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Case C-303/06**,** *S. Coleman* v. *Attridge Law and Steve Law*, Judgment of the Grand Chamber of the Court of Justice of 17 July 2008, not yet reported.

1. Introduction

Most of the judgments handed down by the European Court of Justice pass members of the public by, and receive little or no attention in the mainstream media. However, from time to time, the Court delivers a judgment which makes headline news and which captures the public's attention. The *Coleman* case, concerning the question of whether EC non-discrimination law prohibits discrimination against an individual on the grounds that they associate with a disabled person,[1] is one such case. Both the Advocate General's Opinion and the judgment itself received widespread attention in the press, both in the United Kingdom,[2] where the case originated, and in (some) other Member States.[3] This could be because the factual background to the case is relatively easy to understand; because the potential implications of the Court's judgment for the claimant, and people in a comparable position, can also be grasped quite easily; and, not least, because of the crude and unpleasant nature of the alleged behaviour by the employer.[4] Moreover, the Court's decision that Ms. Coleman was protected from discrimination on the grounds of disability in such circumstances seemed to receive approval in the press. However, this judgment should not be regarded as "a one hit wonder", as many other people who associate with a person with a disability, whether as a primary carer / personal assistant, or in another capacity, are likely to experience discrimination, and benefit from the protection provided by Community non-discrimination law, as established by the Court in this case. This is especially so since national non-discrimination law, which is designed to transpose the relevant EC

1. Specifically, the case concerned discrimination allegedly motivated by the fact that the employee in question had a child with a disability, and the employee was the primary carer of the child.

2. The A.G.'s Opinion made headline news on the BBC news programmes (television and radio) on the day that it was handed down.

3. E.g. the decision made front page news in one of the main Dutch broadsheets, *NRC Handelblad*, 19 and 20 July 2008.

4. The aforementioned article in the *NRC Handelblad* directly quoted some of the remarks allegedly made by the employer. Whilst most of the remarks were translated into Dutch, the expletives were left in the original language and in italics. The BBC was more reticent in reproducing the expletives, although nevertheless succeeded in conveying the nature of the remarks allegedly made.

Directive, is generally silent on this point. The Court's judgment may well also have implications for the other grounds which are the subject of EC non-discrimination, such as sex, race and ethnic origin, and age, and mean that discrimination experienced because one associates with individuals who possess one of these characteristics is also prohibited.[5]

2. Factual background

Sharon Coleman was a legal secretary. She was also the mother of a disabled child who required specialized care. She alleged that, on returning to work after having given birth to her child, she was treated less favourably than other employees in comparable positions because she was the primary carer of a child with a disability. She made a number of allegations of adverse treatment, including that she was not allowed to return to her original job following her maternity leave, whilst parents of non-disabled children were allowed to do this; she was not allowed the same flexibility regarding her working hours as parents of non-disabled children; she was described as "lazy" for requesting time off to care for her child, and threatened with dismissal when she occasionally arrived late because of the need to care for her child, when parents of non-disabled children were not treated in this way; and she said that highly abusive comments were made about her and her child. Ultimately Ms. Coleman accepted voluntary redundancy, and subsequently lodged a claim before an Employment Tribunal that she had been subject to unfair constructive dismissal[6] and had been discriminated against because she was the primary carer of a disabled child.

The Employment Tribunal which heard the case had to determine if the Disability Discrimination Act 1995 (henceforth: DDA) provided protection from such discrimination. The Act clearly prohibits discrimination against individuals who have a disability themselves, but is silent as to whether individuals who experience discrimination not because they have a disability themselves, but because they associate with an individual with a disability were protected. It was accepted by all parties that, on a literal interpretation of the relevant

5. For a discussion of the problems associated with discrimination by association and the legal situation prior to the *Coleman* judgment, see Waddington, "Protection for Family and Friends: Addressing Discrimination by Association", 5 *European Anti-Discrimination Law Review* (2007), 13–21.

6. A constructive dismissal occurs where an employee "resigns" following illegal behaviour by the employer, such as discrimination, which leads the employee to conclude that continued employment with this employer is impossible. The former employee can challenge such unfair constructive dismissals before the courts.

wording of the DDA, only those individuals who had a disability themselves were protected from discrimination. However, a European dimension also arose because the DDA had been amended[7] with effect from 2004 in order to comply with the Employment Equality Directive of 2000.[8] This Directive prohibits employment related discrimination on the grounds of disability, as well as religion or belief, sexual orientation and age. The question of whether the Employment Equality Directive prohibited discrimination in such circumstances was therefore of significance, and the claimant's case turned on this matter.[9]

The Directive prohibits direct discrimination and harassment "on … the grounds" of religion or belief, disability, age or sexual orientation. Protection is not explicitly confined to individuals who possess these grounds or characteristics themselves, and the claimant's lawyers argued that, by using this language, the Directive prohibited "associative discrimination" with regard to direct discrimination and harassment, and the DDA should also be interpreted in this way. The Employment Tribunal concluded that guidance from the European Court of Justice was required on this matter in order for it to proceed,[10] and forwarded a number of preliminary references which, in essence, asked whether the Employment Equality Directive 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.

