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Blog article by Eileen Lavery, Head of Policy

Discrimination by association – what is it?

It has been a long established principle of equality law that it is unlawful to directly discriminate against or harass one person because of certain characteristics, such as the colour or religion, of another person.

For example, in the early case of *Race Relations Board –v- Applin [1973]*, the English Court of Appeal noted that it would be unlawful racial discrimination for a publican to refuse to serve a white customer because she is accompanied by a black customer. The discrimination is still on *racial grounds*, i.e. the ground of colour, and is unlawful.

This type of discrimination is often called *associative discrimination* because the victim is being discriminated against because they are associated with another person who is the main target of the perpetrator's prejudice.

This concept of *discrimination by association* also operates in employment-related cases brought under disability discrimination law, the Disability Discrimination Act 1995 (“DDA”). The principle was established by a decision of the Court of Justice of the European Union in the case of *Coleman -v- Attridge Law [2008]*, where it was alleged that an employer had made derogatory comments about the complainant's disabled son and about his disability. The fact that the complainant was not herself a disabled person initially raised a legal barrier to her claim.

The Court ruled that, though the DDA as originally enacted only seemed to allow disabled employees and job seekers to complain of disability discrimination, the European Union's Employment Equality Directive, covered this scenario. Therefore the DDA should be interpreted as allowing Mrs. Coleman to bring a complaint about the discrimination and harassment to which she alleged she was subjected. The DDA itself has still not been expressly amended to allow this kind of claim, so such claims depend on courts or tribunals reading into the statute



words that will give effect to the EU Court's decision.

This ruling does not apply to the DDA's provision which requires employers to make reasonable adjustments. That duty is owed only to job seekers and employees who are themselves disabled. This means that employers are not required under the DDA to treat non-disabled employees who are carers of disabled people more favourably than others, such as people who care for non-disabled people or those who are not carers at all. It does, of course require that they are not treated less favourably than those others by, for example, being selected for dismissal or redundancy simply and specifically because they are the carers of disabled people. As usual in discrimination cases, the key question is "*why was the complainant treated as they were?*"

There have been a small number of successful associative disability discrimination cases and the best of these, in terms of illustrating the concept, was a recent local case.

McKeith -v- Ardoyne Association [2016]

Ms. McKeith was employed as a part-time advice worker with a community-based organisation. She has a disabled daughter, is responsible for her care, and a friend looked after her daughter while she was at work. She was dismissed, her employers said, on the ground of redundancy. That was disputed by Ms. McKeith and the employment tribunal which heard the case agreed with her by finding that the employer's explanation for the dismissal was not convincing or coherent.

The evidence showed, for example, that Ms. McKeith's manager had sent her home and denied her the opportunity to work because of her disabled daughter. The Tribunal stated that, in her manager's mind, "*because the claimant had a disabled child, her position was not properly in the workplace. Her daughter was 'her priority'.*" That evidence, together with the absence of any other satisfactory explanation for the dismissal, enabled the Tribunal to conclude that Ms. McKeith was dismissed specifically because she was the primary carer of her disabled daughter. As such, it was an act of associative direct discrimination and unlawful.

The Tribunal said that, while the manager's actions may have been for the best of intentions, "*That is not the legal position. People who are disabled themselves, or who are the primary carer of a disabled person, have a right to work within the protection afforded by the 1995 Act.*"

The employer appealed but in September 2016 the Court of Appeal upheld the tribunal's decision. It stated that there was such evidence that, "*in the absence of an adequate explanation, a Tribunal could conclude that the employer committed an unlawful act of associative disability discrimination.*"

[Read more about this case](#)

Conclusion

All employers should remember that the Disability Discrimination Act, in addition to protecting disabled people against discrimination because of their own disability, also protects non-disabled people who are associated with a disabled person where the reason for their discriminatory treatment is because of that association. In this case, the evidence indicated that Ms McKeith was denied the opportunity to work because her daughter is disabled. The law makes such discrimination unlawful.

And any employer considering dismissing someone on grounds of redundancy should follow a fair redundancy selection procedure, one that is based on objective criteria and which does not hinge on any protected factors, such as age, sex, race, religion or politics, sexual orientation or, as here disability. A good place to start for advice on developing and following such a procedure is a guide issued by the Labour Relations Agency: [Advice on Handling Redundancy](#) – we strongly recommend that all employers consider and apply it.

It is equally important that employers give genuine reasons for taking disciplinary or dismissal action against an employee. If redundancy is the genuine reason, then so be it, but a redundancy scenario should not be concocted to hide another reason, such as poor performance, attendance or time-keeping. In those circumstances a discrimination complaint brought by an aggrieved person about their selection would likely, and rightly, succeed. If an employee's performance, attendance or time-keeping are the real problem then the employer should deal with those matters fairly under the appropriate performance or attendance procedure. When doing so, employers should not treat the employee less favourably than they would treat any other merely because that person is associated with a disabled person.