarification. The set of EU Directives now in place are widely acknowledged as the catalyst for the recent consolidation and extension of domestic anti-discrimination provisions under the Equality Act of 2010<sup>7</sup>. In addition, if set in juxtaposition with UK domestic implementation, they provide fertile ground for exploring any prior discrepancies and assessing to what extent harmony now prevails. For the purposes of integrity, on the one hand a candid evaluation of the likely burden determined by the foregoing developments on employers with regard to recruitment, workplace policies and flexible working arrangement requests will reduce the practical context within which the legislative impact can be placed. On the other hand – and to a certain extent to supply the empirical analysis with higher levels of reliability – a comparative analysis of a general nature shall be drawn, particularly by placing an emphasis on both similarities and differences permeating this area of law in both Britain and Italy, the latter being the comparator employed for the purposes of such a methodology.

## 2. Discrepancies within UK Domestic Legislation

The doctrine of transferred discrimination, into which associative discrimination became subsumed<sup>8</sup>, came to fruition in light of the subtle differences in wording incorporated within the SDA 1975 and the RRA 1976. The former contains a possessive element in that<sup>9</sup>: “[...] a person discriminates against a woman if – *on the ground of her sex*<sup>10</sup> he treats her less favourably than he treats or would treat a man [...]”.

Accordingly, a literal reading of the this wording lent the courts no room to manoeuvre with regard to discrimination by association and contrasts starkly with that of the RRA 1976 as<sup>11</sup>: “[...] A person discriminates against another [...] if: (a) *on racial grounds*<sup>12</sup> he treats that other less favourably than he treats or would treat other persons [...]”

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<sup>6</sup> It is maintained that “the difference in language was never considered by Parliament”. See S. Forshaw, M. Pilgerstorfer, *Taking Discrimination Personally? An Analysis of the Doctrine of Transferred Discrimination* King’s Law Journal 19, No. 2, 2008, 266.

<sup>7</sup> Henceforth also the EA 2010.

<sup>8</sup> S. Forshaw, M. Pilgerstorfer, *op. cit.*, 265, 292.

<sup>9</sup> SDA 1975, s 1(1), as subsequently amended.

<sup>10</sup> Emphasis added.

<sup>11</sup> RRA 1976, s 1(1), as subsequently amended.

<sup>12</sup> Emphasis added.

As a natural consequence, the absence of a formulation of a possessive character widened the scope within which relevant legislation could be applied, with this aspect which had indeed already been recognised in the case of *Race Relations Board v Applin*<sup>13</sup>, where similar wording under the Race Relations Act 1968 had permitted Stephenson LJ to determine that “A can discriminate against B on the ground of C’s colour, race or ethnic origin”<sup>14</sup>. In reality, Stephenson LJ provided a simplified definition of associative discrimination in that “the discrimination is transferred onto another by virtue of the association which a person has with that other”<sup>15</sup>. In keeping with the more expansive language of the RRA 1976, the Employment Equality (Sexual Orientation) Regulations of 2003 made use of the expression “on grounds of sexual orientation”<sup>16</sup> while the Employment Equality (Religion or Belief) Regulations of 2003 resorted to the formulation “on the grounds of the religion or belief”<sup>17</sup>. However, it is the explanation of the provisions of both sets of regulations laid down by the DTI (2003) which revealed, for the first time, the main reasoning embodied in the foregoing wording<sup>18</sup>: “[...]direct discrimination [...] covers discrimination against a person by reason of the sexual orientation / religion or belief of someone with whom the person associates. For example, an employee may be treated less favourably because of the religion of his or her partner, or because his or her son is gay”. Either side of such conclusive assumption mutually reflected in the relevant wording and a lack of consistency emerged with regard to the DDA of 1995 and the Employment Equality (Age) Regulations of 2006. In this sense, more recent legislation attempted at reversing the possessive criterion discussed above, maintaining that<sup>19</sup>: “[...] a person (‘A’) discriminates against another person (‘B’) if – (a) on grounds of B’s age<sup>20</sup>, A treats B less favourably than he treats or would treat other persons [...]”.

