ASSOCIATIVE DISCRIMINATION

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INTRODUCTION

1. The goal of anti-discrimination legislation is to extinguish, by legal prohibition, less favourable treatment on the grounds of what are now called ‘protected characteristics’.

2. Those who have either consciously or carelessly discriminated on the grounds of protected characteristics have, historically, not taken care to differentiate between those who possess those characteristics and those who are bound to them by association.

3. Associative Discrimination is?

   Discrimination because of the protected characteristic of a person / persons with whom a complainant is associated – i.e. C does not have the protected characteristic, or is not discriminated against because she has it.

4. The law now offers a degree of protection against discrimination by association, although, this is in not, in reality, entirely new. However, there are limits to the breadth of application of associative discrimination and its future is unclear.

5. To summarise, there is (broadly speaking) protection from the following types of associative discrimination:

   a. Direct discrimination;
   b. Harassment;
   c. Victimisation.

COLEMAN v ATTRIDGE LAW

6. For many, the starting point of any discussion about associative discrimination is the decision of the ECJ in the case of Coleman v Attridge Law: C-303/06 [2008] IRLR 722, in which it held that associative discrimination on the grounds of disability was unlawful.

7. In that case Ms Coleman, who was not herself disabled, complained that she suffered discrimination on the ground that she was the mother and carer of a disabled child.
The ECJ stated that such associative discrimination did fall within the protection of the Equal Treatment Directive (Council Directive 2006/54/EC of 5 July 2006) because the principle of equal treatment applies to the grounds of discrimination set out in art 1, not simply to people who themselves have a disability.

8. In the words of the Advocate General, whose opinion was followed by the ECJ:- 'a robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation'.

9. The questions referred to the ECJ in Coleman concerned the prohibition of direct discrimination and harassment. It is not clear whether the answer in relation to a claim of 'indirect' (and/or, in the context of disability, 'disability-related') discrimination would be the same. There is certainly no duty to make reasonable adjustments for non-disabled people such as carers (at least under the current legislation).

10. However, it is probable that the purposive approach to associative discrimination presumably must apply to discrimination, on the grounds of each of the protected characteristics, listed in art 1 of the Equal Treatment Directive (i.e. not only disability but also age, sexual orientation, religion or belief).

11. The Equality Act subsequently made protection from associative and perceived direct discrimination explicit (s13 EqA 2010). Attempts to extend the scope of the disability provisions to discrimination on the grounds of perceived disability did not meet with success.

S13 direct discrimination
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

12. Although not explicit, it seems that the CJEU [Court of Justice of the European Union] considered associative indirect discrimination to be an arguable cause of action in CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia C-83/14, [2015] IRLR 746, [2016] 1 CMLR 491.
13. In the meantime, the EAT - when Coleman was remitted back to the UK - read the DDA 1995 so as to [align] with the Directive as interpreted by the ECJ's judgment, Underhill P stating:

"It is a principle of EU law that the courts and tribunals of member states should “so far as possible” interpret domestic legislation in order to give effect to the state's obligations under EU law, typically arising under a Directive: the locus classicus is the decision of the European Court of Justice in Marleasing SA v La Comercial Internacional de Alimentación SA C-106/89, [1990] ECR I-4135. It is now well established in UK law that pursuant to that obligation a court or tribunal can in some circumstances go beyond the traditional strict limits of statutory construction and can read words into a statute in order to give effect to EU legislation which the statute was evidently intended to implement. Well-known examples in the employment field are the decisions of the House of Lords in Pickstone v Freemans plc [1989] IRLR 357; [1988] ICR 697 and Litster v Forth Dry Dock & Engineering Co Ltd [1989] IRLR 161; [1989] ICR 341. But it is, equally, acknowledged that that is not legitimate in every case: that is recognised by the phrase 'so far as possible'. The difficulty is to define the touchstone for distinguishing between the two types of case, or—to put it another way—to define the limits of what is ‘possible’."

