

## TRANSFERRED DISCRIMINATION IN EUROPEAN LAW: SURVEYING THE LANDSCAPE POST COLEMAN v ATTRIDGE LAW

### 1. INTRODUCTION

The ECJ's recent judgment in *Coleman v Attridge Law* (Case C-303/06) [2008] IRLR 722 confirms, for the first time, the existence of a European concept of transferred discrimination. The decision undoubtedly has significant repercussions for discrimination lawyers. In this article we examine its impact, focusing upon the present compatibility of our domestic anti-discrimination provisions and the potential width of the concept the ECJ has recognised.

### 2. THE ASSUMED FACTS

The facts in *Coleman* were assumed for the purpose of holding a preliminary hearing to decide whether, in law, Ms Coleman could succeed in her claims under the Disability Discrimination Act 1995 (DDA). Those assumed facts were that Ms Coleman had worked as a legal secretary since 2001. She gave birth to a son in 2002 who suffered from apnoeic attacks, congenital laryngomalacia and bronchomalacia, conditions which required specialist care. Ms Coleman was her son's main carer. In March 2005, Ms Coleman accepted voluntary redundancy but went on to issue a claim against her employer for, *inter alia*, (i) disability related discrimination pursuant to s3A(1), (ii) direct disability discrimination pursuant to s3A(5) DDA, and (iii) disability harassment pursuant to s3B DDA. Her claims under the DDA were centred on her allegations that Attridge Law had treated her less favourably than employees with non-disabled children and had subjected her to harassment, viz treatment which created a hostile atmosphere for her. She alleged, by way of example, that Attridge Law refused to allow her to return to her existing job upon her return from maternity leave; she was referred to as lazy when taking time off to care for her child; she was given less flexibility in her working arrangements than colleagues with non-disabled children; she was told she was using her 'fucking child' to manipulate her working conditions; she was subjected to disciplinary action for lateness and a grievance she brought was not dealt with properly.

### 3. THE POSITION IN DOMESTIC LAW

The immediate difficulty facing Ms Coleman's disability discrimination and harassment claims was the wording of the DDA. Sections 3A(1) and 3A(5) deal with less favourable treatment and contain language requiring a link between the less favourable treatment and the complainant's own personal disability. Section 3A(1) DDA provides (emphasis added):

- “...a person discriminates against **a disabled person** if –
- (a) for a reason which relates to **the disabled person's disability**, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and
  - (b) he cannot show that the treatment in question is justified.”

Section 3A(5) DDA (direct disability discrimination) contains a similar possessive formulation referring to less favourable treatment “on the ground of the disabled

person’s disability”. Of course, Ms Coleman was alleging that the less favourable treatment related to (or was on grounds of) her son’s disability, not her own. This same problem arose in respect of the harassment claim because s3B DDA defines harassment as unwanted conduct “which relates to the disabled person’s disability”.

These words limiting the causes of action to those experiencing discrimination because of the personal possession of a particular protected characteristic can be contrasted with, for example, the language of the domestic Race Relations Act 1976 (RRA), which, since its inception, has prohibited less favourable treatment as follows – s1(1)(a) RRA (emphasis added):

“A person discriminates against another... [if] **on racial grounds** he treats that other less favourably than he treats or would treat other persons”

This wording of the RRA caused the Courts, in a series of domestic cases, to develop a doctrine of transferred discrimination, where the discrimination in question was transferred to another person by virtue of association. For a full exposition and analysis of this development, see Simon Forshaw and Marcus Pilgerstorfer, *Taking Discrimination Personally? An Analysis of the Doctrine of Transferred Discrimination* (2008) 19 King’s Law Journal 265 – 292.

The widest expression of the test in domestic law is found in the judgment of Browne-Wilkinson J sitting in the EAT in *Showboat Entertainment Centre Ltd v Owens* [1984] 1 WLR 384, where he put the issue thus:

“The only question in each case is whether the unfavourable treatment afforded to the claimant was caused by racial considerations.”

