

Similar, Yet Different: The Work-life Balance Directive and the Expanding Frontiers of EU Non-Discrimination Law

Citation for published version (APA):

Bell, M., & Waddington, L. (2021). Similar, Yet Different: The Work-life Balance Directive and the Expanding Frontiers of EU Non-Discrimination Law. *Common Market Law Review*, 58(5), 1401-1432. <https://doi.org/10.54648/cola2021087>

Document status and date:

Published: 01/01/2021

DOI:

[10.54648/cola2021087](https://doi.org/10.54648/cola2021087)

Document Version:

Publisher's PDF, also known as Version of record

Document license:

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SIMILAR, YET DIFFERENT: THE WORK-LIFE BALANCE DIRECTIVE AND THE EXPANDING FRONTIERS OF EU NON-DISCRIMINATION LAW

MARK BELL AND LISA WADDINGTON*

Abstract

The 2019 Work-life Balance Directive prohibits discrimination when workers exercise the rights contained in the Directive, which include rights to take leave for reasons related to caring responsibilities and the right to request flexible working arrangements for caring purposes. This article explores the relationship between the Work-life Balance Directive and EU non-discrimination law. It analyses the provisions of the Directive related to non-discrimination and compares these to equivalent provisions found elsewhere in EU non-discrimination law. It argues that the Work-life Balance Directive should be regarded as forming a new branch of EU non-discrimination law. Such a characterization will be important for its interpretation by the Court of Justice. This is also significant for our understanding of how EU non-discrimination law is evolving.

1. Introduction

The 2019 Work-life Balance Directive extended the rights of workers to take leave for reasons related to caring responsibilities and it created a new right to request flexible working arrangements.¹ A less well-known feature of the Directive is its prohibition of discrimination when workers exercise these rights, or seek to do so. Symbolically, its adoption in 2019 was a sign of the revival of EU social policy after a fallow decade in the wake of the financial crisis. The Directive was proposed on the same day that the Commission

* Mark Bell, Regius Professor of Laws, Trinity College Dublin, the University of Dublin; Lisa Waddington, European Disability Forum Professor in European Disability Law, Faculty of Law, Maastricht University. The authors are grateful to the Department of International and European Law of Maastricht University for providing student assistant support to carry out an initial literature review.

1. Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, O.J. 2019, L 188/79. The Directive must be transposed by Member States by August 2022.

adopted its Recommendation on the European Pillar of Social Rights² and it reflects the prominent commitment to work-life balance within the Pillar.³ Substantively, the Directive is another step in the gradual expansion of EU legislation on the reconciliation of work and family life. As explained below, it advances significantly rights to parental, paternity, and carers' leave for workers, as well as containing a new right to request flexible working arrangements for caring purposes. While other literature has begun to analyse the content of these rights,⁴ this article shines a spotlight on the relationship between the Directive and EU non-discrimination law.

On the one hand, equal treatment is a general principle of EU law and it has a wide-ranging application to different spheres of EU law, such as labour law (in respect of non-standard work)⁵ or immigration law.⁶ On the other hand, there is a distinct body of EU "non-discrimination law" that is focused on protection from discrimination linked to certain personal characteristics, such as gender, ethnic origin or disability. While there is a range of legislation in this field, the most important instruments in relation to employment discrimination are the Racial Equality and Employment Equality Directives,⁷ adopted under Article 19 TFEU, and the Recast Gender Equality Directive,⁸ adopted under Article 157 TFEU. These Directives are closely linked to the right to non-discrimination in Article 21(1) CFR and, in the case of the Recast Gender Equality Directive, Article 23 CFR on equality between women and men. This body of EU non-discrimination law has developed a recognizable and largely common set of concepts and instruments that sets it apart from other types of EU legislation. This includes specific definitions of different kinds of discrimination, and certain procedural requirements, relating *inter*

2. Commission Recommendation (EU) 2017/761 on the European Pillar of Social Rights, O.J. 2017, L 113/56.

3. The Pillar was adopted on 17 Nov. 2017 as an "Interinstitutional Proclamation" of the European Parliament, the Council and the Commission: O.J. 2017, C 428/10.

4. E.g. Oliviera, De la Corte-Rodríguez and Lütz, "The new Directive on work-life balance: Towards a new paradigm of family care and equality?", 45 *EL Rev.* (2020), 295–323.

5. See further Muir, *EU Equality Law – The First Fundamental Rights Policy of the EU* (OUP, 2018), p. 120.

6. *Ibid.*, at p. 133.

7. Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/22, and Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.

8. Directive (EC) 2006/54 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. In respect of self-employment, the Recast Gender Equality Directive is complemented by Directive (EU) 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, O.J. 2010, L 180/1.

alia to the establishment of equality bodies, remedies and sanctions, and requirements regarding the burden of proof in cases of alleged discrimination.

The Work-life Balance Directive prohibits discrimination on the ground of having requested or taken paternity, parental or carers' leave, or flexible working arrangements, for a care-related reason.⁹ It responds to evidence from the Member States that this remains a widespread problem. A detailed comparative study in 2018 concluded:

“despite the existence of clear formal statutory rights implementing the rights laid out in EU law at domestic level, in practice many individuals continue to experience dismissal, discrimination and unfavourable treatment because they are pregnant or exercise their right to family-related leave. Such discrimination appears to be systemic and widespread and has not decreased ...”¹⁰

Such discrimination was already partially addressed in the Parental Leave Directive,¹¹ which the new Directive replaces, but the Work-life Balance Directive expands the personal scope of the protection against discrimination. Although the provisions regarding discrimination are not as elaborate as those found in EU non-discrimination Directives, equality bodies are given a role in their enforcement.¹² A picture emerges, therefore, of (partial) commonalities between the Work-life Balance Directive and EU non-discrimination directives. This article provides a detailed analysis of the substantive content of the non-discrimination provisions in the Work-life Balance Directive. It argues that these provisions should be understood to fall under the umbrella of EU non-discrimination law and that this will be significant for how they are interpreted by the Court of Justice of the EU. In addition, the article reflects on what this then implies for our understanding of how EU non-discrimination law is evolving.

The article begins with a short introduction to the paradigm of EU non-discrimination law. It then provides an overview of the Work-life Balance Directive. After this, it examines the Directive's provisions on discrimination. It identifies those elements that fit within the paradigm of EU non-discrimination law, as well as noting significant differences between the new Directive and existing EU non-discrimination law. In discussing the

9. Directive 2019/1158, Art. 11.

10. Masselot, “Family leave: Enforcement of the protection against dismissal and unfavourable treatment” (Publications Office of the European Union, 2018), 17.

11. Directive (EU) 2010/18 implementing the revised framework agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, O.J. 2010, L 68/13.

12. Directive 2019/1158, Art. 15.

discrimination provisions of the Work-life Balance Directive, the article focuses on the protected ground, the concept of discrimination, and measures relating to the enforcement of rights. The article also pays particular attention to the employer's duties and worker's rights regarding flexible working arrangements, identifying who is entitled to request this, what obligations are imposed on employers, and how a "balancing" of the interests of workers and employers is made. In this respect, the article makes a comparison with the reasonable accommodation duty found in the Employment Equality Directive. The article concludes by reflecting on what this new instrument indicates about the direction of EU non-discrimination law.

2. The paradigm of EU non-discrimination law

As indicated above, although the principle of equal treatment can be applied to a diverse range of situations falling within the scope of EU law, a distinct body of "non-discrimination law" has evolved over time.¹³ This is primarily associated with discrimination on grounds of sex/gender, racial or ethnic origin, religion or belief, disability, age and sexual orientation.¹⁴ In respect of these grounds, Article 19(1) TFEU provides the Union with the competence to "take appropriate action to combat discrimination", which includes the power to adopt binding legislation. In addition, Articles 153(1)(i) and 157(3) TFEU provide a more specialized competence to adopt measures on gender equality in the labour market. Indeed, as discussed in the next section, Article 153(1)(i) is the Treaty base on which the Work-life Balance Directive was adopted. The grounds mentioned in Article 19 TFEU are also given a distinct status by virtue of Article 10 TFEU, which states that "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".¹⁵

These grounds have become associated with the boundaries of EU non-discrimination law. As the ECJ has affirmed on several occasions,

13. For a more extensive analysis of EU non-discrimination law, see, *inter alia*, Ellis and Watson, *EU Anti-Discrimination Law*, 2nd ed. (OUP, 2012); Bell and Numhauser-Henning, "Equal treatment" in Pennings, Jaspers and Peters (Eds.), *EU Labour Law* (Intersentia, 2019), pp. 131–200.