In a similar vein, any potential for associative discrimination appeared outside the scope of the DDA 1995 as<sup>21</sup>: “[...] a person discriminates

<sup>13</sup> *Race Relations Board v Applin* (1973) QB 815.

<sup>14</sup> *Ibid.*, 831.

<sup>15</sup> S. Forshaw, M. Pilgerstorfer, *op. cit.*, 268.

<sup>16</sup> Employment Equality (Sexual Orientation) Regulations of 2003, s 3(1).

<sup>17</sup> Employment Equality (Religion or Belief) Regulations of 2003, s 3(1).

<sup>18</sup> DTI (2003), Explanation of the Provisions of the: Employment Equality (Sexual Orientation) Regulations of 2003 and Employment Equality (Religion or Belief) Regulations of 2003, par. 26.

<sup>19</sup> Employment Equality (Age) Regulations of 2006, s 3(1).

<sup>20</sup> Emphasis added.



against a disabled person if – (a) for a reason which relates to *the disabled person's disability*<sup>22</sup> he treats him less favourably than he treats or would treat others[...].”

S 3A (5) of the piece of legislation in question accounted for another provision “on the ground of the disabled person’s disability” adding further credence – if any were needed – to the strict interpretation which could be sanctioned by the domestic courts. Indeed, such a narrow reading compelled the Employment Tribunal, with respect to *Coleman*, to refer the case to the CJEU for a preliminary ruling on whether the parameters of the Framework Directive<sup>23</sup> extended to protect against discrimination by association.

### 3. The European Stance

In stark contrast with the disparities discussed earlier which overarch UK non-discrimination legislation, a number of EU Directives on the matter resonate with unfettered uniformity.

Among them, Directive 2000/78/EC is particularly relevant to the discussion at hand, as it lays down that<sup>24</sup>: “[...] direct discrimination shall 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 any of the grounds referred to in Article 1*<sup>25</sup>[...]”.

The protected grounds covered by Directive 2000/78/EC under Article 1 are religion or belief, disability, age and sexual orientation while similar terminology is evident in Directives 76/207/EEC and 2006/54/EC - mainly related to sex discrimination – and in Directive 2000/43/EC dealing with racial or ethnic origin discrimination. Such uniformity then appeared to leave room for a creative reading which empowers the CJEU to acknowledge the existence of discrimination on the grounds of association. This aspect is further evidenced by the emphatic reiteration, under Article 2 (1) of Directive 2000/78/EC, according to which “there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1”. Evidently, the expansive nature of the

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<sup>21</sup> DDA 1995, s 3A(1).

<sup>22</sup> Emphasis added.

<sup>23</sup> Hereafter, Directive 2000/78/EC.

<sup>24</sup> Directive 2000/78/EC, Art.2(2)(a).

<sup>25</sup> Emphasis added.

language enshrined in the Directives is a matter for debate, alongside the terminology originating from the philosophical domain of jurisprudence. In assessing the merits of *Coleman*, the Advocate General concluded that: “[...] if someone is the object of discrimination because of any one of the characteristics listed in Article 1 then she can avail herself of the protection of the Directive even if she does not possess one of them herself. It is not necessary for someone who is the object of discrimination to have been mistreated on account of ‘her disability’. It is enough if she was mistreated on account of ‘disability’”<sup>26</sup>.

The rationale upon which these concluding remarks were founded was attributed – in more concrete terms – to the demonstrable terminology of Directive 2000/78/EC where “on any of the grounds” indirectly prescribed that liability should have hinged on the act of discrimination, irrespective of whether the employee herself had a disability. At a more philosophical level, the Advocate General referred to Article 13 of the EC Treaty in reasoning that a commitment to the principles of equal treatment and non-discrimination therein laid the foundations for their practical realisation through Directive 2000/78/EC, as evidenced in *Mangold v Helm*<sup>27</sup>. In relating this train of thought to a yet more fundamental source, equality embodies the values of “human dignity and personal autonomy”<sup>28</sup> which are placed in jeopardy not only by discriminating against someone having a protected characteristic directly, but also “by seeing someone else suffer discrimination merely by virtue of being associated with him”<sup>29</sup>.