The position across the range of anti-discrimination legislation in domestic law is far from consistent. The wording enacted in respect of some prohibited grounds seemingly permits transferred discrimination claims to be made, whereas, on the face of it, others do not. The following table summarises the current position in respect of each of the various prohibited grounds:

Prohibited Ground	Less Favourable Treatment provisions	Harassment provisions
Sex	SDA s1(1)(a): prohibited “on the ground of <b>her sex</b> ”. See also the similar possessive formulations dealing with gender reassignment (s2A(1)), married persons and civil partners (s3), and pregnancy (s3A).	SDA s4A(1)(a): defined in terms of “unwanted conduct that is related to her sex or that of another person”. This section was recently recast following the <i>Equal Opportunities Commission</i> challenge discussed below (see SI 2008/656).
Race	RRA s1(1)(a): prohibited “on racial grounds”.	RRA s3A(1): defined in terms of unwanted conduct “on grounds of race or ethnic or national origins”.
Disability	DDA s3A(1): prohibited “for a reason which relates to <b>the disabled person's disability</b> ”;	DDA s3B(1): defined in terms of unwanted conduct engaged in “for a reason which relates to <b>the disabled</b> ”

	also DDA s3A(5): prohibited “on the ground of <b>the disabled person's disability</b> ”.	<b>person's disability</b> ”.
Sexual Orientation	EE(SO)R r3(1)(a): prohibited “on grounds of sexual orientation”.	EE(SO)R r5(1): defined in terms of unwanted conduct “on grounds of sexual orientation”.
Religion or Belief	EE(RoB)R r3(1)(a): prohibited “on the grounds of the religion or belief of B [the claimant] or of any other person except A [the perpetrator] (whether or not it is also A's religion or belief)”.	EE(RoB)R r5(1): defined in terms of unwanted conduct “on grounds of religion or belief”.
Age	EE(A)R r3(1)(a): prohibited “on grounds of <b>B's age</b> ”, where B is the claimant.	EE(A)R r6(1): defined in terms of unwanted conduct “on grounds of age”.

The emboldened provisions in the table demonstrate that in the sex, disability and age provisions, discrimination by way of less favourable treatment is defined using possessive formulations excluding, on a natural reading, any concept of transferred discrimination. The same is true of the harassment provisions in the DDA. By contrast, the protection against discrimination in respect of race, sexual orientation, and religion or belief (as well as the provisions protecting against harassment relating to sex or age) are wider in their formulation. On any analysis, this lack of consistency is less than satisfactory, particularly given that on many occasions the Courts have emphasised the need to read the anti-discrimination legislation as an interlocking code: see, for example, *Relaxion Group plc v Rhys-Harper & Others* [2003] ICR 867 (in particular at para 134).

#### 4. THE DIRECTIVES

Given the language of the DDA, Ms Coleman was compelled to turn to the European Directives which our domestic discrimination statutes implement. These Directives have not been infected with the same diversity of wording. Less favourable treatment is prohibited uniformly across the prohibited grounds. The Framework Directive (2000/78/EC) declares, at Art 2(1)(a), that (emphasis added):

“...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...**”

Similarly, harassment is dealt within Art 2(3) (emphasis added):

“Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct **related to any of the grounds referred to in Article 1** takes place with the purpose or effect of violating the dignity of a person any of creating an intimidating, hostile, degrading, humiliating or offensive environment...”

Whilst sex discrimination and race discrimination are dealt within in separate Directives (see Directives 76/207/EEC and 2006/54/EC as to sex discrimination and Directive 2000/43/EC on race discrimination), the relevant provisions contain no material differences in wording.

In light of the difference between the Framework Directive and the DDA, an Employment Tribunal stayed Ms Coleman's claim and referred the matter to the ECJ for a preliminary ruling as to the scope of the Directive.