Somewhat unusually, the respondent employer appealed against the decision of the Chairman of the Tribunal to make the preliminary reference, on the grounds *inter alia* that, irrespective of any decision by the European Court of Justice, the DDA was not capable of being interpreted to cover discrimination by association, and that the Chairman had failed to exercise her discretion judicially or had erred in principle. On appeal the Employment Appeal Tribunal[11] found that the Chairman of the original Tribunal was entitled to conclude "that in order to determine … whether the Claimant could bring a claim of associative discrimination under the DDA", it was first necessary to obtain the opinion of the European Court of Justice on the correct interpretation of the Directive, and the preliminary reference was allowed to stand.

7. By the Disability Discrimination Act 1995 (Amendment) Regulations 2003, which came into force on 1 Oct. 2004.

8. Directive 2000/78 of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.

9. In the word's of A.G. Poiares Maduro: "Ms. Coleman can succeed in her case only if the Directive is to be interpreted as prohibiting discrimination by association" (Opinion, para 5).

10. Employment Tribunal, Case No. 2303745/2005, 17 Feb. 2006.

11. Employment Appeal Tribunal, Appeal No. UKEAT/0417/06/DM, 20 Dec. 2006.

3. The Advocate General's Opinion

Advocate General Poiares Maduro gave a very thoughtful Opinion, notable both for its analysis and reflection on the principles underlying non-discrimination and equality legislation, and for its reference to academic literature. The Advocate General commenced his analysis by noting that the Employment Equality Directive had to be interpreted in light of the goals pursued by Article 13 EC, which provided its legal basis, and against the background of the Court's case law on the principles of equal treatment and non-discrimination. He recalled that equality is one of the fundamental principles of Community law, and that "[i]n order to determine what equality requires in any given case it is useful to recall the values underlying equality. These are human dignity and personal autonomy."[12]

The Advocate General went on to elaborate on what he felt these two concepts involved. He found that "at a bare minimum, human dignity entails the recognition of the equal worth of every individual" and that "individuals and political institutions must not act in a way that denies the intrinsic importance of every human life."[13] Meanwhile, personal autonomy "dictates that individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options."[14]

Advocate General Poiares Maduro noted that a person's dignity and autonomy could be undermined when that person is directly targeted, and disadvantaged, because he or she possessed one of the characteristics covered by non-discrimination law.[15] He also noted that "more subtle and less obvious ways" existed in which a person could be discriminated against: "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 persons belonging to suspect classifications."[16] He argued that discrimination against such third persons undermined the dignity and autonomy of the individuals who possessed the covered characteristic as much as discrimination experienced directly by them, and served to exclude the person with the covered characteristic from a range of possibilities and choices that they would otherwise have had.[17]

12. Para 8.
13. Para 9.
14. Ibid.
15. Borrowing from the terminology of the US Supreme Court, the A.G. described these grounds of discrimination as "suspect classifications" (Para 10).
16. Para 12.
17. Paras. 13 and 14.

Having set out this conceptual analysis, the Advocate General turned his attention to the Employment Equality Directive more specifically. He began by noting that the Directive was adopted to protect people belonging to "suspect classifications" and to ensure that their dignity and autonomy were not compromised.[18] In order to achieve this aim, the Directive laid down a general framework for combating discrimination "on the grounds" of religion or belief, disability, age and sexual orientation.[19] By using the phrase "on the grounds of", the Directive sought to distinguish between discrimination that is prohibited, and differences in treatment motivated by other characteristics, such as trustworthiness and politeness, which are permitted.