The Advocate General reasoned that such subtle means of discrimination, in seeing the employee as a conduit “through which the dignity of the person belonging to a suspect classification is undermined”<sup>30</sup>, negatively affected the ability of this person to “exercise their autonomy”<sup>31</sup> by targeting those associated with them and was therefore unlawful per se.

Armed with a veritable amount of philosophical reasoning which paves the way for “a more secure jurisprudential basis from which future applications of the equal treatment principle of the framework Directive

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<sup>26</sup> AG Para. 23 of *Coleman*.

<sup>27</sup> Case C-144/04 *Mangold v Helm* (2005) ECR I-9981, para. 74.

<sup>28</sup> Par. 8 of *Coleman*.

<sup>29</sup> Par. 13 of *Coleman*.

<sup>30</sup> Par. 13 of *Coleman*.

<sup>31</sup> Par. 14 of *Coleman*.



2000/78/EC could have been made<sup>32</sup>, the CJEU (strangely) chose to sidestep the issue. Rather, it focused primarily on observing the dual agenda of “combating every form of discrimination” and facilitating the “social and economic integration of disabled people”<sup>33</sup>. To this end, it held that Directive 2000/78/EC should not be interpreted strictly<sup>34</sup> as this approach would be “liable to deprive that Directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.”<sup>35</sup>

A cursory overview of the European stance would thus acknowledge the inception of discrimination by association as a matter of European Law. However, on closer inspection, several issues remained unsolved. Firstly, a potentially and unanticipated side effect of *Coleman* arose relating to the prerequisite proximity a carer must demonstrate having to the person carrying a protected characteristic. In other words, would the ambit of associative discrimination extend to cover a carer in cases where the complainant was not the *primary* carer? No elucidation on the subject was provided by the CJEU, as *Coleman* involved a primary carer although any unfavourable answer to this question would undeniably cast doubt on the much vaunted commitment to the principle of equal treatment espoused by the judgment handed down by the Courts. Secondly, the CJEU maintained the stance adopted in *Chacon Navas v Eurest Colectividades SA*<sup>36</sup> that “the scope of Directive 2000/78/EC cannot be extended beyond the discrimination based on the grounds listed exhaustively in Article 1 of the Directive”<sup>37</sup>. In so doing, it deemed long-term sickness to be temporary and thus outside the scope of the Directive, whereas the disability protected therein should have been exclusively that of a permanent nature<sup>38</sup>. Associative discrimination against a carer of someone suffering from long-term sickness would therefore appear to flounder on such rigorous boundaries leaving a more expansive interpretation of what constitutes a disability as a future recourse whereby the CJEU may better

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<sup>32</sup> T. Connor, *Case C-303/06 Coleman v. Attridge Law and Steve Law Judgment of the ECJ 17 July 2008; Discrimination by Association: a Step in the Right Direction*, *Journal of Social Welfare and Family Law* 32, No. 1, 2010, 66.

<sup>33</sup> Cited under Recital 6 of Directive 2000/78/EC and referred to in Para. 43 of *Coleman*.

<sup>34</sup> Par. 46 of *Coleman*.

<sup>35</sup> Par. 51 of *Coleman*.

<sup>36</sup> Case C-13/05 *Sonia Chacon Navas v Eurest Colectividades SA* (2006) ECR I-6467.

<sup>37</sup> Par. 46 of *Coleman*.

<sup>38</sup> Par. 45 of *Coleman*.

amalgamate human rights and equal treatment into EU law<sup>39</sup>. Finally, *Coleman* failed to address the scope for indirect associative discrimination as the case in hand was direct in nature and the Courts confined their ruling accordingly. It was thus left open to debate whether it was deliberately excluded or latently included<sup>40</sup>. A literal reading of Directive 2000/78/EC Article 2(2)(b) would however appear to exclude this possibility due to the possessive wording restricting indirect discrimination to “persons *having*<sup>41</sup> a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation.” Nevertheless, it is arguable once again that a failure to recognise indirect associative discrimination would contravene the principle of equal treatment.