## **5. THE ADVOCATE GENERAL'S OPINION**

In an Opinion dated 31 January 2008, Advocate General Poiares Maduro identified a single issue of law arising in the *Coleman* case: "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?" (para 6). He reasoned that as the Framework Directive was enacted by the Council under the authority of Art 13 of the EC Treaty (which permits the Council to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation") that the Directive must be interpreted in light of those goals (para 7). Further, he placed weight on the contents of Article 1 of the Directive that its purpose was "to lay down a general framework for combating discrimination... with a view to putting into effect in the Member States the principle of equal treatment" (para 8). He emphasised that equality was a fundamental principle of Community Law and the Directive was a practical aspect of that principle (para 8). Adopting a distinctly philosophical approach, he reasoned that a "more subtle and less obvious way" of targeting a person and undermining their dignity and autonomy is to "target not them, but third persons who are closely associated with them" (para 12). The Advocate General's view was that "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" (para 12). He also noted that in those cases the person suffering the discrimination additionally becomes the means or instrument through which the dignity of the person belonging to the suspect classification is undermined. The Advocate General reasoned that:

"When the discriminator deprives an individual of valuable options in areas which are of fundamental importance to our lives because that individual associated with a person having a suspect characteristic then it also deprives that person of valuable options and prevents him from exercising his autonomy." (para 14)

The Advocate General concluded that the Directive prohibited the discrimination and harassment alleged in Ms Coleman's case. It did so demonstrably because its language referred to "on grounds of" without adopting possessive pronouns. In an important passage, the Advocate General remarked that:

"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 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 ... 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 certain religious persuasion that leads him to treat some employees less well.” (para 22)

The Advocate General therefore expressed his conclusion, at para 23, 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’.”

## **6. THE JUDGMENT OF THE EUROPEAN COURT**

In its judgment of 17 July 2008, the ECJ reached the same result as the Advocate General as to how Ms Coleman’s case should be decided. However, it is interesting to contrast the emphasis within the reasoning given.

The Court’s starting point was to note a lack of express limitation in the wording of the Directive as far as those who could claim protection were concerned. Rather, according to the Court, the purpose was to combat all forms of discrimination on grounds of disability (para 38). The fact that the Directive contained a number of other provisions which apply only to disabled people (see arts 5 and 7(2), the “positive discrimination measures”) did not act as an implied limitation or a reason to construe the directive strictly (para 43). Rather, the Court referred to Recital 6 of the Directive which referred 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.

Equally, although the Court’s judgment in *Chacón Navas v Eurest Colectividades SA* (Case C-13/05) [2006] ECR I-06467 stressed that the scope of the Framework Directive could not be extended beyond the grounds listed exhaustively in Article 1, the Court saw no implication that the scope *ratione personae* of the Directive must be interpreted strictly with regard to those grounds (para 46).

Further, recital 37 of the preamble to the Directive records the aim of creating a level playing field in the Community as regards equality in employment and occupation. The Court considered that a narrower interpretation would undermine those aims (para 48).

Therefore the Court decided that the Directive "...applies not to a particular category of person but by reference to the grounds mentioned in Article 1" (para 50); a limit of application to those who possess the relevant protected characteristic would "deprive that directive of an important element of its effectiveness and... reduce the protection which it is intended to guarantee" (para 51). The Directive "must be interpreted as meaning that the prohibition of direct discrimination ... is not limited only to people who are themselves disabled (para 56). Equally, the harassment provisions were to be interpreted as not being limited to the prohibition of harassment of people who are themselves disabled" (para 58).

## **7. DISCUSSION AND CONCLUSIONS**

The Court's judgment in *Coleman* therefore recognises, for the first time as a matter of European Law, the existence of a concept of transferred discrimination. Although Ms Coleman's case concerned the disability provisions, it is absolutely clear that the judgment is applicable across the range of prohibited grounds contained in the Framework Directive and also, due to the parity of language in the relevant Directives, sex and race discrimination.

### Incompatibility of National Provisions

One immediate implication of the ruling is the apparent incompatibility between the provisions of the DDA and the Framework Directive. When the case is restored to the Tribunal it will have the unenviable task of considering whether the *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-04135 doctrine, which requires national Courts and Tribunals to interpret national statutory provisions "as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the [directive]", can remedy the situation. We have some doubt whether this doctrine, even after its emasculation in *Pfeiffer & Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Joined cases C-397/01 to C-304/01) [2004] ECR I-08835, is sufficiently strong to achieve this result given the particular wording of the DDA provisions (see also the views of Burton J in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] ICR 1234 at para 61).