14. Although EU law provides extensive protection from nationality discrimination, it is also clear from the separate treatment of this issue in the Treaties, Charter and related legislation, that this remains apart from the non-discrimination measures associated with Article 19 TFEU.

15. Art. 8 TFEU also provides that "in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women".

Article 19 TFEU is exhaustive in its list of protected characteristics; consequently, it may not be used to adopt measures to combat discrimination in respect of other characteristics, such as sickness.¹⁶ In contrast, the Charter of Fundamental Rights recognizes that the right to non-discrimination is not limited to the list of characteristics mentioned in Article 19 TFEU. Article 21(1) CFR states:

“any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

Yet the explanatory notes accompanying the Charter sought to constrain any possibility that it could be used to open the door to a wider understanding of EU non-discrimination law:

“the provision in Article 21(1) does not create any power to enact anti-discrimination laws . . . nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.”¹⁷

In keeping with this explanation, the ECJ has resisted efforts to rely on Article 21(1) CFR in order to expand protection from discrimination to characteristics not mentioned in the Treaties.¹⁸ In *Kaltoft*,¹⁹ which concerned alleged discrimination on grounds of obesity, the Court rejected the argument that the complainant could rely on Article 21(1) CFR. Given the exhaustive list of grounds mentioned in the Treaties, it held that the Union lacks competence to take measures to combat discrimination on grounds of obesity.²⁰ Differences of treatment due to this characteristic fall outside the scope of Union law and,

16. Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, EU:C:2006:456, para 55.

17. Explanations relating to the Charter of Fundamental Rights, O.J. 2007, C 303/17.

18. Ferri, “The unorthodox relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and secondary rights in the Court of Justice case law on disability discrimination”, 16 *EuConst* (2020), 275–305, 300.

19. Case C-354/13, *FOA, acting on behalf of Karsten Kaltoft v. KL, acting on behalf of the Municipality of Billund*, EU:C:2014:2463, para 34.

20. It should be noted, however, that the Court did accept that in certain circumstances, obesity could fall within the concept of disability for the purposes of Directive 2000/78.

consequently, the Charter is not applicable.²¹ Consequently, EU non-discrimination law remains closely tied to the grounds mentioned in the TFEU. Ward even suggests that the Court's current interpretative stance "may have rendered the words 'such as' in Article 21(1) of the Charter devoid of any jurisprudential effect".²²

What falls inside or outside the boundaries of EU non-discrimination law matters because the ECJ has described the non-discrimination Directives as "merely an expression" of Article 21(1) CFR²³ and, in similar vein, a "specific expression" of the EU law general principle of equal treatment.²⁴ Muir argues that this gives them a constitutional significance by merging their substance and effects with EU primary law.²⁵ Concretely, this has been pivotal in disputes between private parties due to the lack of horizontal direct effect of Directives.²⁶ Article 21(1) CFR provides an alternative remedy in non-discrimination cases because it enjoys direct effect in the same manner as provisions of the Treaties.²⁷ In addition, in some cases, the Court's approach to the interpretation of the non-discrimination Directives has been influenced by the connection that it makes between the Directives and both Article 21(1) CFR and the general principle of equal treatment. For example, the Court has sometimes relied on the fundamental rights that underpin the Directives to favour a narrow reading of provisions that permit departures from the norm of equal treatment.²⁸

With this in mind, it seems clear that whether or not the ECJ views the provisions on non-discrimination in the Work-life Balance Directive as falling inside the realm of EU non-discrimination law is of consequence, because of its constitutional quality. As explained further in this article, this will be particularly relevant when resolving the ambiguities in the non-discrimination rights within the Directive where it is possible to interpret its provisions in a more or less expansive fashion. Before delving into those

21. Case C-354/13, *Kaltoft*, paras. 38–39.

22. Ward, "The impact of the EU Charter of Fundamental Rights on anti-discrimination law: More a whimper than a bang?", 20 *CYELS* (2018), 32–60, 39.

23. Case C-391/09, *Runevič-Vardyn and Lukasz Pawel Wardyn v. Vilniaus miesto savivaldybės administracija*, EU:C:2011:291, para 43, referring to the Racial Equality Directive. See also Case C-414/16, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, EU:C:2018:257, para 47, on the Employment Equality Directive.

24. Case C-555/07, *Kücükdeveci v. Swedex GmbH & Co KG*, EU:C:2010:21, para 21. See also Case C-144/04, *Mangold v. Helm*, EU:C:2005:709.

25. Muir, *op. cit. supra* note 5, at 13.

26. E.g. Case C-414/16, *Egenberger*; Case C-193/17, *Cresco Investigation GmbH v. Achatzi*, EU:C:2019:43.

27. Case C-193/17, *Cresco Investigation*, paras. 76–77.

28. E.g. Case C-476/11, *HK Danmark v. Experian A/S*, EU:C:2013:590, paras. 45–46; Case C-447/09, *Prigge and others v. Deutsche Lufthansa AG*, EU:C:2011:573, paras. 38 and 56.

detailed questions, the next section begins with a broader introduction to the Directive.

3. The Work-life Balance Directive

The roots of the Directive lie in a package of measures on work-life balance presented by the Commission in 2008.²⁹ These were designed to facilitate more women entering the labour market and to advance gender equality in employment. Although some reforms were adopted fairly quickly, such as the 2010 revision of the Parental Leave Directive, other measures stalled, such as the proposed reform of maternity leave.³⁰ In 2017, the Commission relaunched its work-life balance policy by presenting a new legislative proposal.³¹ Again, it was clear that the proposed Directive was animated by the pursuit of gender equality. The Commission justified its initiative on the basis that women were being hindered in the labour market by the structure of existing leave entitlements, which were focused on mothers and inadequate for fathers, and by a lack of flexibility in working arrangements.³² The headline elements of the proposal were: the creation of new rights for fathers to paternity leave; ensuring that a minimum amount of parental leave could not be transferred between parents (i.e. from fathers to mothers); a new right to leave for carers; and the right of parents and carers to request flexible working arrangements for caring purposes. Notably, the proposal drew inspiration from the public consultations on the (then) proposed European Pillar of Social Rights and it cited a “wide consensus” on the need for new measures on work-life balance.³³ By characterizing the proposal as a tangible expression of the (renewed) social dimension of the EU,³⁴ the pressure for action was undoubtedly increased. Indeed, the main points of the Directive were politically agreed by the institutions within two years of the proposal.³⁵

The Parental Leave Directive, in both its original and revised forms, was based on a framework agreement of the social partners, but they did not agree

29. Commission Communication, “A Better work-life balance: Stronger support for reconciling professional, private and family life”, COM(2008)635.

30. Luetz and De la Corte Rodríguez, “La directive sur l’équilibre entre vie professionnelle et vie privée: vers un partage plus égalitaire des responsabilités familiales”, 629 Rev. de l’UE (2019), 355–360, at 356.

31. Commission Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM(2017)253.

32. *Ibid.*, at 1.

33. *Ibid.*, at 4.

34. *Ibid.*, at 5.