#### 4. Preamble to the Equality Act 2010

As EU Directives cannot be directly applied to cases involving private persons, *Coleman* was returned to the ET where the principle of indirect effect came into play. In essence “was it really ‘possible’ within the UK’s ‘golden rule’ of statutory interpretation, to interpret the national law to be consistent with the Directive?”<sup>42</sup>. An answer in the affirmative appeared, at least at a theoretical level, to be shackled with inherent complications as, although the DDA 1995 was not consistent with Directive 2000/78/EC, the Government could not have foreseen that this Directive would be interpreted to include discrimination by association eight years later. If it had, this would have been reflected in the wording of the 2003 amendments and/or the Disability Discrimination Act 2005. Nor could the interpretation of the foregoing statutes as excluding associative discrimination be considered to pave the way for an absurd or repugnant result in court. Nevertheless, the ET and – on appeal – the Employment Appeal Tribunal (EAT) inferred that the intention of the 2003

<sup>39</sup> L. Waddington, *Protection for Family and Friends: Addressing Discrimination by Association*, *European Anti Discrimination Law Review* 13, No. 5 2007, 21.

<sup>40</sup> C. O’Brien, *Equality’s False Summits: New Varieties of Disability Discrimination, “Excessive” Equal Treatment and Economically Constructed Horizons*, *European Law Review* 36, No. 1, 2011, 26, 50.

<sup>41</sup> Emphasis added.

<sup>42</sup> T. Hervey, M. Reeves, H. Rodgers, B. Ridgim, T. Roberts. *Case C-303/06 Coleman v. Attridge Law and Steve Law Judgment of the ECJ 17 July 2008; Judgment of the Employment Tribunal, London, 30 September 2008*, *Journal of Social Welfare and Family Law* 31, No. 3, 2008, 310.

amendments had been to fully implement Directive 2000/78/EC and thus upheld the preliminary ruling of the CJEU by indirect effect on grounds tantamount to those articulated previously by the Advocate General: Employment Judge Stacey reasoned that discrimination by association would “offend the principle of equal treatment, autonomy, human dignity and self-respect”. In protecting these principles, the ET and EAT had, in effect, bypassed the ordinary canons of statutory interpretation to facilitate a direct effect of Directive 2000/78/EC between private parties. Judge Stacey may well have envisaged the end justifying the means from a human rights perspective. However, it was hardly a satisfactory legal means to justify such an end.

Although *Coleman* was concerned solely with disability discrimination and thus introduced associative discrimination into EU and domestic law in regard to that protected characteristic, the proclivities of the foregoing judgments seemed to indicate that the courts would henceforth rule in unison across the spectrum of prohibited grounds<sup>43</sup>. However, the case of *Kulikaoskas v MacDuff Shellfish*<sup>44</sup> imparted a telling reminder that such a conclusion was premature at best and presumptuous at worst when the EAT ruled that Directives 92/85/EEC and 2006/54/EC could not be read to deal with associative discrimination as Directive 2000/78/EC had so crucially in the case of *Coleman*. Nevertheless, the tide was shifting in the judicial arena and domestic legislation would have to keep pace<sup>45</sup>. Indeed, the SDA 1975 (Amendment) Regulations of 2008 stood testament to this when – albeit in relation in harassment – s 4A was recast, in response to *Equal Opportunities Commission v Secretary of State for Trade and Industry*<sup>46</sup>, to include harassment by association. With the preamble concluded, the scene was set for a streamlining of domestic equality law in harmony with its EU counterpart under the Equality Act 2010<sup>47</sup>.

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<sup>43</sup> M. Pilgerstorfer, *Transferred Discrimination in European Law*, *Industrial Law Journal* 37, No. 4, 2008, 384, 393.