In any event, the ECJ's determination places the need to amend inconsistent national provisions squarely on the legislative agenda, be that as part of the Single Equality Bill or separately. The table above demonstrates this need in the case of the DDA and the direct discrimination provisions in the SDA and Age Regulations. Interestingly, the SDA was reviewed prior to *Coleman* in *Equal Opportunities Commission* (ante). That challenge considered the provisions concerning harassment (but not direct discrimination). It was accepted (see para 29) that the Directive's definition of harassment did not limit the relevant unwanted conduct such that it had to be related to the sex of the complainant; rather the Directive refers to conduct "related to the sex of a person". After that decision, the Government enacted the Sex Discrimination Act 1975 (Amendment) Regulations 2008 (SI 2008/656) which made the necessary changes to the harassment provisions of the SDA to facilitate transferred harassment claims (see table above).

### How Wide is Transferred Discrimination as a matter of European Law?

Quite apart from removing implementation incompatibilities, the ECJ's judgment has potentially far greater significance. Any assessment of that impact requires consideration of how wide, as a matter of European Law, this new doctrine of transferred discrimination is. It is helpful to consider this issue against the backdrop of the domestic case law developed under the RRA. From that case law, it is possible to identify three classes of case (see *Taking Discrimination Personally?*, ante):

(a) *Cases of Association*

This class is perhaps the classic example of transferred discrimination – where A is discriminated against because of a protected characteristic possessed by B in circumstances where A is associated with B. Ms Coleman's case falls into this category, as do the facts of *Race Relations Board v Applin* [1973] QB 815. There can now be little doubt after *Coleman* in the ECJ that transferred discrimination in European Law covers such associative discrimination.

Care must, however, be taken in respect of transferred sex discrimination. It was noted above that the SDA's harassment provisions were amended following the *Equal Opportunities* case, but that the direct discrimination provisions were not. It might be thought unfortunate that the occasion was not utilised to consider whether amendments were required to the direct discrimination provisions as well. Such changes would, however, be complex since the concept of transferred sex discrimination (where a claimant is treated less favourably because of the gender of a person with whom s/he is associated) is difficult to distinguish from sexual orientation discrimination. Furthermore, the ECJ appears to have considered that no such concept existed in the law relating to equal pay some years ago: see *Grant v South West Trains* [1998] ECR I-00621. *Grant* is a difficult case in this context since although the question of transferred discrimination was referred to the ECJ, it was not considered directly in either the ECJ's judgment or the Opinion of Advocate General Elmer. It is notable, however, that the ECJ took the view that the provisions of the directive prohibiting discrimination between men and women were "based, essentially if not exclusively, on the sex of the person concerned" (para 42). Sadly, the ECJ in *Coleman* did not consider *Grant*. However the *Grant* judgment ought properly to be considered in its historical context: at that time there was no prohibition on sexual orientation discrimination and the ECJ was keen to reaffirm that position rather than allow such claims to proceed in all but name.

(b) *Cases involving Discriminatory Instructions*

Domestic case law developed transferred discrimination beyond association in a number of cases where individuals were subjected to discriminatory instructions: see, for example: *Zarczynska v Levy* [1979] 1 WLR 125; *Showboat* (ante); and *Weathersfield Ltd v Sargent* [1999] ICR 425. We have previously argued that such cases fit awkwardly within a coherent concept of transferred discrimination (see *Taking Discrimination Personally?*, ante), however there is a more compelling reason why such development is unlikely to happen at a European level.

The Directives treat discriminatory instructions in a way which renders it wholly unnecessary for them to be squeezed into an understanding of transferred

discrimination. Unlike our national statutes (with the notable exception of the more recent Employment Equality (Age) Regulations 2006, regulation 5), the Directives deem by separate provision discriminatory instructions to be direct discrimination (see, e.g. Art 2(4) of the Framework Directive). Thus a directly actionable remedy is already available for the relevant employee. We consider that there is much to commend this approach, and hope that the Age Regulations will be used as the model for providing greater consistency across the prohibited grounds.