PRE-COLEMAN

14. But in reality, although Coleman may have been a watershed, insofar as it was, at the moment the ECJ, as it was called then, formally pronounced on the issue, domestic courts had been finding ways to punish and prohibit discrimination by association for years.

15. This first happened in the courts and later through the application of regulations that preceded the Equality Act 2010. Under the pre-Equality Act 2010 legislation, the wording of the legislation in respect of race, religion or belief and sexual orientation was already sufficiently broad so as to cover discrimination by association.
16. The wording used stated that discrimination occurred if treatment was 'on grounds of ...' – RRA 1976 s1(1)(a), EE(RB)R 2003 SI 2003/1660 reg 3(1)(a) and EE(SO)R 2003 SI 2003/1661 reg 3(1)(a).

17. It did not include the personal pronoun — so it was arguably unlawful to treat an employee less favourably on the ground of someone else's race, religion or belief or sexual orientation as well as on the ground of that particular employee's race etc.

18. In the context of sexual orientation, the ACAS guide gives the specific example of a worker who is teased at his workplace because of his son's sexual orientation, and suggests that this may constitute unlawful harassment and see English v Thomas Sanderson Blinds [2008] EWCA Civ 1421, [2009] IRLR 206, [2009] ICR 543. (Per Sedley LJ) It mattered not whether the employee in such circumstances was gay or not. The calculated insult to his dignity, which depended not at all on his actual sexuality, and the consequently intolerable working environment, were sufficient to bring his case both within reg 5 and within the 1976 Directive. The incessant mockery ('banter' trivialised it) had created a degrading and hostile working environment, and it had done so on grounds of sexual orientation.

19. It was, further, an approach that was followed in a number of cases under the RRA 1976: examples being as follows:

a. Zarczynska v Levy [1978] IRLR 532, [1979] ICR 184, EAT: The complainant was sacked for serving a black customer, contrary to her employer's express instructions. She had not been employed long enough to qualify to claim unfair dismissal. The tribunal held that there was no racial discrimination, because she was not sacked because of her own colour. The EAT rightly wanted to condemn the employer for racial discrimination, but had some difficulty in fitting the complainant's case into the scheme of the Act. Eventually, claiming to give effect to the purposive intent of
Parliament, they decided that racial discrimination could include treating one less favourably on the grounds of another’s colour.

b. **Showboat Entertainment Centre Ltd v Owens** [1984] IRLR 7, [1984] ICR 65, *EAT*: A white employee was dismissed for refusing to carry out an instruction from his employers to exclude black youths from an entertainment centre. That instruction was clearly unlawful under s30 **RRA 1976** (instruction to discriminate) but only the Commission for Racial Equality (as it was then) could take enforcement action in respect of that section (s63 **RRA**).

The question was - Could Owens say that his dismissal was an unlawful act of discrimination against him, on the grounds that he had been treated less favourably on the grounds of another’s colour?

The answer was – seemingly – yes.

Arguably, Parliament could not have intended to leave an employee without a remedy in a situation like this, so, following *Levy (above)*, discrimination ‘on racial grounds’ should be interpreted as including discrimination on the grounds of another’s race, colour etc.

c. **See also**:
   i. *Weathersfield Ltd v Sargent* [1999] IRLR 94, CA

20. This approach was seen as giving a (perhaps understandably, given the facts of some of the cases) wide meaning to ‘racial grounds’. Some of the cases might also have been seen as instances of ‘discrimination by victimisation’. Arguably, in a case like *Showboat*, it would have been possible to say that the employee was dismissed for having done something 'by reference to' the Act (s21(1)(c) **RRA 1976**) insofar as they each refused to carry out an order rendered unlawful by the Act (to carry out the order would be an unlawful aiding and abetting (**RRA 1976 s 33**)).
21. However, a similar, but not identical, argument failed in *Kirby v Manpower Services Commission* [1980] IRLR 229, [1980] ICR 420, EAT. As the EAT was determined to take what some saw as an unnaturally narrow view of ‘victimisation’, despite the fact that there was perhaps a good argument for taking what might be seen as a wide view of ‘racial grounds’.

