

## OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 31 January 2008<sup>1</sup>

1. This reference by the South London Employment Tribunal raises, for the first time, an important question about the scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation<sup>2</sup> ('the Directive'). The Tribunal asks whether the prohibition of discrimination contained in the Directive covers cases where an employee is treated less favourably than her colleagues because, although not herself disabled, she is associated with a disabled person.

### **I — Factual background and the questions referred**

2. The claimant in the main proceedings, Ms Sharon Coleman, worked from 2001 as legal secretary for Attridge Law, a firm of solicitors in London, where Mr Steve Law is a partner. In 2002 she gave birth to a son who is disabled; he suffers from bronchomalacia and congenital laryngomalacia. She is his primary carer.

3. On 4 March 2005 the claimant accepted voluntary redundancy and, accordingly, stopped working for Attridge Law. On 30 August 2005 she brought a claim for constructive dismissal and disability discrimination against her former employers, arguing that they treated her less favourably than employees with non-disabled children and subjected her to conduct that created a hostile atmosphere for her. Among the examples of discriminatory treatment that she alleges she has suffered are that her employers refused to allow her to return to her existing job after coming back from maternity leave; they called her 'lazy' when she sought to take time off to care for her son and refused to give her the same flexibility as regards her working arrangements as those of her colleagues with non-disabled children; they said that she was using her 'fucking child' to manipulate her working conditions; they subjected her to disciplinary action; and they failed to deal properly with a formal grievance she lodged against her ill treatment.

4. Ms Coleman sought to rely on the relevant national law, the Disability Discrimination Act 1995, and the Directive. Her argument was that the Directive is intended to prohibit discrimination not only against disabled persons themselves, but also against individuals who are victims of discrimination

1 — Original language: English.

2 — OJ 2000 L 303, p. 16.

because they are associated with a disabled person. The Tribunal, the argument goes on, should interpret the Disability Discrimination Act in conformity with the Directive and thus afford protection against discrimination by association. The defendants in the main action argued that the Act protects only disabled persons and that the Directive is not intended to cover discrimination by association.

5. Ms Coleman can succeed in her case only if the Directive is to be interpreted as prohibiting discrimination by association. Thus, the Tribunal did not proceed fully to establish the material facts and examine the substance of the claim, but, instead, stayed that part of the application and held a preliminary hearing only on the issue of whether or not discrimination by association is prohibited. Following the hearing it stayed the proceedings and referred the following questions to the Court of Justice:

‘(1) In the context of the prohibition of discrimination on grounds of disability, does the Directive only protect from direct discrimination and harassment persons who are themselves disabled?

(2) If the answer to Question (1) above is in the negative, does the Directive protect

employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled?

(3) Where an employer treats an employee less favourably than he treats or would treat other employees, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that treatment direct discrimination in breach of the principle of equal treatment established by the Directive?

(4) Where an employer harasses an employee, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that harassment a breach of the principle of equal treatment established by the Directive?’

## II — Analysis

6. The four questions referred to the Court by the Employment Tribunal boil down to a single issue of law: does the Directive protect non-disabled people who, in the context of their employment, suffer direct discrimination and/or harassment because they are associated with a disabled person?

7. The Directive was adopted under Article 13 EC which was added to the EC Treaty by the Treaty of Amsterdam and reads as follows: 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The first thing to note about Article 13 EC is that it singles out specific grounds of discrimination which it treats as suspect grounds or, to borrow a term from US constitutional law, as 'suspect classifications',<sup>3</sup> and makes them the target of Community anti-discrimination legislation. Under this broad provision legislation may be brought with the aim of combating discrimination on those enumerated grounds. While the Council enjoys considerable discretion to adopt measures tailored to particular circumstances and social contexts, Article 13 EC cannot be interpreted so as to allow the adoption of legislation that would be inconsistent with its aims and spirit and limit the protection that the drafters of the Treaty intended to offer. As a consequence, legislation adopted on the basis of Article 13

EC must be interpreted in the light of the goals pursued by Article 13 itself.<sup>4</sup>

8. Article 13 EC is an expression of the commitment of the Community legal order to the principle of equal treatment and non-discrimination. Thus, any interpretation of both that article and any directive adopted under this legal basis must be undertaken against the background of the Court's case-law on these principles.<sup>5</sup> The Directive itself states in Article 1 that its purpose is 'to lay down a general framework for combating

3 — On the development of the concept of 'suspect classifications' in US constitutional law and the relevant case-law of the Supreme Court see Balkin, J., 'Plessy, Brown and Grutter: A Play in Three Acts' (2005) 26 *Cardozo L. Rev.* 1689.