35. Oliveira et al., *op. cit. supra* note 4, at 301.

to enter into fresh negotiations on work-life balance. Consequently, the Commission produced its own legislative proposal, but it relied on the same legal basis as that used for the Parental Leave Directive. Article 153(1)(i) TFEU permits the Union to support the activities of the Member States in the field of “equality between men and women with regard to labour market opportunities and treatment at work”. This is different from the legal basis of the Recast Gender Equality Directive, which is Article 157(3) TFEU on the “application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation”. Although there can be no doubt that both provisions of the Treaty are concerned with gender equality, the wording of Article 157(3) TFEU is arguably more focused on the “application” of equal treatment through non-discrimination legislation, whereas Article 153(1)(i) is phrased in slightly broader language. Nevertheless, non-discrimination was identified by the Commission as an issue that had arisen in the research conducted prior to issuing its proposal. Specifically, it referred to a study on workplace discrimination related to parenthood conducted by the European Network of Equality Bodies.³⁶ In addition, detailed comparative research for the Commission had documented continued evidence of discrimination related to pregnancy, maternity and parenthood.³⁷ As discussed in more detail in the next section of this article, the Recast Gender Equality and Parental Leave Directives already prohibited less favourable treatment related to maternity or parental leave. As the Parental Leave Directive was to be replaced by the Work-life Balance Directive, it is unsurprising that the Commission proposed to retain this existing prohibition of discrimination, but also to adapt it to the wider remit of the new Directive. It does not appear that this part of the proposal gave rise to significant controversy during the legislative process.

The connection between gender equality and the Work-life Balance Directive is reinforced in the preamble, which refers to Article 23 CFR on equality between women and men, as well as Article 33 CFR on the reconciliation of family and professional life.³⁸ The reference to these provisions of the Charter had already been present since the 2010 revision of the Parental Leave Directive.³⁹ Indeed, the ECJ has acknowledged that the

36. Commission Proposal cited *supra* note 31, at 9. See further, Equinet, *Equality Bodies Promoting a Better Work-Life Balance for All* (Equinet, 2013).

37. Masselot, Caracciolo di Torella and Burri, “Fighting discrimination on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries” (Publications Office of the European Union, 2012).

38. Directive 2019/1158, Recitals 2 and 3. Recital 2 also mentions Art. 3(3) TEU, which states that the Union shall promote equality between women and men.

39. In the “General considerations” of the Framework Agreement, annexed to Directive 2010/18, cited *supra* note 11.

connection between the Parental Leave Directive and the rights found in the Charter mean that it should be viewed “as articulating a particularly important EU social right”.⁴⁰ The Work-life Balance Directive does not, however, refer to Article 21(1) CFR on the right to non-discrimination. At the same time, its preamble includes some recognition that the implications of the Directive go beyond gender equality. Recital 4 recalls the ratification by the Union of the UN Convention on the Rights of Persons with Disabilities (CRPD) and the duty to interpret Union acts in a manner consistent with the Convention, as far as possible. As discussed later, the prohibition of discrimination for carers exercising the rights found in the Directive is likely to be relevant for those who care for persons with disabilities.

The final text adopted by the Council and Parliament retained most of the headline features of the Commission proposal, but with some compromises over the duration and conditions for taking different types of leave.⁴¹ It is not the purpose of this article to make a detailed analysis of each of these rights, but Table 1 summarizes the key entitlements and their beneficiaries.

Table 1: Key Entitlements in the Work-life Balance Directive

Type of Leave	Persons Covered	Standard Duration
Article 4: Paternity Leave	Fathers Equivalent second parents if recognized by national law	10 working days following birth of the worker’s child
Article 5: Parental Leave	Parents	4 months to be taken before the child reaches 8 years old
Article 6: Carers’ Leave	A worker providing personal care or support to a relative or a person who lives in the same household as the worker	5 working days per year
Article 7: <i>Force Majeure</i> Time Off	Workers	Time off for urgent family reasons in the case of illness or accident making the attendance of the worker indispensable

40. Case C-129/20, *XI v. Caisse pour l’avenir des enfants*, EU:C:2021:140, paras. 43–44.

41. See further Oliveira et al., *op. cit. supra* note 4.

Type of Leave	Persons Covered	Standard Duration
Article 9: Flexible Working Arrangements	Workers with children (at least including those with children up to 8 years old) Carers (same definition as applies to carers' leave)	Right to request flexible working arrangements Duration may be subject to "reasonable limitation"

4. Non-discrimination and the Work-life Balance Directive

This section looks further at the Directive's specific provisions relating to discrimination. It explores how these compare to equivalent provisions of EU non-discrimination law and whether they should be interpreted in a similar manner. It examines: the protected ground of discrimination; the concept of discrimination; the right to request flexible working arrangements; and a number of measures relating to the enforcement of rights found in the Directive.

4.1. *The protected ground of discrimination*

As introduced in section 2, a key feature of EU non-discrimination law is its focus on the grounds mentioned in the TFEU. For the most part, the hallmark of these grounds is a deeply personal trait, over which the individual has little or no control (e.g. age, ethnic origin, sexual orientation). In part, this reflected the historical association between non-discrimination law and what were (then) regarded as immutable characteristics.⁴² As non-discrimination law has evolved, it has been increasingly recognized that its protected characteristics are less static than initially understood and that this should not be the only determinant of whether a characteristic is worthy of protection.⁴³ This perspective was reflected in the well-known Opinion of Advocate General Poiras Maduro in *Coleman*.⁴⁴ That case raised the question of whether the prohibition of discrimination on grounds of disability could be extended to the primary carer of a child with a disability. Evidently, the status of caring for someone with a disability is neither innate, nor permanent. He argued that the interpretation of equality should be guided by the values of human dignity and personal autonomy. With regard to the latter value, this:

42. Fredman, *Discrimination Law*, 2nd ed. (OUP, 2011).

43. Khaitan, *A Theory of Discrimination Law* (OUP, 2015); Solanke, *Discrimination as Stigma – A Theory of Anti-Discrimination Law* (Hart Publishing, 2016).

44. Opinion in Case C-303/06, *Coleman v. Attridge Law and Steve Law*, EU:C:2008:61.

“dictates that individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options. The exercise of autonomy presupposes that people are given a range of valuable options from which to choose. When we act as autonomous agents making decisions about the way we want our life to develop our ‘personal integrity and sense of dignity and self-respect are made concrete’”.⁴⁵

Although the ECJ did not explore this argument in its decision, it held that, in certain circumstances, less favourable treatment because of a caring relationship with a person with a disability can constitute discrimination on grounds of disability.⁴⁶ In extending the circle of those protected against discrimination beyond those possessing a particular characteristic (in this case, disability), the Court opened the door to a more flexible reading of the rationale for protection from discrimination; in other words, it implicitly rejected the idea that the law is only concerned with persons with certain immutable characteristics.

This outlook was echoed by Advocate General Sharpston in her Opinion in *Bougnaoui*, which concerned the dismissal of a Muslim employee for wearing a headscarf.⁴⁷ Drawing on the reasoning of Advocate General Poiares Maduro in *Coleman*, she emphasized the “moral impact” of discrimination on a person’s autonomy.⁴⁸ The emphasis on autonomy runs counter to the argument that the individual could have chosen to conceal her religious identity by not wearing a headscarf. Yet this remains contested terrain. In *Achbita*,⁴⁹ which concerned the dismissal of a Muslim employee who commenced wearing a headscarf, Advocate General Kokott maintained that there was a meaningful distinction between discrimination grounds that related to one’s control over the expression of the personal characteristic:

“unlike sex, skin colour, ethnic origin, sexual orientation, age or a person’s disability, the practice of religion is not so much an unalterable fact as an aspect of an individual’s private life, and one, moreover, over which the employees concerned can choose to exert an influence”.⁵⁰

45. Opinion in Case C-303/06, *Coleman*, para 9 (citations omitted).

46. Case C-303/06, *Coleman*, EU:C:2008:415, para 56.

47. Opinion in Case C-188/15, *Bougnaoui, Association de défense des droits de l’homme v. Micropole SA*, EU:C:2016:553.

48. *Ibid.*, para 72.

49. Opinion in Case C-157/15, *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions*, EU:C:2016:382.

50. *Ibid.*, para 116.