<sup>44</sup> *Kulikaoskas v MacDuff Shellfish* (2011) I.C.R. 48.

<sup>45</sup> S. Honeyball, *Discrimination by Association* *Web Journal of Current Legal Issues*, 2007, at [webjcli.ncl.ac.uk](http://webjcli.ncl.ac.uk) (last accessed 19 June 2012).

<sup>46</sup> *Equal Opportunities Commission v Secretary of State for Trade and Industry*, 2007, IRLR, 327.

<sup>47</sup> C. O'Brien, *op. cit.*, *passim*.

## 5. The Equality Act 2010: from Discord to Harmony?

As for the previous EU Directives, the Equality Act of 2010 makes no explicit reference to associative discrimination per se. Rather, in keeping with the Employment Equality (Sexual Orientation) Regulations and the Employment Equality (Religion or Belief) Regulations of 2003, it relies on a set of accompanying explanatory notes to unearth the underlying reasoning<sup>48</sup>. As for the Act itself, direct discrimination would now occur when<sup>49</sup>: “A person (A) discriminates against another (B) if, *because of*<sup>50</sup> a protected characteristic, A treats B less favourably than A treats or would treat others”.

In a deliberate departure from the prevailing variations of “on grounds of”, the Government cited “accessibility to the ordinary user” as the overriding factor in the above deviation from “because of”.<sup>51</sup> However, despite its insistence that the change in wording would not alter the legal meaning<sup>52</sup>, criticism has arisen<sup>53</sup> and “litigation on the meaning of the phrase[...]seems inevitable”<sup>54</sup>. As for indirect discrimination<sup>55</sup>: “A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s”.

Therefore, whereas direct associative discrimination is implicitly subsumed within the Equality Act 2010, any possibility of an indirect form is explicitly excluded. It remains to be seen whether the European Courts will provide more clarity on the issue in future after failing to do so in *Coleman*<sup>56</sup>. Greater transparency is also given by a decidedly more thorough examination of exactly what constitutes a disability in terms of length<sup>57</sup>, ambit<sup>58</sup>, occurrence<sup>59</sup> and treatment<sup>60</sup> while prior tribunal rulings

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<sup>48</sup> Direct discrimination “is broad enough to cover cases where the less favourable treatment is because of the victim’s association with someone who has that characteristic” Equality Act 2010, Section 13 Explanatory Notes.

<sup>49</sup> Equality Act 2010, s 13(1).

<sup>50</sup> Emphasis added.

<sup>51</sup> Equality Act 2010, s 13 Explanatory Notes.

<sup>52</sup> *Ibid.*

<sup>53</sup> See, for example, the concerns of the *Discrimination Law Association* and the arguments of S. Belgrave, *The Ins and Outs of the Equality Bill* 16 No. 7, *Employment Lawyers Association Briefing*, 2009, 88, 90.

<sup>54</sup> D. Christie, *op. cit.*, 193, 196.

<sup>55</sup> Equality Act 2010, s 19(1).

<sup>56</sup> C. O’Brien, *op. cit.*, *passim*.

<sup>57</sup> Equality Act 2010, Schedule 1, par. 2(1).

<sup>58</sup> *Ibid.*, par. 6.

have provided a lengthy list of conditions under which disability might take place (Labour Research Department). However, as with the CJEU in *Coleman*, the prerequisite proximity of a carer to the disabled person is left open to judicial interpretation<sup>61</sup>.

The protected characteristics, now harmonised under s 4 of the EA 2010, are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation. Of these, only marriage and civil partnership is not protected from direct discrimination by association<sup>62</sup> although a small exception applies with regard to the characteristic of age<sup>63</sup>. As *Kulikaoskas* had been dismissed on the grounds that the SDA 1975 did not cover associative discrimination – and European law did not require it to<sup>64</sup> – it is interesting to note that such a case could now be successful if brought under the EA 2010<sup>65</sup>.