Turning to the case at hand, the Advocate General found that, should Ms. Coleman be able to establish that she was adversely treated because of the disability of her son, then she should fall within the protection of the Directive. He noted that it is the ground of discrimination which is the focus of the Directive, not the question of whether the alleged victim actually possesses that ground or characteristic herself. He concluded that the Directive removes "religion, age, disability and sexual orientation completely from the range of grounds an employer may legitimately use to treat some people less well",[20] and, in the context of the specific preliminary reference, advised the Court to hold that the Directive "protects people who, although not disabled themselves, suffer direct discrimination and/or harassment … because they are associated with a disabled person."[21]

4. The judgment

The European Court of Justice first dealt with the issue of admissibility. The Netherlands Government, which intervened in the case, questioned the admissibility of the case, given that the material facts – specifically, whether Ms. Coleman had actually been subject to the adverse treatment which she alleged – had not been established before the national court. The ECJ swiftly dismissed this argument, recalling that it is for the national court to decide at what stage in the proceedings to make a preliminary reference, and, where the ECJ receives a request for an interpretation of Community law which is not manifestly unrelated to the subject-matter of the main proceedings and it has sufficient information to enable it to answer the questions posed, then it is obliged to respond.

18. Para 15.
19. Art. 1 of the Directive, and para 15 of the Opinion.
20. Para 22.
21. Para 25.

The Court then turned to the subject matter of the preliminary reference. The Court began by recalling the purpose of the Directive, which it found to be "to combat all forms of discrimination on grounds of disability" with regard to employment and occupation.[22] 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."[23] However, the Court went on to note that some provisions of the Directive, and specifically Article 5 relating to reasonable accommodation and Article 7(2) addressing health and safety at work and positive action,[24] did only apply to disabled people. This led some of the Member States[25] which intervened in the case to argue that the prohibition of direct discrimination contained in the Directive could also only be relied on by individuals who were themselves disabled. However, the Court found that the aforementioned provisions were disability-specific measures because "they are provisions concerning positive discrimination measures in favour of disabled people themselves or because they are specific measures which would be rendered meaningless or could prove disproportionate if they were not limited to disabled persons only."[26] The existence of such disability-specific measures in the Directive could not lead to the conclusion that the protection from discrimination provided by the Directive as a whole should also be confined to people who actually had a disability themselves.

The Court then addressed a second argument raised by some Member States:[27] that, in light of the Court's earlier judgment in *Chacón Navas*,[28] the concept of disability should be interpreted very strictly. In response, the Court acknowledged that it had held that the personal scope of the Directive could not be extended beyond the grounds enumerated in the Directive and Article 13 EC in *Chacón Navas*. However, it stressed that, in that case, it had not held that the grounds that were covered by the Directive had to be interpreted strictly.[29]

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

22. Para 38.
23. Ibid.
24. In the context of positive action, Art. 7(2) refers to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting the integration of disabled persons into the working environment.
25. United Kingdom, Greece, Italy and the Netherlands.
26. Para 42.
27. United Kingdom, Italy and the Netherlands.
28. Case C-13/05, *Chacón Navas* v. *Eurest Colectividades SA*, [2006] ECR 1-6467. For commentary on this case see annotation by Waddington, 44 CML Rev. (2007), 487–499.
29. Paras. 44–47.

The Court recalled that Ms. Coleman alleged that she suffered less favourable treatment on the ground of disability, and noted once again that the Directive functions by reference to the covered grounds, and not with regard to a particular category of person. 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."[30]

The Court then addressed the rules regarding the burden of proof in such cases. The Directive provides for a partial reversal of the burden of proof with regard to direct and indirect discrimination.[31] The Court stated that this principle applied equally to cases of alleged discrimination by association, meaning that it was for Ms. Coleman to establish facts from which it may be presumed that direct discrimination on the grounds of disability has occurred, leaving the onus on the employer to prove that no discrimination had taken place.

Turning to the matter of harassment by association, the Court applied a similar line of reasoning as with regard to direct discrimination, and concluded its judgment by ruling that the protection from direct discrimination and harassment found in the Employment Equality Directive is not limited to people who are themselves disabled, but also applies when an employer directly discriminates against or harasses an employee, where that discrimination or harassment is based on the disability of the employee's child, whose care is provided primarily by the employee.[32]

5. Analysis

The Court's judgment is to be welcomed for extending protection from direct discrimination and harassment to an individual in a particularly vulnerable

30. Para 51.

31. In Art. 10(1).

32. Note that the *Coleman* case can be distinguished from an (apparently similar) earlier judgment of the ECJ in Joined Cases C-87/90, C-88/90 & C-89/90, *Verholen and others* v. *Sociale Verzekeringsbank Amsterdam*, [1991] ECR I-3757. The case concerned the implementation by the Netherlands of Directive 79/7 on the principle of equal treatment for men and women in matters of social security, O.J. 1976, L 6/24. Verholen was a man who had been indirectly affected by the Dutch Government's failure to provide for equal benefits retroactively, in that his pension would have been higher if his wife, who was the victim of discrimination, had received equal benefits. The ECJ found that someone in Mr Verholen's position could rely on the provisions of the directive before a national court. However, unlike in *Coleman*, the Court did not view Mr Verholen as a (possible) victim of discrimination by association. On the contrary, Mr Verholen was viewed as someone who associated with a victim of discrimination, and experienced negative consequences as a result.