In its decisions in *Bougnaoui* and *Achbita*, the Court walked a middle line. On the one hand, it accepted that the protected ground of religion encompassed also external expression of religious belief.⁵¹ On the other hand, it accepted that it could be justified for an employer to suppress such manifestations of belief in the pursuit of a policy of religious neutrality.⁵²

What emerges, therefore, is a picture where EU non-discrimination law has evolved in a direction that rejects a static view of discrimination grounds as characteristics that are unchanging or completely outside of the control of the individual, even if the question of personal “choice” is not entirely absent from case law. This discussion is relevant when turning to consider discrimination relating to the exercise of rights to leave for caring purposes. At times, older case law foundered on the Court’s characterization of taking parental leave as a “choice”. In a case that concerned less favourable treatment of those who took parental leave compared to those absent from work for compulsory military or civilian service, the Court held that these situations were not comparable: “parental leave is leave taken voluntarily by a worker in order to bring up a child. The voluntary nature of such leave is not lost because of difficulties in finding appropriate structures for looking after a very young child, however regrettable such a situation may be.”⁵³ The Work-life Balance Directive represents a further indication that EU non-discrimination law is moving away from the view that protection from discrimination should not extend to characteristics or circumstances over which the individual can, in theory, exercise personal autonomy. The key provision is Article 11, entitled “Discrimination”. This states:

“Member States shall take the necessary measures to prohibit less favourable treatment of workers on the ground that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6 or time off from work provided for in Article 7, or that they have exercised the rights provided for in Article 9.”

In terms of personal scope, it is notable that a significant proportion of the workforce will potentially be able to rely on this protection from discrimination. In particular, Article 7 on time off for urgent family reasons might be invoked by almost any worker who has living relatives that could be

51. Case C-188/15, *Bougnaoui*, EU:C:2017:204, para 30; Case C-157/15, *Achbita*, EU:C:2017:203, para 28.

52. *Ibid.*, Case C-157/17, *Achbita*, para 40.

53. Case C-220/02, *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich*, EU:C:2004:334, para 60.

regarded as part of the worker's "family".⁵⁴ Although the Directive does not define "family", it defines "relative" as "the worker's son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership".⁵⁵ As a protected ground of discrimination, Article 11 of the Work-life Balance Directive differs from the personal characteristics expressly covered by EU non-discrimination Directives. Instead, it has echoes of the discrimination by association approach found in *Coleman*. The situations covered by the Work-life Balance Directive depend on the existence of a relationship to another person, whether as a parent or a carer. That relationship is certainly long-term in many instances, but the circumstances could also be temporary. For example, if a close relative has an accident, then a worker might need to take time off for *force majeure* reasons to provide care or to put in place caring arrangements. The worker will benefit from protection from discrimination because he or she requested and/or took such time off. This protection is ongoing insofar as it encompasses discrimination because such time off was taken in the past. At the same time, the underlying personal circumstances might not be long-term in nature; if the relative recovers quickly from the accident, then the need to provide care might cease.⁵⁶ This observation is not intended to query the justification for applying the prohibition of discrimination to persons in such situations. It does, though, represent an extension of the prohibition of discrimination to situations that are further removed from the historical paradigm of what constitute the protected characteristics.

In the context of the Work-life Balance Directive, the most prominent justification for this extension of the personal scope of non-discrimination law is the connection to gender equality, but – as discussed below – this is not the only link. The Directive builds on a trajectory that emerged from previous legislation. The 2006 Recast Gender Equality Directive prohibited "less favourable treatment of a woman related to pregnancy or maternity leave".⁵⁷ This codified earlier case law that had taken the view that unfavourable

54. See further, Weldon-Johns, "EU work-family policies revisited: Finally challenging caring roles?", 12 ELLJ (2021), forthcoming.

55. Directive 2019/1158, Art. 3(1)(e).

56. Notably, the Commission's proposal for the Work-life Balance Directive did not include time off for *force majeure* reasons within the discrimination prohibition, but this was included as a result of an amendment adopted by the European Parliament: see Art. 11, Legislative resolution of 4 April 2019 on the proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, TA/2019/0348.

57. Directive 2006/54, Art. 2(2)(c). This provision was originally introduced in Directive (EC) 2002/73 amending Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. 2002, L 269/15.

treatment related to pregnancy and maternity leave was a form of direct discrimination on grounds of sex.⁵⁸ In 2010, the Parental Leave Directive included an expanded provision on protecting “workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave”.⁵⁹ This went a step further than the aforementioned provision in the Recast Gender Equality Directive. Whereas the latter only protected women from discrimination related to pregnancy or maternity leave, less favourable treatment related to parental leave can affect both women and men. The substantial over-representation of women amongst those taking parental leave⁶⁰ means that less favourable treatment for this reason will often also be a *prima facie* instance of indirect discrimination on grounds of sex.⁶¹ However, this argument will not typically assist a male complainant, so the protection from discrimination introduced by the Parental Leave Directive had genuine added value.⁶²

Having already featured in the Parental Leave Directive, it was logical that protection from discrimination should be carried over into the Work-life Balance Directive. Again, the underpinning rationale is combating gender-based inequalities. The over-representation of women amongst those who are likely to take parental or carers’ leave, or request flexible working arrangements, means that the discrimination protection can be viewed as shoring up the pre-existing legislation on gender equality.⁶³ This can also be understood as the reason for protecting fathers and male carers from discrimination when using these rights. Less favourable treatment of fathers, or men who are carers, may reflect gender stereotypes on the part of employers about who should be doing the caring,⁶⁴ while obstacles to fathers exercising

58. E.g. Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, EU:C:1990:383; Case C-136/95, *CNAVTS v. Thibault*, EU:C:1998:178, para 26. Mulder notes that there is a debate as to whether the legislative text is as far-reaching as the earlier case law: Mulder, “Directive 2006/54/EC” in Ales, Bell, Deinert and Robin-Olivier (Eds.), *International and European Labour Law: Article-by-Article Commentary* (Nomos, 2018), pp. 547–585, at pp. 561–562.

59. Clause 5(4), annexed to Directive 2010/18. In comparison, the 1996 Framework Agreement on Parental Leave only protected workers from dismissal, but not “less favourable treatment”: Clause 2(4), annexed to Directive (EC) 96/34 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, O.J. 1996, L 145/4.

60. See further, Eurofound, “Parental and Paternity Leave – Uptake by Fathers” (Publications Office of the European Union, 2019).

61. E.g. Case C-486/18, *RE v. Praxair MRC SAS*, EU:C:2019:379, paras. 81–86.

62. Kamanabrou and Wietfeld, “Directive 2010/18/EU” in Ales et al., op. cit. *supra* note 58, pp. 1026–1048, at p. 1043.

63. Oliveira et al., op. cit. *supra* note 4, at 296.

64. Chieragato, “A work-life balance for all? Assessing the inclusiveness of EU Directive 2019/1158”, 36 *International Journal of Comparative Labour Law and Industrial Relations* (2020), 59–80, at 69.

these rights may compound the tendency for women to have a disproportionate share of caring responsibilities.⁶⁵

Although it is reasonable to understand the discrimination provision in the Work-life Balance Directive as designed to “facilitate” gender equality,⁶⁶ it can also be argued that its scope is in fact more extensive. In respect of the protection that it affords to those who are carers of adults, this supports gender equality because women continue to be more likely to be engaged in such caring than men. However, there is also an important intersection with the protected ground of disability found in the Employment Equality Directive. Carers of persons with disabilities will fall within the scope of the Work-life Balance Directive if they are either close relatives or living in the same household as the person for whom they provide care. As mentioned earlier, the *Coleman* case has already established that less favourable treatment of a primary carer of a person with a disability can constitute unlawful discrimination.⁶⁷ The Work-life Balance Directive reinforces this position by providing an additional layer of protection for those seeking to combine working life with caring. This is significant, because an analysis of the Member States in 2018 found that those who took carers’ leave were not always protected in national law from discrimination because of taking such leave and that there was little evidence of any case law on this issue.⁶⁸ The discrimination prohibition found in the Work-life Balance Directive could even be viewed as a step along the path to recognizing the status of being a carer as a prohibited ground of discrimination.⁶⁹ It has been argued that being a carer often reflects familial or emotional bonds that touch closely on personal identity and that caring frequently arises in situations over which the individual has limited control.⁷⁰ Therefore, in certain respects, being a carer shares some of the emblematic features of the discrimination grounds already covered by EU non-discrimination legislation. Nevertheless, the protection

65. Oliveira et al., op. cit. *supra* note 4, at 300.

66. Ibid., at 319; Russell and Masselot, “Why do we care? The shifting concept of care in New Zealand and in the United Kingdom”, 36 *International Journal of Comparative Labour Law and Industrial Relations* (2020), 81–106, at 96.