## 6. Associative Discrimination across the Channel: the “Elastic” Nature of Italian Discrimination

To further corroborate the specific scope of this analysis, it may be of interest to briefly appreciate how the concept of associative discrimination has been crafted in legal terms, judicially interpreted and doctrinally dissected in one of the other countries belonging to the EU. By way of example, the concept of associative discrimination in Italy has never been formally at threat, due to the implementation of both Directive 2000/43 and Directive 2000/78. In considering the discriminatory nature of the

<sup>59</sup> *Ibid.*, par. 8 and par. 9.

<sup>60</sup> *Ibid.*, par. 5.

<sup>61</sup> A. Eriksson, *European Court of Justice: Broadening the Scope of European non-Discrimination Law*, *International Journal of Constitutional Law* 7, No. 4, 2009, 731, 753.

<sup>62</sup> *Ibid.*, s 13 (4).

<sup>63</sup> *Ibid.*, Schedule 9, Part 2, par. 15.

<sup>64</sup> The SDA 1975 was explicit in prohibiting discrimination against a woman on grounds of *her* pregnancy. Therefore, a literal reading could not incorporate the scope for associative discrimination. Furthermore, in respect to *Kulikaoskas*, relevant European legislation was the Pregnant Workers Directive and the Equal Treatment Directive, as opposed to the Framework Directive relied upon in *Coleman* – a Directive which was drafted in a much broader manner.

<sup>65</sup> There is a general lack of clarity as to whether a claim for associative pregnancy discrimination would now be successful despite the harmonization of this area of law under the Equality Act 2010. Therefore, the onus will be on future case law to provide direction.

status laid down in Italian law, Legislative Decree No. 216/2003 has never made reference in its wording to personal pronouns such as “his/her”<sup>66</sup>. Therefore, as correctly emphasised by a number of scholars<sup>67</sup>, the *ratio decidendi* in *Coleman* does not find – or rather, has never found – obstacles in the Italian legislative framework. A major risk arising from Italian legislation is that of a rather elastic interpretation of discrimination – hence “elastic” discrimination – where the principle of exclusivity of the protected characteristics, as established by the Court of Justice of the European Union in *Chacon Navas v Eurest Colectividades*<sup>68</sup>, could be affected.

<sup>66</sup> The text of the Legislative Decree 216/2003 stipulates as follows:

“[...] [P]er principio di parità di trattamento si intende l'assenza di qualsiasi discriminazione diretta o indiretta a causa della religione, delle convinzioni personali, degli handicap, dell'età e dell'orientamento sessuale. Tale principio comporta che non sia praticata alcuna discriminazione diretta o indiretta, così come di seguito definite:

*Discriminazione diretta* quando, per religione, per convinzioni personali, per handicap, per età o per orientamento sessuale, una persona è trattata meno favorevolmente di quanto sia, sia stata o sarebbe trattata un'altra in una situazione analoga;

*Discriminazione indiretta* quando una disposizione, un criterio, una prassi, un patto o un comportamento apparentemente neutri possono mettere le persone che professano una determinata religione o ideologia di altra natura, le persone portatrici di handicap, le persone di una particolare età o di un orientamento sessuale in una situazione di particolare svantaggio rispetto ad altre persone”

([...] By principle of equal treatment it shall be meant the lack of any discrimination, either direct or indirect, on the ground of religion, personal believes, disabilities, age and sexual orientation. Such a principle means that no discrimination, either direct or indirect, shall be applied, more specifically as defined below:

Direct discrimination in cases where, on the ground of religion, personal believes, disabilities, age or sexual orientation, a person is treated less favourably than a different person, in a similar circumstance, is treated, has been treated or would be treated in a similar circumstance.

Indirect discrimination in cases where a provision, a criterion, a practice, an agreement or a behaviour ostensibly neutral may cause (i) people who hold a religion or ideology of different nature, (ii) people affected by a disability, or (iii) people belonging to a particular age group or having a specific sexual orientation, to be affected by a condition of disadvantage in comparison to other people)

In Italy a brief analysis relating to discrimination may be found in A. Vallebona, *Istituzioni di Diritto del Lavoro*, 2 *Il Rapporto di Lavoro*, 7<sup>th</sup> ed., CEDAM, 2011, 309, 318. See also M. Barbera (ed.), *Il Nuovo Diritto Antidiscriminatorio*, Giuffrè, 2007.