**EXCEPTIONS TO ASSOCIATIVE DISCRIMINATION**

22. While the concept of associative discrimination is now firmly established as a possible basis for claims in relation to certain of the protected characteristics covered by the EqA 2010, there are exceptions.

**Pregnancy Exception**

23. Pregnancy is not a protected characteristic to which associative discrimination applies.

24. The dismissal of A because B, with whom A is associated (e.g. as her husband) is pregnant, would not be pregnancy discrimination on the plain wording of S18 EqA 2010.

*S18(2) Equality Act 2010 says:*

A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably— (a) because of the pregnancy

25. But is it possible to argue that EU law requires protection to apply, and that s18 must be read so as to accommodate such a claim, in the same way as had been done with DDA 1995 in *EBR Attridge Law LLP v Coleman* [2010] IRLR 10? (A similar question may arise in relation to the dismissal or detrimental treatment of the intended mother in a surrogacy arrangement, by reference to her association with the birth mother.)

26. Likewise, in an IVF situation, once the embryo has been implanted, one would presume that the ‘protected period’ under s18 has commenced, as the ‘pregnancy’ has commenced.
27. The issue of discrimination on the basis of the pregnancy of a complainant’s partner arose, [it is thought for the first time, and certainly for the first time at EAT level], in Kulikaoskas v MacDuff Shellfish [2011] ICR 48.

28. The claimant’s complaint of sex discrimination was that he had been dismissed (after less than a month’s service) because, he claimed, his partner, also employed by the respondent, was pregnant. He alleged that her condition had come to light when he was taken to task for assisting her with some heavy lifting.

29. The claimant’s claim was rejected by the tribunal without being registered, and an application to review this decision was refused on the ground that it disclosed no cause of action.

30. The necessary foundation in EU law was not available under the pre-Equality Act 2010 legislation, to the male employee seeking to complain of associative discrimination on grounds of his partner’s pregnancy, in Kulikaoskas v (1) Macduff Shellfish, (2) Watt [2011] ICR 48, EAT.

31. That case was distinguished from Coleman on a number of bases, including that the decision in Coleman had been based on the Framework Directive and not on the Pregnant Workers Directive and the recast Equal Treatment Directive.

32. The appeal against that decision to the EAT was also rejected. Lady Smith, after reviewing all the potentially relevant provisions of EU law, and the Coleman case and case law on associative discrimination in other fields, concluded that the special protection afforded to pregnancy was intended for the protection of women, and was not extendable by analogy with the reasoning in Coleman to the protection of those associated with them.

The Pregnant Workers Directive states the following as its ‘objective’:

“to protect the health and safety of women in the workplace when pregnant or after they have recently given birth and women who are breastfeeding.”
33. The position was sufficiently clear that a reference to the CJEU was not necessary. The case raises a number of interesting issues. Lady Smith may have been correct in pointing out some of the oddities that would result from a finding that SDA 1975 s 3A (the provision in force for the purposes of this case) covered associative pregnancy discrimination, such as that a claim could be brought by a teacher dismissed for having got a pupil pregnant. But any such claimant would be likely to receive no compensation on the application of the 'just and equitable' test for the award of compensation.

34. These issues were also ventilated by Mummery J in *O’Neill v Governors of St Thomas More RC Upper School* [1996] IRLR 372, [1997] ICR 33, EAT, at para 57. However, the possibility that unmeritorious claims would be possible in any given case may not be a good reason to hold that meritorious claims may not be pursued.