situation. However, it may be premature to conclude from the judgment that discrimination by association is prohibited in all situations, on all grounds, and for all forms of discrimination. The judgment is, moreover, interesting for the comments which the Court made (in passing) with regard to the requirement to provide a reasonable accommodation in favour of persons with disabilities. These points are examined further below.

5.1. *Who is protected from discrimination by association?*

Firstly, one should note that the EC equality directives, and specifically the Racial Equality Directive[33] (addressing discrimination on the grounds of racial and ethnic origin) and the Recast[34] and Gender Goods and Services[35] Directives (both addressing gender discrimination), adopt a similar formulation to the Employment Equality Directive when prohibiting direct discrimination and harassment. These forms of discrimination are therefore prohibited where they are "on the grounds" of the characteristic(s) addressed in the relevant directives. In light of the Court's reasoning in *Coleman*, it is probable that direct discrimination and harassment by association are also prohibited under these directives, and therefore for all Article 13 EC grounds.

However, there are, in the background, at least two warning bells which suggest one should be slightly cautious in claiming that *Coleman* is conclusive proof for claiming that discrimination by association is prohibited with regard to all grounds in such cases. First, the Court seemed to place a great deal of emphasis on the nature of the relationship between Ms. Coleman and her son, and, in particular, the fact that she was his primary carer. Whilst the Court certainly did not hold that the closeness of the relationship, and the level of dependency of the child, were determinant for finding that protection existed from discrimination by association, a very narrow reading of the judgment could lead one to conclude that not all levels of association would merit equal protection. If one were to argue in favour of such an interpretation, one could perhaps find support in the fact that a limited number of EC Member States have chosen to prohibit explicitly discrimination by association on the grounds of disability, whilst not paying similar attention to discrimination by association

33. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment irrespective of racial or ethnic origin, O.J. 2000, L 180/22.

34. Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O.J. 2006, L 204/23.

35. Directive 2004/113/EC of 13 Dec. 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. 2004, L 373/37.

on other grounds. The reason for this seems to be the particular risk of discrimination faced by those who provide care or assistance to people with disabilities, as well as the need to promote the provision of assistance to individuals with disabilities. The Austrian Disability Equality Act[36] and Act on the Employment of People with Disabilities[37] both extend the protection from discrimination to relatives who fulfil caring duties in relation to family members or partners with a disability. A similar motivation seems to lie behind the decision of the French legislature to extend the right to one specific form of reasonable accommodation, namely individualized working hour arrangements, to family members of people with disabilities under certain circumstances.[38] The goal of such accommodations is to allow family members and relatives to support the individual with a disability. In contrast it is recalled that, under the Employment Equality Directive, the right to an accommodation is limited explicitly to individuals with a disability, and the Court stated this in its judgment.

Secondly, if *Coleman* is to be read as also establishing a prohibition of discrimination by association on the grounds of sex, it sits uneasily with the Court's earlier judgment in *Grant* v. *South West Trains*.[39] That case involved a claim of sex discrimination by a female employee of a train company, on the grounds that she was denied access to a travel concession for her same sex partner, when unmarried staff who had a different sex heterosexual partner were given access to such benefits. The difference in treatment was therefore based on the sex of partner who the claimant "associated" with. Although Ms. Grant claimed, in essence, that she was the victim of discrimination by association, the Court did not directly address this in its judgment, and instead held that EC law did not require that an individual with a same sex partner be treated in the same way as an individual with a heterosexual partner. One could interpret the case as evidence that discrimination by association on the grounds of sex was not prohibited under EC law at that time. However, as Pilgenstorter and Forshaw have recently commented, "the *Grant* judgment ought properly to be considered in its historical context: at that time there was no protection on sexual orientation discrimination and the ECJ was keen to reaffirm that position rather than allow such claims to proceed."[40]

Nevertheless, in spite of these national examples where protection from discrimination by association is only explicitly stated to cover disability, and

36. Para 4.

37. Para 7b.

38. Labour Code (Legislative Part), Para 1: Individualized working hours, Art. L 212-4-1-1, inserted by Law No. 2005-102 of 11 Feb. 2005, Art. 24 IV, Official Gazette of 12 Feb. 2005.

