Employment

Who cares wins?

Does *Coleman* offer carers a free standing right to flexible working arrangements asks **Juliet Carp**?

IN BRIEF

- Employees are protected against discrimination because of their sex, race, disability, sexual orientation, religion or belief and age.
- However, the extent to which discrimination based on association is covered by the law is unclear (which affects carers).
- To make things more difficult, various pieces of legislation address different types of discrimination "by association" in different ways.

Sharon Coleman was a legal secretary working at Attridge Law. Her son suffers from medical conditions requiring special care. Coleman alleges that after her return to work from maternity leave she suffered discrimination because of her son's disability. She claims she was offered less flexible working arrangements than other parents who worked with her and that she was subject to abusive comments related to her son's disability. She accepted voluntary redundancy and later claimed she suffered discrimination contrary to the Disability Discrimination Act 1995 (DDA 1995).

Language problems

The problem for Coleman is that the language of DDA 1995 does not appear to cover discrimination on grounds of someone else's disability. DDA 1995 is the means through which the disability-related aspects of the EC Equal Treatment Framework Directive 2000/78/EC (Framework Directive), are implemented in the UK. So, before making any decisions on the facts, the employment tribunal asked the European Court of Justice (ECJ) for clarification of the scope of the Framework Directive. The ECJ confirmed that the Directive could apply to Coleman's case (Case C-303/06), [2008] All ER (D) 245 (Jul)—and it is now clear that UK law should offer protection to an employed carer against discrimination on grounds of her child's disability.

The battle goes on

To win her case Coleman still needs to persuade the tribunal both that her allegations are true and that DDA 1995 can be interpreted consistently with the ECJ's decision. The Employment Appeal Tribunal (EAT), considering an appeal against referral to the ECJ, decided that DDA 1995 could be interpreted to allow Coleman to win her case, but at that stage the EAT did not have the ECJ's view on interpretation of the Framework Directive, so the EAT was not in a position to decide how DDA 1995 should be interpreted. If DDA 1995 cannot be interpreted to give effect to the Framework Directive, UK law will need to be changed.

Coleman's battle may not be over but the timing of the ECJ decision is helpful for other carers. The government confirmed recently in response to consultation on the new Equality Bill that it does not intend to change the scope of the law on discrimination by association, save to extend protection to association with transsexuals. The *Coleman* decision was released just before the response was issued and the government has acknowledged that it would need to consider *Coleman* carefully.

A matter of law

Discrimination law generally covers direct discrimination, indirect discrimination, harassment and victimisation (adverse treatment because of a claim). Coleman alleges direct discrimination, eg being allowed less flexibility than colleagues with healthy children, and harassment, eg verbal abuse, because of her son's disability. Her claim did not cover indirect discrimination—broadly, a provision, criterion or practice that would apply equally to people not associated with the protected status which leads to disadvantage. The distinction is important because indirect discrimination is likely to be a bigger concern to both employees who are carers and their employers.

Discrimination at work?

A typical example might be a woman who cares for her elderly mother at home. Suppose she asks whether she can start work at 9.30am rather than 9am so that she can take her mother to a day centre which does not open till 8.30am. The daughter makes a flexible working request which is refused because it would be inconvenient for the business. She may then argue that she suffers indirect discrimination because of the requirement to start work at 9.00am.

She might claim:

- Sex discrimination: if she thinks that the requirement to start work at 9am affects a disproportionate number of female employees;
- Disability discrimination: DDA 1995 does not appear to cover indirect discrimination because of someone else's disability. (The law could be changed to allow this after *Coleman*. However, Coleman did not claim indirect discrimination so this may not happen.) She would also need to prove that her mother is disabled; or
- Age discrimination: The Employment Equality (Age) Regulations 2006 (SI 2006/1031) (Age Regulations), do not appear to cover indirect discrimination because of someone else's age. Like

DDA 1995, those regulations are supposed to implement the Framework Directive so it seems likely that age discrimination law will be changed to allow claims of age discrimination by association in line with *Coleman.* However, as with DDA 1995, the changes probably will not extend to indirect discrimination.