35. It is also difficult to see why, on the assumed facts of the case, the protection of Mr Kulikaoskas from dismissal was not necessary to protect his pregnant partner’s dignity and autonomy, in the same way that protecting Ms Coleman from victimisation as the carer of a disabled child was necessary for the protection of the child’s dignity and autonomy.

36. However, it is notable that Mr Kulikaoskas’s partner was not ‘in the workplace’ of the discriminator and perhaps that goes some way to explaining the decision, bearing in mind the ‘objective’ of the Pregnant Workers Directive.

37. There was another appeal to the Inner House of the Court of Session (on 11 January 2012) which was referred to the CJEU in relation to questions about the 2006 Equal Treatment Directive. However, it is understood that the case was settled and the reference withdrawn before reaching a hearing.

38. In addition, the wording of s99 ERA 1996 and reg 20 MAPLE SI 1999/3312 (*Maternity & Parental Leave Regs*), and s1 SDA 1975, is clear enough to establish that there is no room for serious argument that dismissal of the partner of a pregnant woman would be caught – i.e. partners are clearly not protected under reg 20 and thus s99 ERA,

**MPL Regs – reg 20 – Unfair dismissal**
(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or

...

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

(a) the pregnancy of the employee. etc.

39. However, as alluded to above, the position under EqA 2010 s 13 is less clear.

**S13 direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

40. This defines direct discrimination as treating the person less favourably because of a protected characteristic, a term which includes sex (s11). Thus associative sex discrimination is now within the scope of unlawful discrimination.

41. If an employer treats a male employee less favourably because of his association with a female, that is surely unlawful discrimination?

42. It must at least be arguable that the same less favourable treatment inflicted because the woman with whom he is associated is pregnant, a condition which is gender-specific, is equally within the scope of the definition, not least because of the jurisprudence of both the CJEU and the domestic courts establishing that pregnancy discrimination is sex discrimination.

43. The existence of specific further protection against unfavourable treatment (with no need for a comparator) for reasons relating to pregnancy, for women only, does not preclude such reasoning.
44. Whether or not Kulikaoskas is correct on the law as it stood before 1 October 2010, it may well not reflect the position since the coming into force of the principal provisions of the EqA 2010.

Reasonable Adjustments Exception

45. Associative discrimination does not extend to the making of reasonable adjustments, which can only be required where the employee himself or herself is disabled: s20 EqA 2010.

S20 sets out e/r’s obligations.
S21 says:

S21 (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.


46. There have also been post Equality Act authorities on this issue: see Newcastle upon Tyne Hospitals NHS Foundation Trust v Baglay [2012] EqLR 634, EAT and Hainsworth v Ministry of Defence [2013] EqLR 1159, EAT, where it was held as a matter of policy and construction that associative discrimination does not apply to the duty to make reasonable adjustments in disability discrimination.

47. Similarly, it has been held not to extend to perceived discrimination, see Aitken v Commissioner of Police of the Metropolis UKEAT/0226/09, [2011] 1 CMLR 58, although in J v DLA Piper UK [2010] IRLR 936, [2010] EqLR 164, the issue was seen as sufficiently open to debate as to warrant a reference to the ECJ (which the EAT was not prepared to make in the circumstances of that particular case).

Religious Belief & Sexual Orientation?

48. Any doubt over whether RB and/or SO were exceptions has dissipated. They are, it is opined, not exceptions.
49. The definition of direct discrimination in the Employment Equality (Religious Belief) Regs 2003 SI 2003/1660 reg 3(1)(a) was similar to that in Employment Equality (Sexual Orientation) Regs 2003 SI 2003/1661, when initially introduced.

50. These regulations, as the author understands it, were revoked (by schedule 27) of the Equality Act 2010. They were replaced by ss 10 & 12 of the Equality Act, i.e. religion/belief and sexual orientation were freestanding protected characteristics, just like sex and race (albeit probably distinct from disability and pregnancy, as are sex and race).