67. Case C-303/06, *Coleman*, para 56.

68. Masselot, op. cit. *supra* note 10, 96.

69. See further, Waddington, “Carers, gender and employment discrimination: What does EU law offer Europe’s carers?” in Moreau (Ed.), *Before and After the Economic Crisis: What Implications for the ‘European Social Model’?* (Edward Elgar, 2011), pp. 101–128.

70. See further, Caracciolo di Torella and Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (Routledge, 2020), pp. 9–10; Horton, “Caring for adults in the EU: Work-life balance and challenges for EU law”, 37 *Journal of Social Welfare and Family Law* (2015), 356–367, at 362.

provided in the Work-life Balance Directive remains partial. As Weldon-Johns points out, the definition of “carer” found in the Directive:⁷¹

“reflects the traditional nuclear family by focusing on traditional bonds and presumed relationships of care, rather than focusing on responsibilities for care that may extend beyond defined familial roles . . . it fails to acknowledge the diverse and complex relationships and responsibilities for care that may exist, such as care for other family members, neighbours or friends”.⁷²

Moreover, protection from discrimination will only arise where the carer is exercising one of the rights found in the Work-life Balance Directive. So, for example, a job applicant who is not hired because the prospective employer is concerned about how they would combine work with their caring responsibilities is unlikely to find protection in the Work-life Balance Directive.

Arguably, the most effective means of preventing discrimination against carers would be to adopt an express prohibition of discrimination on this ground,⁷³ rather than seeking to indirectly derive protection via other grounds, such as gender and disability, or attaching protection to the exercise of certain entitlements, as reflected in the Work-life Balance Directive. Yet, as explained in section 2, the rigid parameters of EU non-discrimination law place great barriers in the path of expanding the list of protected grounds. Even though the non-exhaustive list of grounds found in Article 21(1) CFR allows for dynamism in the interpretation of the right to non-discrimination, the ECJ’s existing case law demonstrates a marked reluctance to rely upon the Charter to move beyond the list of protected characteristics found in the provisions of the TFEU. In the absence of any change in that reading of the Treaties or the Charter, it appears that evolution in the personal scope of EU non-discrimination law will come through the type of provision found in the Work-life Balance Directive. This incrementally extends the field of non-discrimination law without fundamentally disturbing its TFEU boundaries.

71. Directive 2019/1158, Art. 3(1)(d) states: “‘carer’ means a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State”.

72. Weldon-Johns, *op. cit. supra* note 54, at 16.

73. E.g. in Ireland’s Employment Equality Acts 1998–2015, one of the protected grounds is “family status”. This includes being a parent for a person under the age of 18 and being a parent or resident primary carer for an adult with a disability “which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis” (s.2(1)).

4.2. *The concept of discrimination*

Article 11 prohibits “less favourable treatment of workers on the ground that they have applied for, or have taken” the various types of leave covered by the Directive, or exercised the right to request flexible working arrangements. The first observation that can be made is that the Directive does not provide any further definition of what constitutes discrimination. This does not appear to have been a significant issue during the legislative process, judging from the preparatory documents. In its committee report, the Parliament had proposed adding words to Article 11 in order for it to “prohibit discrimination and less favourable treatment”,⁷⁴ which might indicate a desire to ensure that the interpretation of discrimination was not confined to instances of less favourable treatment. While this amendment was not adopted, Recital 40 (in the final text) states that workers should be protected against “discrimination or any less favourable treatment”. Unlike EU non-discrimination directives, there is no reference to direct discrimination, indirect discrimination, or harassment. There are, at least, two possible models for how this generic reliance on “less favourable treatment” can be approached.

One approach can be found in the directives on part-time and fixed-term work. These refer to the principle of non-discrimination, which is defined by reference to a test of less favourable treatment. For example: “In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds”.⁷⁵

There are, however, significant differences between this formula and that found in Article 11 of the Work-life Balance Directive. First, these directives do not prohibit *any* less favourable treatment of fixed-term or part-time workers. Instead, it is limited to a comparison of fixed-term and permanent work (or part-time and full-time work). Consequently, the ECJ has held that it is not unlawful to treat one category of fixed-term worker less favourably than other fixed-term workers.⁷⁶ Secondly, it is necessary to identify a permanent

74. Amendment 80, Report on the proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, A8-0270/2018, 23 Aug. 2018.

75. Clause 4(1) of the Framework Agreement in the Annex of Directive 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, O.J. 1999, L 175/43. See also, Clause 4(1) of the Framework Agreement in the Annex of Directive (EC) 97/81 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, O.J. 1998, L 14/9.

76. Case C-16/15, *Pérez López v. Servicio Madrileño de Salud (Comunidad de Madrid)*, EU:C:2016:679, para 66; Case C-20/10, *Vino v. Poste Italiane SpA*, EU:C:2010:677, para 57.

worker, or a full-time worker, in a “comparable” situation. This has occasionally been a barrier to claims under the non-discrimination provision of the Part-Time Work Directive where no comparable scenario for a full-time worker could be identified.⁷⁷ Thirdly, less favourable treatment can be justified on objective grounds. None of these elements are expressly found in Article 11 of the Work-life Balance Directive, which suggests that it should not be interpreted as embracing a concept of discrimination equivalent to that found in these directives. This matters, because a more rigorous approach to interpreting discrimination exists in the EU non-discrimination directives, so the reading of the Work-life Balance Directive will be strengthened if it is aligned with the understanding of discrimination found in those instruments. Moreover, it should be noted that the ECJ has never described the prohibition of discrimination in the Part-Time and Fixed-Term Work Directives as an expression of Article 21(1) CFR. Instead, it has described them as an implementation of the principle of equality before the law found in Article 20 CFR.⁷⁸ This suggests that, in the Court’s mind, there is a distinction between the concept of non-discrimination derived from Article 21(1) CFR and its related directives, and provisions on equal treatment found in other branches of EU law.

If the concept of discrimination in the Work-life Balance Directive is instead linked with that found in EU non-discrimination law, then an appropriate point of reference will be the less favourable treatment test found in the Recast Gender Equality Directive. Article 2(2)(c) of that Directive prohibits “any less favourable treatment of a woman related to pregnancy or maternity leave”.⁷⁹ The genesis of this provision was case law where it was difficult to apply the normal comparator test used in direct discrimination cases. In particular, where discrimination occurred because of pregnancy, the Court held that this was to be treated as direct discrimination because it could only affect women.⁸⁰ Similarly, in *Thibault*, the Court clarified that “unfavourable treatment” arising from maternity leave was direct discrimination on grounds of sex, again without the need to identify a male comparator.⁸¹ The reason for inserting Article 2(2)(c) in the Recast Gender Equality Directive was to codify this case law and thereby avoid the need for a comparator test in such discrimination claims.⁸²

77. E.g. Case C-221/13, *Mascellani v. Ministero della Giustizia*, EU:C:2014:2286, para 27.

78. Case C-96/17, *Gardenia Vernaza Ayovi v. Consorci Sanitari de Terrassa*, EU:C:2018:603, para 20.

79. Directive 2006/54, Art. 2(2)(c).

80. Case C-177/88, *Dekker*, para 12.

81. Case C-136/95, *Thibault*, para 32.

82. Recital 23, Directive 2006/54.

Arguably, it is more persuasive to view the less favourable treatment test in Article 11 of the Work-life Balance Directive as reflecting the same rationale as Article 2(2)(c) of the Recast Gender Equality Directive. As discussed above, Article 11 reflects a legislative history whereby the provisions on non-discrimination relating to maternity leave were first replicated for parental leave. The Commission's proposal for the Work-life Balance Directive made it explicit that Article 11 was intended to maintain that existing protection, and to extend it to other types of leave, as well as the right to request flexible working arrangements.⁸³ Drawing inspiration from gender equality law is also consistent with the preamble of the Work-life Balance Directive, which links the Directive to Article 23 CFR on equality between women and men.⁸⁴ Therefore, it would be fully in keeping with the spirit and purpose of the Work-life Balance Directive to read Article 11 in a similar manner to Article 2(2)(c) of the Recast Gender Equality Directive. This implies that unfavourable treatment because of exercising the rights found in the Work-life Balance Directive would breach Article 11, without the need to identify another worker in a comparable situation. In this regard, there is a clear difference with the concept of discrimination in the Part-Time and Fixed-Term Work Directives where, as explained above, a comparator must be identified. Removing the need for a comparator is also significant because, in the past, the ECJ has rejected claims of sex discrimination relating to parental leave because (in its view) a worker on parental leave was not in a comparable situation to other workers.⁸⁵