4 — Indeed, one cannot exclude the possibility of anti-discrimination measures adopted under Article 13 EC that would violate that very same provision (for example, measures offering protection from discrimination based on religious belief to the adherents of only some, but not all, religions). Also, as Christopher McCrudden suggests in 'Thinking about the discrimination directives', (2005) 1 *European Journal of Anti-Discrimination Law* 17, 20, equal treatment and non-discrimination as guaranteed by the Directive should be placed within a broader human rights context. Recital 4 to the Directive refers to the 'universal right' to 'equality before the law and protection against discrimination' which is 'recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms'. I would add to this list the Charter of Fundamental Rights, Chapter III of which is devoted to equality, and which includes a specific provision on the integration of persons with disabilities (Article 26). A recent development in the area of international human rights which concerns disability issues is the adoption of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol. The Convention was adopted by the General Assembly on 13 December 2006 and opened for signature on 30 March 2007 when 81 States and the European Community signed it. It provides, inter alia, that the signatory parties are to prohibit 'all discrimination on the basis of disability' (Article 5(2)).

5 — It has been pointed out in the literature on discrimination that no conclusive answer as to whether discrimination by association is prohibited flows from Article 13 EC and the directives that were adopted under it. However, it has been suggested that such discrimination will probably be treated as falling within the scope of the anti-discrimination directives. See Schiek, D., Waddington, L. and Bell M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart Publishing, 2007, pp. 169, 170.

discrimination ... with a view to putting into effect in the Member States the principle of equal treatment' (my emphasis). The Court's case-law is clear as regards the role of equal treatment and non-discrimination in the Community legal order. Equality is not merely a political ideal and aspiration but one of the fundamental principles of Community law.<sup>6</sup> As the Court held in *Mangold* the Directive constitutes a practical aspect of the principle of equality.<sup>7</sup> In order to determine what equality requires in any given case it is useful to recall the values underlying equality. These are human dignity and personal autonomy.

that individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options.<sup>9</sup> 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'.<sup>10</sup>

9. At its bare minimum, human dignity entails the recognition of the equal worth of every individual. One's life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another. As Ronald Dworkin has recently reminded us, even when we disagree deeply about issues of political morality, the structure of political institutions and the functioning of our democratic states we nevertheless continue to share a commitment to this fundamental principle.<sup>8</sup> Therefore, individuals and political institutions must not act in a way that denies the intrinsic importance of every human life. A relevant, but different, value is that of personal autonomy. It dictates

10. The aim of Article 13 EC and of the Directive is to protect the dignity and autonomy of persons belonging to those suspect classifications. The most obvious way in which such a person's dignity and autonomy may be affected is when one is directly targeted because one has a suspect characteristic. Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of

6 — See, inter alia, Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569 and the case-law cited therein. See also the discussion in Tridimas, T., *The General Principles of EU Law* (2<sup>nd</sup> ed.), Oxford University Press, 2007, and Dashwood, A., and O'Leary, S., (eds), *The Principle of Equal Treatment in EC Law*, Sweet and Maxwell, 1997.

7 — Case C-144/04 *Mangold v Helm* [2005] ECR I-9981 paragraph 74.

8 — Dworkin, R., *Is Democracy Possible Here?: Principles for a New Political Debate*, Princeton University Press, 2006, chapter 1.

9 — Raz, J., *The Morality of Freedom*, Oxford University Press, 1986. For the sake of accuracy it should be noted that some authors include the value of personal autonomy within that of dignity. The same happens with the treatment of these two concepts in the case-law of some constitutional courts. This, which might be of relevance in the context of the interpretation of legal provisions that refer only to the value of human dignity, is of no relevance for present purposes.

10 — *Ibid.*, p. 154.

a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably.

11. Similarly, a commitment to autonomy means that people must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications. Access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realisation of one's potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life.

12. Yet, directly targeting a person who has a particular characteristic is not the only way of discriminating against him or her; there are

also other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications.

13. Indeed, the dignity of the person with a suspect characteristic is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. In this way, the person who is the immediate victim of discrimination not only suffers a wrong himself, but also becomes the means through which the dignity of the person belonging to a suspect classification is undermined.

14. Furthermore, this subtler form of discrimination undermines the ability of persons who have a suspect characteristic to exercise their autonomy. For instance, the autonomy of members of a religious group may be affected (for example, as to whom to marry or where to live) if they know that the person they will marry is likely to suffer discrimination because of the religious affiliation of his spouse. The same can happen, albeit to a lesser extent, with individuals who are disabled. People belonging to certain groups are often more vulnerable than the average person, so they have come to rely on individuals with whom they are closely

associated for help in their effort to lead a life according to the fundamental choices they have made. When the discriminator deprives an individual of valuable options in areas which are of fundamental importance to our lives because that individual is associated with a person having a suspect characteristic then it also deprives that person of valuable options and prevents him from exercising his autonomy. Put differently, the person who belongs to the suspect classification is excluded from a range of possibilities that would otherwise have been open to him.