51. This effectively ought to bring associative discrimination in respect of religious belief and/or sexual orientation into line with sex and race discrimination, etc. The upshot must presumably be that associative direct discrimination on these grounds applies such as it does in respect of sex or race discrimination?

52. For example, where A treated B badly because B was friends with a Muslim that would amount to unlawful discrimination. Where the discriminator acted as he did because of his/her own beliefs that would be a consideration which might provide an explanation of his behaviour and also allow a court or tribunal to understand the motivation behind the action—but it would not be conclusive proof that there has been unlawful discrimination.

53. The EAT in Saini v All Saints Haque Centre [2009] IRLR 74, [2009] 1 CMLR 1060 upheld a complaint of discrimination by Mr Saini, who was subject to harassment because of the faith of his colleague; both were Hindu.

54. Lady Smith held that 'if an employee establishes that he has been subjected to [paragraph 5(1)(b)] conduct because of his employer pursuing a discriminatory policy against the religious beliefs held by another employee that will be enough [to establish discrimination]'.

55. In so finding the EAT noted that this ensured that the EE(RB)R 2003 SI 2003/1660 were consistent not only with the aims and intention of the EC Framework Directive 2000/78/EC but also with the judicial interpretation of the Race Relations Act 1976, which was similarly engaged where there is discriminatory conduct on the grounds of someone else's race (e.g. Showboat Entertainment Centre Ltd v Owens [1984] IRLR 7, [1984] ICR 65).
SOME INTERESTING CASES – straight pubs and BNP members

56. For an illustration of how the purposive approach works, see Lisboa v Realpubs Ltd UKEAT/0224/10, [2011] EqLR 267, in which the re-launch—and re-positioning—of London’s first openly gay pub led the EAT to hold that the claimant had been the victim of unlawful sexual orientation discrimination by way of association.

57. The case concerned the attempt on the part of the pub’s new management to broaden the appeal of the pub such that (on the findings of the Employment Tribunal) gay customers were ‘plainly and unarguably’ treated less favourably on the grounds of their sexual orientation. In considering the complaint by one of the pub staff, however, the ET had held that this did not amount to discrimination by way of association on grounds of sexual orientation because the attempted re-launch amounted to a lawful policy.

58. The EAT disagreed, finding that it had been an error for the ET to stop its enquiry at the point it decided the policy was lawful. It should have considered the effects of the policy and whether that would amount to less favourable treatment, as the claimant suggested.

59. By contrast, the Courts took a different approach in the pre-Equality Act case of Serco (see below). There are, however, limits to the way in which the principle of discrimination by association can be used, as was apparent from that case, which was brought under RRA 1976 by an employee who lost his job because his employer discovered he was an active member of the British National Party.

Serco Ltd v Redfearn [2006] IRLR 623, CA: The employee was summarily dismissed from his job as a driver, following representations made by unions representative of its workforce, when he was elected as a BNP councillor in Bradford. He claimed direct discrimination on the ground of race, arguing that he had been dismissed on the ground of Asian race and ethnic origin of the people he transported in his job. Having lost in the employment tribunal but won in the Employment Appeal Tribunal, Mr Redfearn sought to persuade the CA that a wide interpretation of the Showboat decision was correct, and that this assisted him.
He failed, Mummery LJ (who delivered the only reasoned judgment) pointing out that:

'Taken to its logical conclusion [Mr Redfearn's] interpretation of the 1976 Act would mean that it could be an act of direct race discrimination for an employer, who was trying to improve race relations in the workplace, to dismiss an employee, whom he discovered had committed an act of race discrimination, such as racist abuse, against a fellow employee or against a customer of the employer'.

60. The correct analysis was that although the decision to dismiss Mr Redfearn was taken in circumstances which included racial considerations (i.e. the fact that a significant proportion of Serco's customers and workforce were Asian) he was not dismissed 'on racial grounds'. Mr Redfearn was held to have been dismissed because of his membership of the BNP, and it was stated that he could not 'credibly make a claim of direct race discrimination by Serco against him on the ground that he is white by relying on the decision of his own chosen political party to limit its membership to white people'.