*(c) Misusing the Protection: cases involving action on grounds of an individual's breaches/attitude to equal opportunities*

Such cases typically involve an individual complaining about being dismissed or subjected to other detriment because of that individual's breaches or perceived breaches of equal opportunities rules/policies or reasons relating to that individual's views/attitudes to such policies. The argument runs that such action by the employer is on grounds of race (or, by extension, another prohibited ground) in a very wide sense. The *Serco Ltd v Redfearn* [2006] ICR 1367 case is a good example. There, the Court of Appeal held that Mr Redfearn, who was dismissed from his employment after being elected as a councillor for the BNP, was "no more dismissed 'on racial grounds' than an employee who is dismissed for racially abusing his employer, a fellow employee or a valued customer. Any other result would be incompatible with the purpose of the 1976 Act to promote equal treatment of persons irrespective of race..." (para 47). Although the Court did not specifically explain in that case why Mr Redfearn's case fell outside the *Showboat* dicta, the answer perhaps lies in the fact that a different division of the Court had recognised that the *Showboat* test was expressed too widely: "I cannot accept so wide a statement, which, as was apparent in the course of submissions, could produce consequences totally repugnant to the very purpose of the legislation" (*Wheeler v Leicester City Council* [1985] AC 1054, per Ackner LJ at 1060).

There are sound policy reasons for cases within this category to be excluded from the scope of transferred discrimination as the *Serco* decision demonstrates. We consider it unlikely that such cases will be being brought within a European concept of the doctrine, not least as so to do would undermine the aims of the Directive and the principle of equal treatment as espoused by the Advocate General and the Court in *Coleman*.

*(d) Wider than Associative Discrimination?*

*Coleman* was an association case and it is therefore wholly unsurprising that the Advocate General and the Court directed their reasoning to that class of case. There are places, however, where language permitting of a wider conception of transferred discrimination was used. It has been seen above, for example, that in his Opinion the Advocate General referred to "the Directive ... not allow[ing] 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" (para 22) and further, that, "what is important is that disability ... was used as a reason to treat [the claimant] 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" (para 23).

Similarly, the ECJ itself noted that the prohibition of discrimination “applies not to a particular category of person but by reference to the grounds mentioned in Article 1” (para 50).

It is possible, therefore, to conceive of other factual scenarios beyond cases of association which arguably fall within such a wider understanding of transferred discrimination. The case of *English v Thomas Sanderson Blinds Limited* (EAT judgment [2008] IRLR 342), currently pending before the Court of Appeal, illustrates one such scenario. In that case, the claimant was subjected to unpleasant remarks and banter which suggested he was gay. It was a feature of the assumed facts that the alleged perpetrators knew that in reality that Mr English was not gay, but nevertheless subjected him to such banter because he had characteristics stereotypically associated with gay people. This perhaps demonstrates a further category of case: one in which a person, although not actually possessing the protected characteristic themselves, is perceived to be a member of the protected group or, despite being known not to belong to that group, is treated as if they were because of the possession of stereotypical characteristics. These cases might be termed attribution cases, where the perpetrator attributes (whether mistakenly or knowingly) the protected characteristic to the victim. A further factual example could be the case of a man who speaks with a strong American accent being subjected to anti-American banter despite the fact that he has no American nationality or national origins and merely developed the accent by living in the US for a number of years.

In our view, the attribution cases are likely to fall within the European concept of transferred discrimination in view of the purpose of the legislation as highlighted by the *Coleman* decision as well as the reasoning of the Advocate General and ECJ. It is not, to our minds, a significant step beyond the association cases where the attribution takes place (be it mistakenly or knowingly) because of stereotypical characteristics exhibited by the claimant which are associated with people of the relevant protected class.

Much remains to be seen as to how, precisely, the Courts will develop the *Coleman* conception of transferred discrimination. However, the judgment of the ECJ promises to open a large number of potential arguments which could be deployed by advocates in discrimination cases and which are likely to have to be resolved by the appellate courts as well as to extend, significantly, the protection afforded by the anti-discrimination legislation.

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