16. The important words here are 'on the grounds of'. It is a familiar proposition of both law and moral philosophy that not all discrimination is wrong. In the context of employment, for instance, it is perfectly acceptable for an employer to hire a candidate who is responsible, trustworthy and polite and exclude candidates who are irresponsible, untrustworthy and rude. Conversely, we think it is wrong to reject someone on the basis of his or her race or religion, and in most legal systems the law intervenes to prevent such discrimination from taking place. What determines whether the employer's conduct is acceptable or not, and triggers the law's intervention, is the ground of discrimination relied on by the employer in each case.

### *How the Directive functions*

15. The Community legislature adopted the Directive in order to protect, in the field of employment and occupation, people belonging to suspect classifications and to ensure that their dignity and autonomy is not compromised either by obvious and immediate or subtle and less obvious discrimination. An indication of how this is to be achieved is already apparent in Article 1 of the Directive, which reads: 'The purpose of this Directive is to lay down a general framework for combating discrimination *on the grounds of* religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment' (my emphasis).

17. The fact that the wrongness of discrimination depends on the grounds upon which it is based is reflected in the way relevant legislation is structured. Virtually all anti-discrimination statutes prohibit discrimination on a number of specified grounds. This is the strategy followed by the Community legislature in the Directive which outlaws discrimination based on religion or belief, disability, age and sexual orientation. The main duty imposed by anti-discrimination legislation, such as the Directive, is to treat people in a certain way which is comparable to how others are treated.<sup>11</sup> By adopting the

<sup>11</sup> — Gardner, J., 'Discrimination as Injustice', (1996) 16 *Oxford Journal of Legal Studies* 353, 355. As Gardner explains this is a question of justice. Thus, when we say that it is wrong to treat someone less favourably on certain grounds what we mean is that justice requires that we do not rely on those grounds in order negatively to affect that person's position. Put differently, if we do rely on those prohibited grounds we have inflicted on the person concerned an injustice.

Directive the Council has made it clear that it is wrongful for an employer to rely on any of these grounds in order to treat an employee less well than his or her colleagues. As soon as we have ascertained that the basis for the employer's conduct is one of the prohibited grounds then we enter the realm of unlawful discrimination.

18. In the sense described above, the Directive performs an *exclusionary* function: it excludes religious belief, age, disability and sexual orientation from the range of permissible reasons an employer may legitimately rely upon in order to treat one employee less favourably than another. In other words, after the coming into force of the Directive it is no longer permissible for these considerations to figure in the employer's reasoning when she decides to treat an employee less favourably.

19. The Directive prohibits direct discrimination,<sup>12</sup> harassment<sup>13</sup> and indirect discrimination.<sup>14</sup> The distinguishing feature

of direct discrimination and harassment is that they bear a necessary relationship to a particular suspect classification. The discriminator relies on a suspect classification in order to act in a certain way. The classification is not a mere contingency but serves as an essential premise of his reasoning. An employer's reliance on those suspect grounds is seen by the Community legal order as an evil which must be eradicated. Therefore, the Directive prohibits the use of those classifications as grounds upon which an employer's reasoning may be based. By contrast, in indirect discrimination cases the intentions of the employer and the reasons he has to act or not to act are irrelevant. In fact, this is the whole point of the prohibition of indirect discrimination: even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons.<sup>15</sup> It is this 'disparate impact' of such measures on certain people that is the target of indirect discrimination legislation. The prohibition of such discrimination ties in with the obligation of employers to accommodate those groups by adopting measures and designing their policies in a way that does not impose a burden on them which is excessive compared with that imposed on other people.<sup>16</sup> In this way, while the prohibition of direct discrimination and harassment operates as an exclusionary mechanism (by excluding from an employer's reasoning reliance on certain grounds) the prohibition of indirect discrimination operates as an inclusionary mechanism (by obliging employers to take into account and accommodate the needs of individuals with certain characteristics). It is for this reason that even if we were to accept the

12 — Defined in Article 2(2)(a) as a situation 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1'.

13 — Defined in Article 2(3) as conduct relating to any of the grounds listed in Article 1 that 'takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading humiliating or offensive environment'.

14 — Defined in Article 2(2)(b) as a situation where 'an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons'.

15 — I have discussed the issue of past discrimination and equal treatment in the context of equality between men and women in my Opinion in Case C-319/03 *Briheche* [2004] ECR I-8807.