Aligning the Work-life Balance Directive with other EU non-discrimination Directives is also significant when considering whether Article 11 prohibits harassment. Consider a *Coleman*-type scenario where a male employee experiences harassment because he exercises the right to carers' leave to provide care for an elderly parent. There might be an argument here that this is age discrimination by association (echoing the approach in *Coleman*). The more pertinent question is whether being subject to harassment because of carers' leave is contrary to the prohibition of "less favourable treatment" in the Work-life Balance Directive? On the one hand, an explicit prohibition of harassment is not found in the Work-life Balance Directive, unlike EU non-discrimination Directives.⁸⁶ On the other hand, this does not exclude the possibility of interpreting "less favourable treatment" in

83. Commission Proposal cited *supra* note 31, at 14.

84. Recital 2, Directive 2019/1158.

85. Kamanabrou and Wietfeld, *op. cit. supra* note 62, p. 1044; e.g. Case C-333/97, *Lewen v. Denda*, EU:C:1999:512, para 37; Case C-537/07, *Gómez-Limón Sánchez-Camacho v. Instituto Nacional de la Seguridad Social and others*, EU:C:2009:462, para 57.

86. E.g. Art. 2(1), Directive 2006/54.

the Work-life Balance Directive as encompassing harassment.⁸⁷ The arguments in favour of such an interpretation are strengthened if the Work-life Balance Directive is viewed as falling within the family of EU non-discrimination law, where harassment is understood to be a form of prohibited discrimination.

4.3. *Flexible working arrangements*

The Work-life Balance Directive provides workers with the right to request flexible working arrangements in order to enable them to carry out caring tasks.⁸⁸ This is linked to a corresponding duty on employers to consider and respond to the request in a timely manner and, in case the request is refused, to provide reasons for the refusal or postponement of such arrangements.⁸⁹ Flexible working arrangements are understood broadly to include “the possibility for workers to adjust their working patterns including through the use of remote working arrangements, flexible working schedules, or reduced working hours”.⁹⁰ Unlike the forms of leave addressed under the Directive, there is not an absolute right to receive flexible working arrangements for a care-related reason, but only a right to request such arrangements and have the request seriously considered by the employer.

The right to request flexible working arrangements is conferred on parents of children up to a specific age, which shall be at least eight years,⁹¹ and “carers”. The Directive allows Member States the possibility to restrict the right to request flexible working arrangements for caring purposes to workers who have worked for the employer for a specific period, which cannot exceed six months.⁹²

As noted above, employers are under a duty to consider the request for flexible working arrangements, but are not obliged to grant the request. The Impact Assessment accompanying the Commission’s legislative proposal

87. McColgan provides examples from domestic case law of using a “less favourable treatment” test in cases of harassment: McColgan, “Harassment” in Schiek, Waddington and Bell (Eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007), pp. 477–560, p. 524.

88. Directive 2019/1158, Art. 9(1).

89. Directive 2019/1158, Art. 9(2).

90. Directive 2019/1158, Art. 3(f) and Recital 34. For a discussion of flexible working hours in particular, see Todorova and Radulovikj, “Work-life balance: Challenges of gender equality in the labour market of North Macedonia vs European Union”, 4 *EU and Comparative Law Issues and Challenges Series* (2020), 751–770, at 761–765.

91. The original Commission proposal indicated workers with children up to at least the age of 12 were to be entitled to request flexible working arrangements: Commission Proposal cited *supra* note 31, Art. 9(1).

92. Directive 2019/1158, Art. 9(4).

stated that an absolute right to “request flexible working” (presumably meaning a right to flexible working arrangements) was discarded “as it would create serious restrictions for employers to determine how work is organised in a firm”.⁹³ The Directive gives some indication of the factors employers should consider when deciding on a request, and makes clear that a balancing of interests is required, “taking into account the needs of both the employer and worker”.⁹⁴ Recital 36 of the Directive also indicates that the employer should be able to take into account, *inter alia*, “the duration of the flexible working arrangements requested and the employers’ resources and operational capacity to offer such arrangements”.

In terms of EU non-discrimination law, the right to request flexible working arrangements bears certain similarities with the right to reasonable accommodation found in the Employment Equality Directive. Article 5 of that Directive provides:

“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.”

Undoubtedly, allowing a worker to change their working pattern and hours in order to better combine work and care tasks is a form of accommodation. However, there are significant differences between the “right to request” flexible working arrangements in the Work-life Balance Directive and the “duty to provide” a reasonable accommodation in the Employment Equality Directive.

The duty found in the Work-life Balance Directive can be regarded as a procedural duty, since it involves a duty to consider a request seriously and to grant the request in the absence of a good reason for refusal, but it is not a duty to grant the request. A procedural duty might be summarized as where:

“The worker is given a statutory right to request a workplace adjustment, although this may be circumscribed to certain types of adjustment and only at certain intervals in the employment relationship. The employer has a duty to consider the worker’s request and the law may require an

93. Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU final, SWD(2017)202, at pp. 11 and 68.

94. Directive 2019/1158, Art. 9(2).

explanation of the ultimate decision. Managerial prerogative is preserved with regard to how the employer weighs the competing considerations.”⁹⁵

In contrast, the reasonable accommodation duty found in the Employment Equality Directive can be regarded as a “substantive duty”:

“The employer has an obligation to make workplace adjustments in order to achieve the end result of removing or mitigating barriers that the worker experiences to her participation or advancement in the job.”⁹⁶

The reasonable accommodation duty is therefore more far-reaching and, in particular, it is more difficult to justify a failure to provide an accommodation for a person with a disability than it is to justify a failure to provide flexible working arrangements for a carer – the existence of a “good reason” for not providing a disability-related accommodation does not remove the duty. Instead, the employer must show a far greater degree of hardship or difficulty, amounting to a “disproportionate or undue burden” before legitimately refusing an accommodation request.

Nevertheless, whilst the “disproportionate burden” test is more demanding (i.e. more difficult to meet) than the test for declining to allow flexible working arrangements for carers, there remain some similarities. Both tests involve a balancing of interests of the employer and employee, albeit that the balance is weighted more heavily in the employee’s favour under the reasonable accommodation duty. Both tests can also explicitly consider the financial costs involved with providing the accommodation/arrangements, and the Commission has indicated that “excessive cost” can be a reason to refuse a request for flexible working arrangements.⁹⁷ Recital 36 of the Work-life Balance Directive goes further than the Employment Equality Directive insofar as it recognizes that factors unrelated to cost can also be taken into account, including the needs of both the employer and worker, the duration of the flexible working arrangements and the employers’ operational capacity. Again, this gives the impression that the obligation on the employer to provide flexible working arrangements is weaker than the corresponding duty to provide reasonable accommodation.

A further difference between the two duties is that EU law does not allow Member States to restrict the right to benefit from a reasonable accommodation to disabled individuals with a minimum period of

95. Bell, “Adapting work to the worker: The evolving EU legal framework on accommodating worker diversity”, 18 *International Journal of Discrimination and the Law* (2018), 124–143, at 138.

96. *Ibid.*, at 137.

97. Commission Proposal cited *supra* note 31, p. 10.

employment – indeed, the duty is even owed to job applicants, who may never take up a job with an employer, and disabled workers are entitled to a reasonable accommodation from their first day of employment. In contrast, the right to request flexible working arrangements can be conditional on a minimum period of work. Lastly, the range of actions which an employer may need to take in response to a reasonable accommodation request are potentially quite far-reaching, while the actions required to establish flexible working arrangements are more limited. For example, flexible working arrangements do not expressly include allowing a worker to transfer to another position which is less physically or mentally demanding, or allowing a worker to transfer to another location / work site (as opposed to remote working), even though such arrangements may enable the worker to (better) carry out caring tasks.