39. Case C 249/96, *Grant* v. *South West Trains*, [1998] ECR I-621.

40. Pilgerstorfer and Forshaw, "Transferred Discrimination in European Law, Case C-303/06, *Coleman* v. *Attridge Law*", 37 *Industrial Law Journal* (2008), 384–393.

uncertainties relating to the Court's previous case law, it seems likely that *Coleman* should be read as establishing the general principle, applicable to all EC equality directives, that direct discrimination and harassment by association are prohibited. The use of the same language, with all directives prohibiting discrimination "on the grounds" of the relevant characteristic, rather than explicitly requiring that claimants possess that characteristic themselves, is the strongest argument in support of this position.

This argument seems to have convinced the London Employment Appeal Tribunal in a recent case involving harassment which was motivated not by the religion or belief of the victim, but by the religion of a third party. *Saini* v. *All Saints Haque Centre, Bungay and Paul*[41] involved an appeal from an earlier judgment of an Employment Tribunal which had found that the appellant and a colleague, who were both Hindus, had been unfairly dismissed and wrongfully dismissed by the All Saints Haque Centre and two other respondents, who were of a different religion. The original Tribunal also found that the Hindu colleague had been discriminated against on the grounds of his faith, but rejected the claimant's argument that he had been the victim of harassment on the grounds of religion or belief under the relevant UK law.[42] The Employment Appeal Tribunal found that the original Tribunal had established that the appellant had been subject to behaviour that would have amounted to harassment, were it not for the fact that the Tribunal had found that the behaviour in question was not motivated by the appellant's religion or belief. The original Tribunal regarded this as an essential element of the test for harassment. Instead the original Tribunal found that the mistreatment was motivated by the respondents' desire to obtain information and evidence, from the appellant, which would assist them to dismiss his Hindu colleague, and the animosity to the colleague was based on his Hindu religion. In contrast the Employment Appeal Tribunal found that the (mis)treatment in question was on the grounds of religion or belief – namely the religion or belief of the colleague who the respondents' wished to dismiss. The original Tribunal had not considered this matter. Citing both the *Coleman* case and the Employment Equality Directive, the Employment Appeal Tribunal found: "[the relevant provision of UK law dealing with harassment and religion] will be breached not only where an employee is harassed on the grounds that *he* holds certain religious or other relevant beliefs but also where he is harassed because someone else holds certain religious or other beliefs. … Such an interpretation is consistent with the aims and

41. *Mr. G. Saini* v. *All Saints Haque Centre, Mr. D. Bungay, and Mr. S. Paul*, Appeal No.: UKEAT/0227/08, judgment, Employment Appeal Tribunal, 24 Oct. 2008.

42. Paras. 3(1)(a) and 5(1)(b) of the Employment Equality (Religion or Belief) Regulations 2003. The Regulations were adopted to transpose the Employment Equality Directive.

intention of the … [Employment Equality] Directive and of the plain import of the legislation. To adopt the language of the Advocate General at paragraph 17 in *Coleman* v. *Attridge Law*: 'As soon as we have ascertained that the basis for the employer's conduct is one of the prohibited grounds then we enter the realm of unlawful discrimination.'"[43]

5.2. *Discrimination by association and indirect discrimination*

Ms. Coleman's claim, and the preliminary reference from the Employment Tribunal, only concerned the question of whether direct discrimination and harassment by association with regard to disability were prohibited. The Court did not address, in any way, the situation with regard to indirect discrimination. However, an initial reading of the Employment Equality Directive appears to suggest that it does not protect people who are associated with someone with a disability from indirect discrimination. The Employment Equality Directive defines indirect discrimination as occurring where "an apparently neutral provision, criterion or practice would put persons having … a particular disability … at a particular disadvantage compared with other persons …". The definition therefore seem to provide protection from indirect discrimination only for "persons having … a particular disability …" who are disadvantaged. As a consequence, it seems difficult to argue that an individual who is disadvantaged not because they have a disability, but because someone they associate with has a disability, is protected from indirect discrimination as a result of this association under EC law. Such protection would only be possible if, "persons having … a particular disability" could be interpreted as including "persons who associate with persons having a particular disability".