16 — See the discussion in Jolls, C., 'Antidiscrimination and Accommodation', (2001) 115 *Harvard Law Review* 642.

argument of the United Kingdom Government that discrimination by association is clearly outside the scope of the prohibition of indirect discrimination that does not mean in any way that it also falls outside the scope of the prohibition of direct discrimination and harassment. On the contrary, including discrimination by association in the scope of the prohibition of direct discrimination and harassment is the natural consequence of the exclusionary mechanism through which the prohibition of this type of discrimination operates.

20. Ms Coleman's case raises an issue of direct discrimination. As the order for reference makes clear, she is not complaining of the impact a neutral measure had on her as the mother and carer of a disabled child, but claims that she was singled out and targeted by her employer precisely because of her disabled son. Therefore, the issue for the Court is whether direct discrimination by association is prohibited by the Directive.

21. It is clear that had the claimant been disabled herself the Directive would have

been applicable. In the present case, though, the allegation is that it was the disability of the claimant's son which triggered the discriminatory treatment. Thus, the person who is disabled and the person who is the obvious victim or the object of the discriminatory act are not the same. Does this render the Directive inapplicable? Given my analysis up to this point, I think it does not.

22. As stated, the effect of the Directive is that it is impermissible for an employer to rely on religion, age, disability and sexual orientation in order to treat some employees less well than others. To do so would amount to subjecting these individuals to unjust treatment and failing to respect their dignity and autonomy. This fact does not change in cases where the employee who is the object of discrimination is not disabled herself. The ground which serves as the basis of the discrimination she suffers continues to be disability. The Directive operates at the *level of grounds of discrimination*. The wrong that it was intended to remedy is the use of certain characteristics as grounds to treat some employees less well than others; what it does is to remove religion, age, disability and sexual orientation completely from the range of grounds an employer may legitimately use to treat some people less well. Put differently, the Directive does not allow the hostility an employer may have against people belonging to the enumerated suspect classifications to function as the basis for any kind of less favourable treatment in the context of employment and occupation. As I have



explained, this hostility may be expressed in an overt manner by targeting individuals who themselves have certain characteristics, or in a more subtle and covert manner by targeting those who are associated with the individuals having the characteristics. In the former case, we think that such conduct is wrong and must be prohibited; the latter is exactly the same in every material aspect. In both cases, it is the hostility of the employer towards elderly, disabled or homosexual people or people of a certain religious persuasion that leads him to treat some employees less well.

23. Therefore, if someone is the object of discrimination because of any one of the characteristics listed in Article 1 then she can avail herself of the protection of the Directive even if she does not possess one of them herself. It is not necessary for someone who is the object of discrimination to have been mistreated on account of 'her disability'. It is enough if she was mistreated on account of 'disability'. Thus, one can be a victim of unlawful discrimination on the ground of disability under the Directive without being disabled oneself; what is important is that that disability — in this case the disability of Ms Coleman's son — was used as a reason to treat her less well. The Directive does not come into play only when the claimant is disabled herself but every time there is an instance of less favourable treatment because of disability. Therefore, if Ms Coleman can prove that she was treated less favourably because of her son's disability she should be able to rely on the Directive.

24. Finally, the United Kingdom Government has argued that the Directive was adopted with a view only to the setting of minimum standards. The fact that the Council was acting in an area where competence remains largely within the power of the Member States would, according to that Government, support such a view. As a consequence, it is an issue for the Member States to decide whether or not to prohibit discrimination by association in the field of employment and occupation. I do not agree. First, the fact that an area is not fully harmonised or that the Community has only limited competence to legislate in no way implies that the intervention of Community law, whatever this may be, must take place at the lowest level. In other words, the fact that the Community has a limited competence in the field of fundamental rights does not mean that when it decides to exercise that competence it can provide only minimum standards of fundamental rights protection. Second, there is nothing in the Directive or its recitals indicating that such was the intention of the Council. On the contrary, recital 6, for instance, refers to 'the importance of combating *every form of discrimination*' (my emphasis).<sup>17</sup>

17 — There is a further reason which undermines the view of the United Kingdom. The equal treatment obligations that the Directive imposes may have costs, mainly for employers, and, to some extent, the imposition of those obligations entails a decision to socialise the costs through particular market mechanisms. This can be achieved in an efficient and equitable manner that does not distort competition only if those equal treatment obligations are interpreted and applied uniformly throughout the common market. If that were not the case we would be facing the risk of creating an uneven playing field in Europe, as the shape of the equal treatment obligations imposed on economic operators by Community law would not be the same throughout the common market but would depend on whether a particular Member State has chosen to outlaw a specific type of discrimination.

### **III — Conclusion**

25. For the reasons given above, I think that the Court should answer the question of the Employment Tribunal as follows:

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation protects people who, although not themselves disabled, suffer direct discrimination and/or harassment in the field of employment and occupation because they are associated with a disabled person.