<sup>67</sup> See L. Calafà, *Disabilità, Discriminazione e Molestia “Associate”: il Caso Coleman e l'Estensione Elastica del Campo di Applicazione Soggettivo della Dir. 2000/78*, 4 *Rivista Critica di Diritto del Lavoro*, No. 4, 2008, 1169, 1172. The author stresses *verbatim* as follows: “[...] si può ricordare che il principio di diritto sancito dalla sentenza Coleman non trova ostacoli specifici al suo funzionamento” ([...] it can be reminded that the principle of law introduced by the Coleman case does not encounter any specific obstacles as regards its functioning).

<sup>68</sup> SA(C-13/05).



However, the answer to this doctrinal question<sup>69</sup> is that such a *bête noire* – thanks to the Attridge Law *decisum* – has been de facto tamed. This is because, as a result of the acknowledgement of associative discrimination, the protected characteristics remain nonetheless the limited number (*numerus clausus*) legislated under Art.13 of the Treaty of Amsterdam. It is unquestioned though, also in a legal system such as the Italian one, that, as a result of *Coleman*, those who are potentially the victims of an act of discrimination may not be identified in advance, but for the generic and nebulous caveat of the closeness being met. As correctly pointed out by a number of scholars, in interpreting the ruling, the close relationship, such as mother/child but also further relationships, should nonetheless be implicitly consistent with the required criterion.

## 7. Consequences for Employers

The *Coleman* verdict provided due warning to employers that equal opportunity policies and practices would need to be fully assessed<sup>70</sup> and purposeful steps taken to educate and train their respective workforces with an increased awareness of associative discrimination in mind<sup>71</sup>. If this warning was observed, the enforcement of the EA 2010 would have served as a simple confirmation that their foresight had been justified. However, even in such a scenario, events were not straightforward as “the risk of [...] associative [...] discrimination is not immediately obvious”<sup>72</sup>. Indeed, although the EA 2010 had provided higher levels of clarity for employers in terms of what constitutes a disability along with the exclusion of indirect associative discrimination, confusion surrounded the issue of proximity and with a significant amount of workers combining work with unpaid care it is conceivable that tribunals could face a flood of claims. As any claim for compensation would be uncapped in such circumstances, employers must take reasonable and well documented steps, in order to avoid discrimination by association, with regard to recruitment and promotion policies or face a potentially considerable cost<sup>73</sup>.

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<sup>69</sup> See particularly L. Calafà, *op. cit.*

<sup>70</sup> T. Connor, *op. cit.* 59, 69.

<sup>71</sup> J. Amphlett, *A Caring Attitude*, *European Lawyer* 11, No. 82, 2008.

<sup>72</sup> E. Bartlett, *Legislative Comment: Equal Measures*, *European Lawyer* 45, No. 102, 2011.

<sup>73</sup> J. Amphlett, *op. cit.*, *passim*.

Perhaps the most obvious manifestation of the impact arising from recent developments comes in the problems employers may face at the time of considering requests for flexible working arrangements. In Britain, the statutory right was extended to parents of children under six – or under 18 for a disabled child – by the Employment Act of 2002 and to carers of adults by the Work and Families Act of 2006. Burdened with the possibility that a refusal may now amount to discrimination by association, employers must base such decisions on robust business reasons and adequately document these grounds to show that all requests are handled dispassionately and fairly. In addition, any lateness or absence relating to caring responsibilities must be handled carefully to ensure, for example, that cases relating to care for the elderly are not treated less favourably than those for childcare<sup>74</sup>. Similarly in Italy, in looking at the matter of the associative discrimination from a wider perspective, it is also inevitable to come across sections of legislation partly overlapping with the new concept; for instance, the forms of leave specifically allowed to employees – so that they can look after people close to them with disability – has been recently introduced in the national legal system, thanks to Law no. 183/2010, and relevant Legislative Decree No. 119/2011, particularly art. 3 and 4<sup>75</sup>.