The Advocate General also noted the difference between, on the one hand, the prohibitions of direct discrimination and harassment, and, on the other, indirect discrimination. He concluded that, in the case of direct discrimination and harassment, there is a "necessary relationship" between the adverse treatment and the "suspect classification", with the covered ground being the direct motivating factor for the adverse treatment. He argued that the Directive prohibits the use of those classifications or grounds as a basis for any employment related decision. He contrasted this situation with that existing under indirect discrimination, which involves apparently neutral measures which have a (usually) unintentional negative impact on members of the covered group. "… [W]hile the prohibition of direct discrimination and harassment operates as an exclusionary mechanism (by excluding from an employer's reasoning reliance on certain grounds) the prohibition of indirect discrimination operates as an

43. Para 28 of the judgment. Emphasis in original.

inclusionary mechanism (by obliging employers to take into account and accommodate the needs of individuals with certain characteristics)."[44] He concluded that, even if one were to accept that this implied that discrimination by association fell outside the scope of the Directive with regard to indirect discrimination,[45] this did not mean this was also true in the case of direct discrimination and harassment. In contrast, interpreting these forms of discrimination as including a prohibition on discrimination by association "is the natural consequence of the exclusionary mechanism through which the prohibition of this type of discrimination operates".[46]

Whilst the Court did not reflect on the status of indirect discrimination in its judgment, it did make a strict separation between those Articles which cover only disabled people, such as Article 5 and Article 7(2), and those provisions which address discrimination "on the grounds of disability", where the focus was on the characteristic which led to the disadvantage, rather than on whether the claimant actually possessed that characteristic. This may suggest that the Court might also interpret protection from indirect discrimination as being confined to persons with a disability. However, the reasons given for restricting the benefits of Articles 5 and 7 to people who have a disability do not seem to apply in the context of indirect discrimination,[47] and the Court was silent on this issue.

Taking the opposing position, one could argue that the Court should, given the opportunity, interpret the prohibition of indirect discrimination as covering those who experience discrimination on the grounds that they associate with a disabled person – on the basis that this would be in line with the broad purpose of the Directives, even though it would not be in accordance with a literal interpretation of the wording. However, this would probably be a rather "ambitious" interpretation by the Court. Nevertheless, in light of the Court's silence on the matter, it remains unresolved.

5.3. *The status of reasonable accommodation*

As already noted, the Court referred to two "disability specific" provisions of the Directive in its judgment, namely Article 5, concerning the duty to provide a reasonable accommodation to a person with a disability, and Article 7(2). The latter Article refers to the right of Member States, with regard to disabled

44. Para 19.
45. As the United Kingdom Government had argued (para 19).
46. Para 19.
47. Unless one could argue that extending indirect discrimination to cover individuals who associate with others who possess one of the covered characteristic would "prove to be disproportionate".

persons, to maintain or adopt provisions on the protection of health and safety at work or measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting the integration of disabled persons into the working environment. The Court's discussion of the reasonable accommodation provision is worth noting because, on the one hand, this is a relatively new obligation in most Member States and there remains some uncertainty as to the exact scope and meaning of the requirement and, on the other hand, the ECJ has not yet had the opportunity to hand down a preliminary ruling in a case directly concerning Article 5 or reasonable accommodation.

In *Coleman* the Court found that the restriction of the entitlement to a reasonable accommodation and the measures mentioned in Article 7(2) to disabled persons was justified because the provisions concern "positive discrimination measures in favour of disabled persons themselves or because they are specific measures that would be rendered meaningless or could prove to be disproportionate if they were not limited to disabled persons only."[48] This could imply that the Court regards reasonable accommodation as a form of "positive discrimination" in favour of disabled people. However, this is not how the Employment Equality Directive perceives reasonable accommodation, nor is it in accordance with the United Nations Convention on the Rights of Persons with Disabilities,[49] which the European Commission has signed on behalf of the Community. Whilst an unjustified failure to make a reasonable accommodation is not explicitly listed as a form of discrimination in the Directive, it was arguably meant to be interpreted in this way. Moreover Article 5 is clearly quite separate from Article 7, which addresses positive action, and which only gives Member States the *possibility* to adopt positive action measures. In contrast, Member States are *obliged* to provide for reasonable accommodations and, in most cases, their national law defines a failure to make a reasonable accommodation as a form of discrimination. In addition, Article 2 of the UN Convention clearly defines a denial of reasonable accommodation as a form of discrimination, and the Commission has followed this lead in its proposal for a new Article 13 EC directive,[50] which addresses disability and a variety of other grounds.[51]

48. Para 42.

49. Convention on the Rights of Persons with Disabilities (adopted 13 Dec. 2006, opened for signature 30 March 2007).

50. Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective or religion or belief, disability, age or sexual orientation, COM(2008)426 final.