One explanation for the differences between the two duties lies in how closely they are connected with the prohibition of discrimination. In the Work-life Balance Directive, the duty to consider requests for flexible working arrangements is not characterized as flowing from the principle of non-discrimination. In contrast, Article 5 of the Employment Equality Directive states that reasonable accommodation should be provided “in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities”. This link between accommodation and non-discrimination has been reinforced subsequent to the adoption of the Directive. Notably, the CRPD included denial of reasonable accommodation in its definition of discrimination on the basis of disability;⁹⁸ this has been acknowledged by the ECJ.⁹⁹ However, even if the two duties are construed differently, the Work-life Balance Directive may contain elements which could provide some inspiration for the interpretation of the reasonable accommodation duty under the Employment Equality Directive. As noted above, the Work-life Balance Directive refers to a range of non-economic factors to be considered when deciding on a request to work flexibly,¹⁰⁰ including the needs of both the employer and worker and the duration of the flexible working arrangements. In contrast, the Employment Equality Directive focuses on cost and financial issues when listing factors to be considered in determining the existence of a disproportionate burden: “the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance”.¹⁰¹ The broader approach favoured in the Work-life

98. Art. 2 CRPD.

99. Case C-397/18, *DW v. Nobel Plásticos Ibérica SA*, EU:C:2019:703, para 72.

100. Directive 2019/1158, Recital 36.

101. Directive 2000/78, Recital 21.

Balance Directive is of course not prohibited by the Employment Equality Directive, and can be regarded as a reminder of the need to take into account the needs of the individual requesting the accommodation and factors unrelated to cost.

4.4. *Enforcement of rights*

This section examines whether the Work-life Balance Directive fits within the paradigm of EU non-discrimination law in respect of the provisions relating to enforcement of rights. It considers the following issues: the burden of proof; penalties; protection from victimization; and the role of equality bodies. The relevant provisions of the Directive have to be placed in the context of evidence that the existing provisions were not sufficient:

“Despite the existence of formal provisions prohibiting discrimination and unfavourable treatment based on parental leave, in practice there are frequent legal breaches, but few or no cases are taken to court. Although compliant with EU law, remedies and sanctions for the violation of the protection against discrimination and unfavourable treatment based on parental leave are considered insufficient and ineffective.”¹⁰²

Set against this backdrop, it is significant that the Work-life Balance Directive goes further than the equivalent provisions in the Parental Leave Directive.

4.4.1. *The burden of proof*

A common feature of EU non-discrimination directives is that they provide for a shift in the burden of proof from the complainant to the respondent where the complainant establishes facts from which it could be presumed that discrimination has occurred.¹⁰³ Article 12 of the Work-life Balance Directive includes a similar provision, but this applies only in respect of situations where the worker has been dismissed on the grounds that they applied for, or have taken, the leave permitted in the Directive or have exercised the right to request flexible working arrangements.¹⁰⁴ There is an exception, however, because this added protection from discriminatory dismissal does not apply to workers taking time off for *force majeure* reasons. A practical aid to raising evidence that could shift the burden of proof is the entitlement of a worker dismissed for one of the reasons mentioned in Article 12 to receive “reasons

102. Masselot, op. cit. *supra* note 10, 11.

103. E.g. Art. 19, Directive 2006/54.

104. Art. 12(3), Directive 2019/1158.

for the dismissal in writing” from the employer.¹⁰⁵ At first sight, therefore, the shift in the burden of proof does not extend to discrimination claims brought under Article 11 of the Work-life Balance Directive, unless these entail the worker’s dismissal.

There is, though, a bridge connecting the provision on the burden of proof in the Recast Gender Equality Directive with the Work-life Balance Directive. Article 19(4) of the Recast Gender Equality Directive applied its rules on the burden of proof to the Parental Leave Directive “insofar as discrimination based on sex is concerned”. The Work-life Balance Directive specifies that references in other legislation to the Parental Leave Directive shall be construed as references to the Work-life Balance Directive.¹⁰⁶ Consequently, the burden of proof will shift in respect of a claim of discrimination under the Work-life Balance Directive if this is “concerned” with discrimination based on sex. While this will be helpful for many complainants, it does not address the situation of cases where sex discrimination does not arise. For instance, a father who is treated less favourably because he seeks flexible working arrangements to assist with caring for his children may not be able to show that there was any discrimination on grounds of sex unless there is evidence that a woman would have been treated differently.

Ultimately, the ECJ may face the question of whether it fills this lacuna by implying rules on the shift on the burden of proof to all types of discrimination cases arising under Article 11 of the Work-life Balance Directive. Such an interpretation would be logical if the spirit and the purpose of the Directive is regarded as falling within the paradigm of EU non-discrimination law.

4.4.2. *Penalties*

Article 13 of the Work-life Balance Directive specifies that the penalties provided for in national legislation implementing the Directive shall be “effective, proportionate and dissuasive”.¹⁰⁷ This is an instance where the Work-life Balance Directive adopts language already found in EU non-discrimination directives. The Race Equality Directive and the Employment Equality Directive both state that “sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive”.¹⁰⁸ The Recast Gender Equality Directive goes further than other non-discrimination directives insofar as it specifies that

105. *Ibid.*, Art. 12(2).

106. *Ibid.*, Art. 19(1).

107. This was already contained in Art. 2, Directive 2010/18.

108. Art. 15, Directive 2000/43; Art. 17, Directive 2000/78. See also, Art. 25, Directive 2006/54.

there must be “real and effective compensation or reparation” for those injured by discrimination, which normally excludes any prior upper limit on the level of compensation.¹⁰⁹ The Commission’s proposal for the Work-life Balance Directive was closer to the model found in the Race Equality and Employment Directives. It did not contain any reference to “real and effective compensation”, but it did specify that penalties “may take the form of a fine. They may also comprise payment of compensation”.¹¹⁰ In the adopted version, these words were removed from the main body of the Work-life Balance Directive, but they are included in the preamble.¹¹¹ While the absence of reference to compensation in the text of the Directive makes this provision appear weaker than the equivalent texts in the non-discrimination directives, it seems unlikely that this will lead to a substantive difference of interpretation. If remedies have to be “effective”, then this will almost certainly require domestic legislation to permit the award of financial compensation. Frequently, litigation concerns situations where the individual has already left the employment relationship in which the dispute arose. In such situations, compensation is typically the only meaningful way in which any material losses sustained by the individual can be redressed. This is also the conclusion to be drawn from the Court’s existing case law on what constitute “effective, proportionate and dissuasive” penalties. While it has accepted that there can be situations where non-pecuniary sanctions are effective, it has rejected the idea that “a purely symbolic sanction” could be sufficient.¹¹² Furthermore, it has held that “the severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect”.¹¹³

4.4.3. *Victimization*

Article 14 of the Work-life Balance Directive provides:

“Member States shall introduce measures necessary to protect workers, including workers who are employees’ representatives, from any adverse treatment by the employer or adverse consequences resulting from a complaint lodged within the undertaking or any legal proceedings for the purpose of enforcing compliance with the requirements laid down in this Directive.”

109. Art. 18, Directive 2006/54.

110. Art. 13, Commission Proposal cited *supra* note 31.

111. Recital 43 states that penalties may include “fines or the payment of compensation, as well as other types of penalties”.

112. Case C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, EU:C:2013:275, paras. 64 and 68.

113. *Ibid.*, para 63.

There was no equivalent provision in the Parental Leave Directive. Protection from victimization is, however, a familiar feature of EU non-discrimination directives and the text above echoes that found in an equivalent provision of the Recast Gender Equality Directive.¹¹⁴ The ECJ has interpreted the latter provision as protecting from victimization also other employees who provide formal or informal support to an employee who has experienced discrimination.¹¹⁵

4.4.4. *Role of equality bodies*

Perhaps the most striking alignment of the Work-life Balance Directive with EU non-discrimination law is found in relation to equality bodies. The Race Equality and the Recast Gender Equality Directives both require Member States to designate a body or bodies for the promotion of equal treatment.¹¹⁶ These bodies are mandated to take general measures for the advancement of equality, such as conducting surveys and publishing reports. In addition, they must provide “independent assistance to victims of discrimination in pursuing their complaints”. There was no equivalent provision in the Parental Leave Directive, but the Work-life Balance Directive provides that the equality body (or bodies) designated by the Member State for the purposes of the Recast Gender Equality Directive shall be “competent with regard to issues relating to discrimination falling within the scope of this Directive”.¹¹⁷ Recital 45 clarifies that this includes “the task of providing independent assistance to victims of discrimination in pursuing their complaints”.