In other words, it seems that the expansion of the concept of discrimination – insofar as to encompass the elastic nature of discrimination – enthusiastically promoted at the heart of the EU, is not totally consistent with the acknowledgment, at domestic level<sup>76</sup> in some European countries, of similar rights recognised to employees/workers, through the several forms of leave. As a result, the matter ultimately needs an immediate and profound rethinking. As present, it is difficult to not recognise that the new area of law – marked by the elastic character of discrimination – carved with generosity by the speculative stances of the European Union legislator, particularly its “judicial arm” (the CJEU), fails to clarify the concept further and certainly leaves the business at a standstill, as they may not be totally aware of the legal consequences of their decisions to so crucial a business matter, such as human resources management. In a time when European institutions should harmonise rules, rather than fragmenting them, the elastic dimension of discrimination, coupled with the additional legal burdens set up at

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<sup>74</sup> J. Amphlett, *op. cit.*, *passim*.

<sup>75</sup> See O. Bonandi, *I Diritti Dimenticati dei Disabili e dei loro Familiari in seguito alle Recenti Riforme*, *Rivista Giuridica del Lavoro e delle Previdenza Sociale* No. 4, 2011, 779, 818.

<sup>76</sup> The example of the UK and Italy has been explained in this work.

domestic level in each EU country – devoid of homogeneity and with no limit – might compel more than an isolated observer to raise an eyebrow.

## 8. Conclusion

In conclusion, over 40 years of fragmented and piecemeal domestic legislation had contributed to several discrepancies with regard to the scope to which it could be applied in prohibiting discrimination in the workplace. The manifestation of such inconsistencies in the wording of these provisions revealed a glaring deviation from the homogeneity of language within EU Directives, an issue brought conclusively to light by *Coleman*. However, although clarity may have prevailed in terms of the language used in the Directives, the CJEU preliminary ruling in *Coleman* was rather less so with ambiguity surrounding the extent to which associative discrimination should be covered; a state of play perpetuated further by *Kulikaoskas*. Therefore, in an attempt to both harmonise UK legislation and conform to EU law, the EA 2010 represented a merging of nine protected characteristics, of which eight were now implicitly safeguarded from discrimination by association. As for harmonisation between EU and UK law, it appears that the latter might have gone beyond minimum implementation, although any future vestige from the EU on the possibility of indirect associative discrimination would be cause for reassessment. As for employers, in light of *Coleman* and the EA 2010, reasonable steps must be taken in implementing adequate recruitment, promotion and equal opportunity policies while demand for flexible working arrangements must be fairly assessed and documented to guard against the risk of less favourable treatment. All in all “it seems likely that the road to outlawing discrimination by association will have a few more twists and turns yet”<sup>77</sup>.

In response to a wider European scope of literature<sup>78</sup> provided on this concept allowing for an alternative country analysis,<sup>79</sup> *de iure condendo*, therefore in the way the legislation should be reformed, the European Union legislator should better address this matter and clarify, through an amendment of Directive 2000/78, the concept of “associative” – or elastic – discrimination itself. Furthermore, the Directive should offer greater transparency, particularly in respect to the principle of closeness so

<sup>77</sup> D. Christie, *op. cit.*, 196.

<sup>78</sup> As regards Italy, see L Calafà, *op. cit.*

<sup>79</sup> Particularly the glimpses of comparative analysis provided under Chapter 6 *supra*.

as to eliminate any room for discretion exercisable by both the domestic legislator and/or domestic courts from the outset.

The aspect pointed out in this work is that the terminology used in legislating on associative discrimination act is dissected and interpreted across the different EU jurisdictions – as is the case of the UK and Italy – in totally different ways among courts and still ignored by the local law-makers, albeit somehow tolerated. This may represent a potential issue, in terms of identification of the relevant right bestowed upon the victim as well as measures to be adopted by the employers.



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