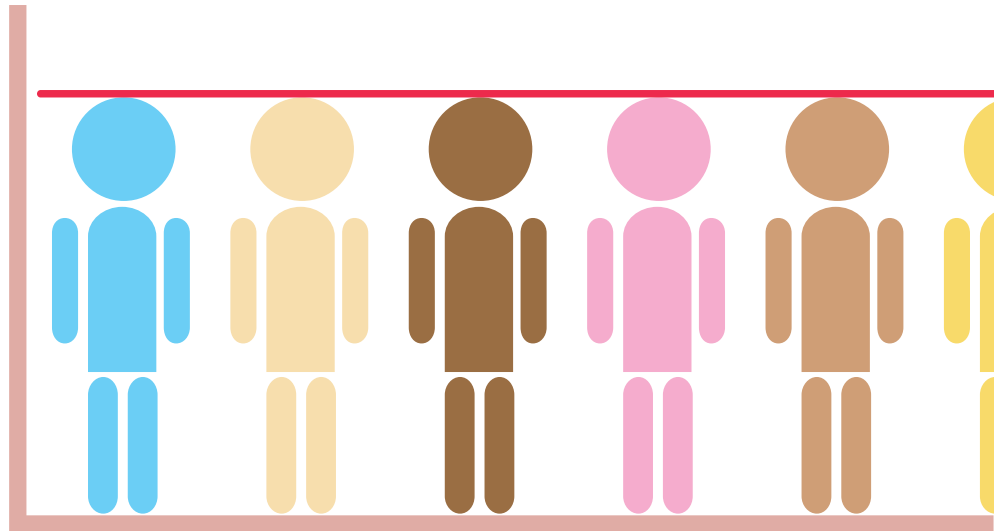


# A guide to discrimination

The Equality Act 2010, introduced the concept of discrimination by association into UK legislation, following the landmark decision of the European Court of Justice (ECJ) in *Coleman v Attridge Law*. While claims of this type have been relatively unusual, two recent cases have put the issue back in the spotlight. Sarah Embleton and Kate Redshaw consider what they could mean for employers.



Usually if a person is discriminated against, it is because of a “protected characteristic” that they themselves hold, such as their race, sex or sexual orientation. Discrimination by association, however, protects a person from being discriminated against because of a third-party’s protected characteristic.

For example, if a heterosexual worker is dismissed by her manager because he does not like the way she socialises with gay friends, the worker would have a claim for direct discrimination on the ground of sexual orientation, even though her own sexual orientation was not the reason for the less favourable treatment. Similarly, in *Coleman v Attridge Law*, the claimant was found to have been directly discriminated against and harassed because of her son’s disability – but she herself was not disabled.

#### What forms of discrimination are prohibited?

The Equality Act recognises that discrimination can arise in a number of different ways including: direct discrimination; indirect discrimination; victimisation; and harassment. However, in relation to discrimination by association, only direct discrimination and harassment are prohibited in the legislation.

Direct discrimination by association might occur as in the worker/manager example above. Harassment by association might arise where, for example, a non-Jewish employee with a Jewish partner is subjected to inappropriate workplace “banter” about Jews.

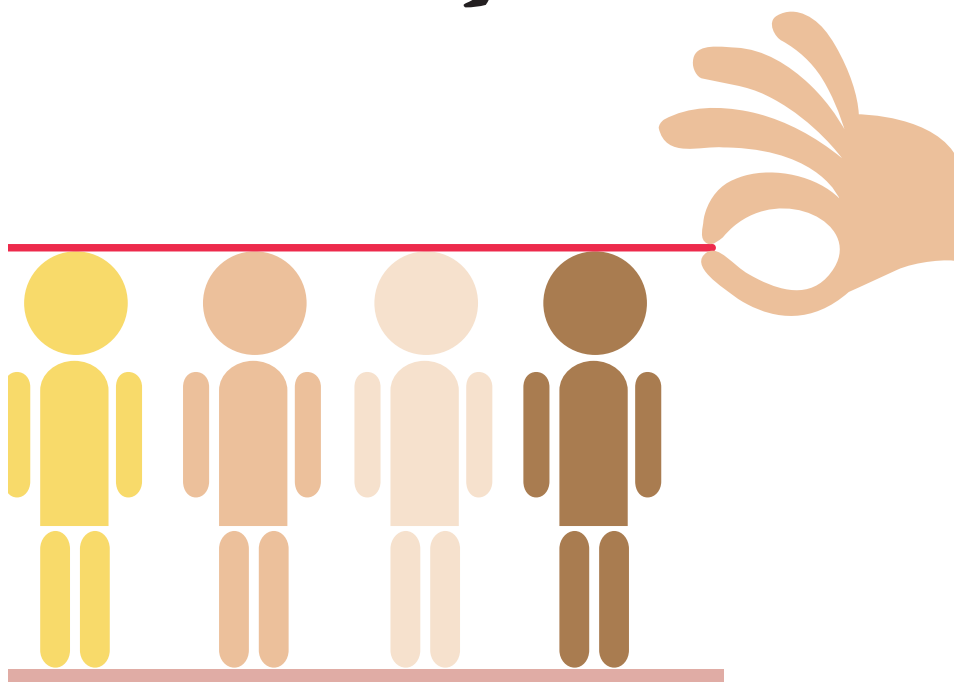
#### How is the law developing?