Looking back to the Commission’s proposal, this was framed in slightly broader terms: equality bodies would have been competent for any “issues” falling within the scope of the Work-life Balance Directive.¹¹⁸ The final text is more specific because it refers only to “discrimination”; Member States are not required, therefore, to give equality bodies a general mandate for any matters arising under the scope of the Directive. At the same time, the Commission’s proposal had not included the explicit reference to providing assistance to individual victims, so in this regard the final text is more precise on the functions that equality bodies should perform.¹¹⁹ The linking of the

114. Art. 24, Directive 2006/54.

115. Case C-404/18, *Hakelbracht and others v. WTG Retail BVBA*, EU:C:2019:523, para 35.

116. Art. 13, Directive 2000/43; Art. 20, Directive 2006/54.

117. Art. 15, Directive 2019/1158.

118. Art. 15, Commission Proposal cited *supra* note 31.

119. This reflects an amendment adopted by the European Parliament to Recital 45, cited *supra* note 56.

Work-life Balance Directive to equality bodies provides clear evidence that, to some extent, this Directive has been assimilated into the paradigm of EU non-discrimination law. It marks a clear distinction when compared to other parts of EU labour law. Notably, the Directive on transparent and predictable working conditions was adopted on the same day as the Work-life Balance Directive.¹²⁰ This includes various provisions on enforcement, some of which are also found in the Work-life Balance Directive; for example, there are equivalent provisions on protection from victimization and on penalties. However, unlike the Work-life Balance Directive, there is no obligation on Member States to designate any agency with responsibility to assist individuals seeking to enforce their rights.¹²¹

Overall, the provisions on the enforcement of rights seek to apply the strategies used in EU non-discrimination law to mitigate the barriers that individuals encounter when they contemplate bringing legal proceedings to challenge discrimination. These measures are a step forward in comparison to the Parental Leave Directive. It is notable, though, that the Commission has recently advanced a much bolder set of measures on enforcement of rights in its proposed reform of the law on equal pay.¹²² This includes proposals to ensure that equality bodies have legal standing; that courts or competent authorities can issue injunctions to stop infringements of the law; that legal and judicial costs can be awarded against defendants who lose discrimination claims; and that fines can be applied where there is infringement of the law.¹²³ It remains to be seen if the Parliament and Council will agree to adopt such measures, but they illustrate that the existing provisions on enforcement, such as those in the Work-life Balance Directive, may be only partial steps and that there may be room to strengthen these requirements.

5. Conclusion

This article has explored the Work-life Balance Directive and its proximity to the paradigm of EU non-discrimination law. It has identified various ways in which the Work-life Balance Directive is similar to the EU non-discrimination

120. Directive 2019/1152 (EU) on transparent and predictable working conditions in the European Union, O.J. 2019, L 186/105.

121. Art. 16 provides that workers should have “access to effective and impartial dispute resolution and a right to redress in the case of infringements of their rights arising from this Directive”.

122. Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM(2021)93.

123. *Ibid.*, Ch. III Remedies and Enforcement.

directives. It is evident that the prohibition of discrimination found in the Work-life Balance Directive is more closely aligned to EU non-discrimination law than, say, other types of EU legislation that include provisions on discrimination (such as the directives on non-standard work). Certainly, the Work-life Balance Directive is not identical to other non-discrimination directives. As discussed in section 4, the right to request flexible working arrangements is not equivalent to the duty to provide reasonable accommodation. There is, however, sufficient proximity to sustain the view that the Work-life Balance Directive is properly characterized as being part of the family of EU non-discrimination legislation.

As discussed in section 2, this is not merely a technical question of classification. It matters because it will be relevant to how the Directive's provisions on discrimination are interpreted. On the one hand, there are unresolved issues discussed in this article, such as: whether there is a requirement for a comparator when applying the less favourable treatment test; whether the burden of proof shifts in all proceedings under Article 11; or whether harassment related to the exercise of rights in the Work-life Balance Directive is prohibited. On the other hand, there is the question of whether litigants can invoke Article 21(1) CFR in combination with Article 11 of the Directive. This has proven to be a valuable source of rights for litigants relying on the EU non-discrimination Directives, but the Court has not indicated that Article 21(1) CFR is relevant to other types of non-discrimination provision, such as those in the Directives on non-standard work. If Article 11 of the Work-life Balance Directive is viewed as an "expression" of the right found in Article 21(1) CFR, then this provides an important remedy in disputes between private parties in domestic courts, given that horizontal direct effect of the provisions of the Directive is not possible. In light of the analysis of this article, and in particular the strong connection between the Work-life Balance Directive and issues of gender and disability equality, there is a persuasive argument that discrimination cases arising under this Directive should also be viewed as falling within the scope of Article 21(1) CFR. This argument is even stronger in respect of Article 23 CFR on equality between women and men, which is explicitly mentioned in Recital 2 of the Directive. The Court has not yet had an opportunity to determine whether Article 23 CFR may also have direct effect in disputes between private parties, although there is no reason to assume that this is excluded.¹²⁴

124. The Court has relied on Art. 23 CFR when interpreting EU legislation on gender equality in a dispute between private parties: Case C-232/09, *Danosa v. LKB Līzings SIA*, EU:C:2010:674, para 71.

The second question posed at the outset of this article was what impact the Work-life Balance Directive has on our understanding of the evolution of EU non-discrimination law. One of the constraints on EU non-discrimination law is the legislative competence conferred by the TFEU. As explained in section 1, the TFEU contains an exhaustive list of prohibited grounds of discrimination. This straightjacket is at odds with the character of non-discrimination law. The global history of this field of law is that, over time, marginalized groups have often managed to shed light on the discrimination that they encounter and persuade legislatures and courts that their experience warrants inclusion under the protective cloak of non-discrimination law. So, for example, characteristics such as disability or sexual orientation were typically absent from non-discrimination legislation prior to the 1990s, but they are now widely recognized as grounds deserving of legal protection. As discussed in section 4, the earlier idea that non-discrimination law was primarily concerned with immutable characteristics has now been supplanted by a more flexible understanding of the way in which factors like stigma, prejudice and disadvantage intersect to make certain social groups vulnerable to discrimination. Insofar as the TFEU provides an exhaustive list of protected characteristics, it freezes in time the boundaries of EU non-discrimination law. Some change can, of course, come through the way in which the ECJ interprets the grounds identified in the TFEU. Ultimately, though, adding further grounds would require Treaty amendment, which is rare and very difficult to accomplish.

The Work-life Balance Directive opens up a different vista of how EU non-discrimination law can remain dynamic and not hemmed in by the list of grounds found in the TFEU. The Directive provides an example of additional measures that expand the reach of EU non-discrimination law. It copper-fastens a rationale for non-discrimination law that links it to dignity and autonomy; a person should not experience less favourable treatment because they exercise entitlements designed to facilitate the socially-valuable tasks of parenting and caring. The sense that the Work-life Balance Directive is complementary to other non-discrimination Directives is captured by Oliveira et al.:

“it can be argued that the Work-Life Balance Directive is not a Directive *on* equality, in the sense of prohibiting discrimination as a process or imposing equality as a result, but it is a Directive *for* equality, since its objective is to create conditions to facilitate equality between men and women in the labour market”.¹²⁵

125. Oliveira et al., *op. cit. supra* note 4, at 319.

Looking ahead, the Work-life Balance Directive marks out a path that might, in time, lead to more comprehensive protection for carers from discrimination. The trajectory of EU law on the reconciliation of work and caring responsibilities has been to extend gradually the range of rights and there is no reason to believe that this Directive is the final chapter in that story.