MISTAKEN ASSOCIATION

61. The definitions (both under the pre-Equality Act 2010 legislation and under the Equality Act itself) have also been held to be wide enough to cover cases where mistakes are made by the discriminator. If I am treated less favourably on the ground that I am thought to be gay/Catholic or whatever, then it matters not that in fact I am not gay/Catholic etc.

62. It is still unlawful to subject me to less favourable treatment. As the case of *English v Thomas Sanderson Blinds* [2008] EWCA Civ 1421, [2009] IRLR 206, [2009] ICR 543 shows, treatment is also prohibited under the regulations even if the perpetrators know that the complainant is not gay, and are simply using homophobic abuse as a vehicle to 'bully' the complainant.

*English v Thomas Sanderson Ltd* involved the homophobic abuse of a fellow worker who was known by the perpetrators not to be gay, but was thought to be a target because he had been to public school and lived in Brighton. The EE(SO)R 2003 SI
2003/1661 covered harassment of someone who was gay and someone who was wrongly perceived to be gay.

63. Also, by extension of the rule in *Showboat Entertainment Centre v Owens* [1984] IRLR 7, [1984] ICR 65, EAT, there can be harassment of A because of B's [sexual] orientation.

64. The Court of Appeal allowed Mr English’s appeal by 2 to 1. The majority (Collins and Sedley LJ) took a relatively first-principled approach that 'on the ground of' *can* cover actions such as these, which came within the natural meaning of reg 5, and that none of the existing case law is to be construed as ruling that out (especially if one simply poses the question put by Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 1 AC 501, [1999] 4 All ER 65—'why did the complainant receive less favourable treatment?

65. This was seen as clearly within the legislative intent of the Regulations.

66. However, although this point has now been cleared up, the difficulties in this area should not be underestimated, and are shown by two aspects of this decision—

(1) the strong (and relatively long) dissent by Laws LJ who held that reg 5 [*which effectively contained the same causation wording as s13 – 'on the ground of', meaning the same as 'because of'][per s13]*) could not bear this interpretation and could not be re-read to do so in order to comply with the backing directive—

and

(2) the fact that (crossing the majority on result) Laws and Sedley LJ thought that the 'National Front case' (*Redfearn v Serco Ltd* [2006] ICR 1367, CA) posed problems here (though they resolved them in different ways) whereas Collins LJ did not.

**VICTIMISATION**

67. Victimisation can (clearly, it is opined) be by way of association.

**s27 Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

68. So; direct discrimination, harassment and victimisation can be by association.

69. But what about victimisation where there is merely an association with the protected act (rather than an association with the protected characteristic via the act) – see below.

HOW CLOSE MUST THE ASSOCIATION BE?

70. In the case of Thompson v London Central Bus Co [2016] IRLR 9, EAT, the question arose as to how widely the ‘association’, in a case of associative discrimination, was to be construed.

71. Did it have to be in the nature of a familial association (as in Coleman) or could it arise from membership of the same trade union (the issue in Thompson)?

72. The Employment Tribunal felt this was too far removed. The EAT disagreed (HHJ Richardson), holding that there were no non-permitted categories; the question was one of causation – Had the association in question had the relevant effect on the treatment of the claimant? – i.e. what was the reason? – what were the grounds? – what caused the treatment?.

73. In Thompson, the complaint made was one of victimisation rather than direct discrimination. The Employment Tribunal had earlier ruled that such a claim could be brought as a matter of law and there had been no appeal against that decision. The case had therefore proceeded on that basis and the issue was not before the EAT.
However, victimisation under the s27 Equality Act 2010 is differently worded, referring to the victimisation of 'B' because 'B' does the protected act. On its face, that would seem to rule out discrimination by way of association merely to the person who does the protected act (albeit not by association to the person with the protected characteristic, where the complainant does the protected act him/herself).