In the 2014 case of *Hainsworth v Ministry of Defence*, the Court of Appeal considered whether or not an employer had an obligation to make reasonable adjustments for an employee whose daughter was disabled. The employee was based in Germany and, while the

#### LEGAL DEFINITIONS – EQUALITY ACT 2010

- **Direct discrimination** occurs where “a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably”.
- **Harassment** occurs where “a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either: violating B’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B”.
- **Indirect discrimination** occurs where “a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B”.

# Discrimination by association



employer provided on-site schooling for employees' children, it did not provide schooling for children with "significant needs". Ms Hainsworth, whose daughter had Down's Syndrome, asked for a transfer to the UK so that she could organise the schooling that her daughter needed but her employer refused. Ms Hainsworth subsequently brought a claim against her employer for failing to make a reasonable adjustment, given her daughter's disability.

The Court of Appeal was clear that the duty to make reasonable adjustments only applies to employees who are themselves disabled and does not extend to employees who are associated with a disabled person. It also made clear that it is only instances of direct discrimination and harassment that require protection from discrimination by association. (Despite the *Hainsworth* decision, employers may, of course, still wish to consider whether or not they can accommodate such adjustments from an employee-relations perspective.)

While the UK currently limits the scope of discrimination by association to direct discrimination and harassment, recent European developments may see the position change. A referral to the ECJ by the Bulgarian national courts in *Chez Razpredelenie Bulgaria* may widen the scope of discrimination by association to include indirect discrimination. The ECJ has yet to deliver its judgment in the case, but the Advocate General has delivered her opinion.

The claimant in the case, a non-Roma, runs her business in a predominately Roma district of Bulgaria. The electricity supplier for the district has a practice of positioning electricity meters higher up than is usual because of the large number of instances of meter-tampering that they experience in the district. For various reasons, the claimant says this amounts to less favourable treatment.

There is no claim for direct discrimination available to the claimant as both Roma and non-Roma people are affected by the practice, but the Advocate General considered that it was possible to extend the scope of discrimination by association to include indirect discrimination (albeit that it may be possible for the electricity supplier to objectively justify its actions).

The Advocate General's opinion is not binding on the ECJ, but their opinions are often followed by the court so it can be indicative as to the court's likely approach. If the ECJ does extend protection to include indirect discrimination, this is potentially wide ranging in impact.

As an aside, the Advocate General also considered how close the relationship has to be between the claimant and the third party with the protected characteristic for it to constitute discrimination "by association".

She found that there was no need for there to be a close personal relationship (as had been the case in *Coleman*) and gave the example that business people meeting for the first time could still be discriminated against by association where, for example, they are turned away from a restaurant because one of the party is black.

## Practical tips on discrimination by association

Many employees prefer to keep their home and family life private. While workplace "banter" may seem innocent, consider the impact it might have on employees who, while not having a protected characteristic themselves, might take offence due to their association with friends or family members who have protected characteristics.

Review your workplace policies and consider whether or not they should refer specifically to discrimination by association (for example, in bullying and harassment policies).

When providing diversity training to your staff, ensure you cover discrimination by association so that your employees – particularly your managers – know that it is possible to discriminate in this way and are aware of the sort of behaviour that could lead to claims.

Consider the impact of your decisions not just from a legal perspective but also from an employee-relations point of view. While you may have a legal defence to your decisions, this will not necessarily appease employees who feel unfairly treated.

## Protected characteristics

Nine characteristics are protected under the Equality Act but only eight are relevant in respect of discrimination by association: age; race; disability; gender reassignment; religion or belief; sex; sexual orientation; and pregnancy and maternity. Marriage or civil partner status is excluded.

## THE AUTHORS

■ Sarah Embleton and Kate Redshaw are senior associates at Burges Salmon LLP. Email: sarah.embleton@burges-salmon.com or kate.redshaw@burges-salmon.com