In each case the employer may be able to justify the discrimination. None of these approaches offers guaranteed protection for the carer. Given that employment relationships can deteriorate rapidly when discrimination claims are made, making claims of this type can take some courage. Many women refused flexible working arrangements to care for children have challenged their employers but employees may not be prepared to take similar risks to care for other dependants.

law where the language of the legislation does not currently appear to cover direct discrimination or harassment by association and age discrimination, where the language of the legislation does not appear to cover direct discrimination by association. Changes to other strands may follow.

We may also see some change to the language of the harassment provisions in the race, religion or belief, sexual orientation and age legislation to bring the wording into line with the amendment to the harassment provision in the Sex Discrimination Act 1975 (SDA 1975) made earlier this year.

Enforcement

It can be hard to predict future developments where UK legislation is based on European law, but it is worth looking at existing Directives and European policy for clues. The European Commission's focus is now enforcement and the political reality of the expanded EU makes the prospect of a new Directive giving direct protection to carers remote.

> "Few people would have sympathy with complaints that laws protecting carers from harassment or direct discrimination are overly burdensome"

In the short term, *Coleman* has helped make clear that it is contrary to EC law for an employer to directly discriminate against, or harass, employees because of their child's disability. In the longer term, other strands of discrimination legislation may be changed so that there is more consistency between the protection offered.

The six strands of discrimination

The six core strands of UK discrimination protection—sex, race, disability, religion or belief, sexual orientation and age—are covered by separate legislation.

Discrimination by association is dealt with in different ways. As well as DDA 1995, the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), the Employment Equality (Sexual Orientation) Regulations 2003 (S1 2003/1661) and the Age Regulations are all intended to implement the Framework Directive. While *Coleman's* case only related to DDA 1995, the ECJ's decision expressed principles which should apply to religion or belief, sexual orientation and age discrimination too.

The likely changes to legislation following *Coleman* will probably be most significant for disability discrimination

EC influence

The EC Directives that are currently most relevant to carers are the Equal Treatment (Race) Directive 2000/43/EC, implemented in the UK through the Race Relations Act 1976; the Equal Treatment (Sex) Directive 2006/54/EC implemented in the UK through SDA 1975 and the Framework Directive, mentioned above, covering the other core strands.These directives do not use consistent expressions to define discrimination. None of the Directives appears to expressly limit coverage to discrimination on grounds of the employee's own status but the language used in the Directives regarding indirect discrimination is not consistent.

Purpose

Coleman indicates that the purpose of the Framework Directive is to safeguard individual autonomy and it seems logical to assume that this principle should be applied to the other discrimination Directives. Extension of discrimination by association to indirect discrimination would have the biggest impact on carers.

However, this was not the subject of the *Coleman* case and the general principles articulated in *Coleman* may not lead to confirmation that indirect discrimination by association is protected by the Directives for some time, if at all.

The employer's perspective

From the employer's perspective these developments may be worrying. Few people would have sympathy with complaints that laws protecting carers from harassment or direct discrimination are overly burdensome.

Employers are already obliged to tackle abuse on other grounds and arrangements for training, dealing with complaints etc, should already be in place. Employers who have policies making it clear that harassment, abuse and unfair treatment on any grounds are unacceptable will find that they need to make few adjustments.

Extension of protection to indirect discrimination by association would probably place the greatest burden on employers. A change to discrimination laws to allow claims based on indirect discrimination by association would increase the number of people who can challenge a refusal to allow their preferred working arrangement, make it easier for them to make successful claims, and lead to more flexible arrangements being offered that involve compromise for business. Employers would spend more time managing internal procedures and be obliged to agree to more requests. This would lead to increased costs for business.

Wait and see

Although *Coleman* gives a good indication of the direction in which the ECJ is moving, it does not clearly oblige the government to ensure protection against indirect discrimination by association. The government may decide to "wait and see".

Coleman has helped carers of disabled children win protection against direct discrimination and harassment and that is likely to be extended to carers of the elderly. A freestanding right to different working arrangements to make care for others easier still does not exist. NLJ

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