51. The proposal for the new directive defines an unjustified denial of reasonable accommodation as discrimination in Art. 2(5).

Alternatively, the Court could have signalled that it regarded reasonable accommodation as a measure that would be "rendered meaningless" or "disproportionate" if it were not limited to people with a disability. However, this view can also be questioned, and (some) other jurisdictions certainly do not share this limited view of the scope or relevance of reasonable accommodation.

One of the earliest examples of a legislative mandate to provide a reasonable accommodation can be found in the US Civil Rights Act of 1964, which was amended in 1972 to impose a duty on employers to accommodate the religious practices of employees, as long as doing so did not place an undue hardship on the employer.[52] The duty was only subsequently extended to cover people with disabilities.[53] Similarly, the early Canadian reasonable accommodation cases also involved accommodation on the grounds of religious belief.[54] Moreover, accommodation duties regarding religion can also be found in the laws of various EU Member States.[55]

In addition, other jurisdictions have not confined the accommodation duty to the grounds of disability and religious belief. Most notably, Canadian legislation imposes a duty on employers to accommodate individual employees up until the point of undue hardship,[56] and this duty relates to all characteristics covered by the relevant human rights legislation.[57] In addition, there is a wide body of Canadian case law addressing reasonable accommodation on a variety of grounds other than disability, demonstrating the relevance of the concept beyond disability.

Lastly in this context, the decision of the Court to refer to "positive discrimination measures" is somewhat strange. This terminology is not generally used

52. See Vickers, *Religion and Belief Discrimination in Employment – the EU law* (European Commission and European Network of Legal Experts in the non-discrimination Field, 2007), at 20–23.

53. In the Rehabilitation Act 1973 and, subsequently, the Americans with Disabilities Act 1990.

54. See *Ontario Human Rights Commission* v. *Simpsons-Sears*, [1985] 2 S.C.R. 536, *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 and *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970.

55. For further information and commentary see Waddington, "Reasonable Accommodation" in Schiek, Waddington and Bell (Eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart, 2007), pp. 697–701.

56. See *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU ("Meiorin")*, [1999] 3 S.C.R. 3 and *British Columbia (Superintendant of Motor Vehicles)* v. *British Columbia (Council of Human Rights ("Grismer")*, [1999] 3 S.C.R. 868.

57. The grounds covered are more extensive than those found in EC non-discrimination law, and include grounds such as family status.

in the EC context,[58] and does not necessarily make sense in the context of reasonable accommodation. The use of the term "discrimination" in this context, albeit "positive discrimination", implies that non-disabled people somehow lose out when the accommodation is provided to the disabled person, but that this loss is justified and therefore allowed. On occasion, this may be the case, such as when a worker with a disability is allocated a coveted resource which is in scarce supply, such as a reserved parking space or a larger office in order to accommodate their particular needs. However, this will not always be true and, e.g. the provision of work-related information in Braille, which is an accommodation which could only benefit a blind person, cannot be regarded as positive discrimination in favour of a disabled person. Instead, the provision of such information involves providing different treatment, which can only benefit a blind person, and people without that disability are not being discriminated against or disadvantaged in any way.

5.4. *Implications of the case for national legislation: Protection from discrimination by association in the Member States pre-Coleman*

Should *Coleman* indeed be read as establishing a prohibition on direct discrimination and harassment by association across all Article 13 EC grounds, then it is likely to have a significant impact on the interpretation of national non-discrimination law designed to transpose the equality directives. However, this does not necessarily mean that the relevant national provisions will need to be amended. Whilst discrimination by association is only occasionally addressed in national legislation, many Member States have opted to copy the wording of the relevant directives, meaning that the provisions in question already prohibit discrimination "on the grounds" of the covered characteristics. As a consequence, existing national law will easily lend itself to an interpretation in line with the *Coleman* judgment. However it is worth noting that in some countries, such as Ireland and Sweden, the relevant legislation or preparatory works accompanying the legislation already make it clear that discrimination by association across all grounds is already prohibited.[59]

58. Instead, in the context of EC law, reference is usually made to "positive action", and it is submitted that this is the preferred term in the EC context. However, it is also worth noting that there is a "terminological confusion" in this area, and the terms "positive action" and "positive discrimination" may sometimes be used to connote the same idea, but also sometimes to convey related but different meanings. This topic is worthy of an article in itself, and is not discussed further here.