74. A broad approach to associative discrimination was also adopted by the EAT (Langstaff P) in *EAD Solicitors LLP v Abrams [2015] IRLR 978*.

The question in that case was whether the complaint of associative discrimination could be made by a limited company, relying on sections 13 (direct discrimination) and 45 (prohibition of discrimination against members of LLPs) of the Equality Act 2010. A solicitor member of the LLP had altered his arrangements so that a limited company (of which he was the sole shareholder) stood as member in his place. The company employed him to provide his services to the LLP, but it was the company that was the member and thus the complainant under section 45 when the application of a retirement age meant its shareholder’s services were no longer utilised by the LLP. Applying the Interpretation Act 1978, the EAT held that 'person' included 'a body of persons, corporate or incorporate' and a complaint of associative age discrimination could thus be brought by the limited company in this context.

**INDIRECT ASSOCIATIVE DISCRIMINATION**

75. Whilst it is clear that associative discrimination is prohibited in cases of direct discrimination it is less clear whether it is possible to bring a complaint of indirect discrimination because of the protected characteristic of a person / persons with whom a complainant is associated. This seems now to be at least arguable, as a consequence of the judgment of the CJEU in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia [2015] IRLR 746*. It was held that 'the principle of equal treatment in the Directive is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds'.

*CHEZ*: Ms Nikolova owned a shop in a predominantly Roma district in a Bulgarian town, but she was not Roma.
She complained about the practice of the electricity distributor of placing meters on concrete pylons at a height of between six and seven meters, as she could not monitor her electricity consumption or check her bills. The placing of meters at this height (which was not the practice in non-Roma areas) was apparently to prevent tampering and fraud – though no evidence was adduced to show that this was more likely in Roma areas. The CJEU held that the Equal Treatment Directive afforded protection to an individual who is subject to a detriment even though they are not themselves a member of the race or ethnic group.

76. The claim of (associative) direct discrimination was upheld – and the court went on to hold that if not direct discrimination, the practice in relation to the placing of meters could constitute indirect discrimination.

77. No specific question was posed asking whether a person not sharing the race or ethnic origin of those disproportionately disadvantaged by the PCP would be within the scope of the indirect discrimination provisions. However, the reference to both 'less favourable treatment' (found in the definition of direct discrimination) and 'particular disadvantage' (found in the definition of indirect discrimination) suggests that 'associative indirect discrimination' is, as a matter of law, possible.

78. Whether s19 EqA can be read in a manner consistent with this judgment remains to be seen. Section 19(1) requires that for 'B' to be discriminated against, 'A' must have applied a PCP which is discriminatory 'in relation to a relevant characteristic of B's'. This clearly requires B to possess the characteristic. Similarly, s 19(2)(b) refers to putting 'persons with whom B shares the characteristic' at a disadvantage.

THE FUTURE

79. The exponential expansion of anti-discrimination has largely occurred against a European background, driven by its directives and judgments and implemented by primarily Labour Governments, (the principle exception being the DDA 1995). It appears at present that the current government interprets ‘Brexit’ as encompassing a reduction of both EU law and the influence of the ECJ and that, equally, it may be some time before there is another Labour government.
80. Whether any of the existing rights are to be rolled back or diluted is unclear, but it is not difficult to envisage a significant hiatus in the further development or expansion of anti-discrimination law.

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Article 2

Definitions

1. For the purposes of this Directive, the following definitions shall apply:

(a) ‘direct discrimination’: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) ‘indirect discrimination’: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

(c) ‘harassment’: where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

(d) ‘sexual harassment’: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

(e) ‘pay’: the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer;

(f) ‘occupational social security schemes’: schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (‘‘) whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person’s rejection of or submission to such conduct;
(b) instruction to discriminate against persons on grounds of sex;

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.