59. For further information on the situation in Ireland and Sweden see Waddington, op. cit. *supra* note 5, at 17–18.

5.5. *Implications of the case for the UK Disability Discrimination Act and Ms. Coleman*

As noted above, Ms. Coleman could only be successful in her claim if the Employment Equality Directive prohibited direct discrimination and harassment by association with regard to disability. Nevertheless, the ECJ's finding that the Directive should indeed be interpreted in this way, did not necessarily mean that Ms. Coleman would be successful in her claim before the Tribunal. Since this case involved a dispute between two private parties, Ms. Coleman could not rely on the (possible) direct effect of the Directive's provisions before a national court, and was dependent on the Tribunal finding that it could interpret the domestic law in line with the Directive. This limitation is in line with the ECJ's long-standing case law[60] finding that directives cannot have horizontal direct effect, meaning that the direct effect of a directive cannot be pleaded against an individual, but only against (an organ of) the State. Therefore, following the Court's judgment, the UK Employment Tribunal had to decide if the national law was capable of being interpreted in a way that was compatible with the Court's findings.[61] The provisions of the DDA clearly refer to discrimination "against a disabled person" and less favourable treatment on the grounds of "the disabled person's disability",[62] and did not seem to lend themselves easily to an interpretation which was in conformity with the Court's judgment. For this reason Pilgerstorfer and Forshaw, writing recently in the *Industrial Law Journal* and before the Tribunal handed down its ruling, stated "[w]e have some doubt whether this doctrine [directive conform interpretation LW] … is sufficiently strong to achieve this result given the particular wording of the DDA provisions."[63]

In considering the matter, the Tribunal[64] found that the DDA had been amended in order to put into effect the Directive and noted that the DDA did not contain a provision which clearly stated that discrimination by association was not covered. For that reason, the Tribunal adopted "a purposive, non-literal approach"[65] and found that it could "read into" the relevant provi-

60. See e.g. Case 152/84, *Marshall* v. *Southampton and South-West Hampshire Area Health Authority (Teaching)*, [1986] ECR 723 and Case C-91/92, *Facini Dori* v. *Recreb Srl*, [1994] ECR I-3325.

61. In accordance with the principle of "indirect effect", or directive conform interpretation (consistent interpretation) as outlined in, *inter alia*, Case C-106/89, *Marleasing,* [1990] ECR I-4135.

62. Section 3A(5) DDA. (relating to direct discrimination). Section 3B, concerning harassment, contains similar provisions.

63. Pilgerstorfer and Forshaw , op. cit. *supra* note 40, at 389.

64. *Sharon Coleman* v. *EBR Attridge Law LLP*, Case No.: 2303745/2005, judgment on a Pre-Hearing Review, Employment Tribunal, 30 Sept. 2008.

65. Para 30.

sions of the DDA a new phrase which allowed for "a person associated with a disabled person" to be protected from direct discrimination and harassment. This was regarded "as reading in words that modify so as to remove the incompatibility, or perhaps qualifying the provision as a whole."[66] Therefore, whilst the new Equality Bill in the UK[67] may explicitly address this matter in the future, the Tribunal's interpretation has "resolved" this matter, for the time being, in favour of individuals who feel they have been discriminated against because of their association with a person with a disability.

6. Conclusion

The *Coleman* judgment is significant for confirming that the Employment Equality Directive prohibits direct discrimination and harassment by association on the grounds of disability. This form of discrimination is potentially widespread, and the Court's judgment is to be welcomed for the protection it confers on vulnerable individuals. Moreover, the decision should in all probability be read to mean that the EC non-discrimination directives prohibit direct discrimination and harassment by association across all Article 13 EC grounds. Such an interpretation can easily be accommodated in most Member States, as, in many case, the relevant definitions of discrimination found in the Directive have simply been copied into the national implementation legislation. However, the status of indirect discrimination by association was not addressed in the judgment, and current indications are that this is not prohibited by the EC non-discrimination directives. The judgment is also of interest for the Court's (somewhat confusing) comments on the obligation to provide a reasonable accommodation. Thus far the Court has not been called on to interpret Article 5 of the Directive[68] and, when it is finally called upon to do so, it is hoped that its approach will provide more conceptual clarity than found in *Coleman*.

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66. Para 31.

67. The UK Government has announced that it will submit a new Equality Bill to Parliament in 2009 that will replace the existing non-discrimination legislation, including the DDA.

68. The Court has only handed down two judgments relating to disability and the Employment Equality Directive (*Chacón Navas* and *Coleman*), and both of these related to the personal scope of the Directive with regard to the disability ground. Nevertheless, in both judgments the Court addressed, in passing, the reasonable accommodation duty found in Art. 5.

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