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HAFAL RESEARCH PAPER:

Do current legal provisions provide adequate protection for carers in employment?

"No-one should have to choose between caring for disabled relatives and their job"

– Sharon Coleman, Claimant in Coleman v Attridge Law [2008] IRLR 722 ECJ

Alun Thomas RGN PgDip MA

April 2009

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Introduction

The employment rights relating to employees in a caring role in the UK have until recently been extremely limited. The recognition of carers within the social policy agenda has progressed and has been acknowledged through a range of legislation relating to their caring role[1] and the provision of social care grants, but this has failed to be transferred to a specific recognition of carers as a group requiring special protection from discrimination in employment at least until the European Court of Justice (ECJ) ruling in Coleman v. Attridge Law brought it into sharp focus. In the UK over five million people have caring responsibilities, almost a third of whom are in full time work.[2] In comparison, there are approximately one million people in work who have a disability.[3] In 2001 15.7% of the UK population was over 65; by 2021, this is predicted to rise to 19.2%[4], an increase in the region of 2 million.[5] This increasingly aging population is likely to result in a significant increase in the number of people in work becoming carers for elderly parents; this is also in addition to the consequences of improved medical intervention resulting in a higher survival rate for such conditions as birth injuries resulting in a greater caring role for parents. This paper will explore the current legal protections for carers in employment both specifically around the law relating to their caring responsibilities, and also to protection of employment for those who might experience discrimination because of their gender (women are over 50% more likely to be the main carers than men[6]). An assessment will be made as to whether these protections provide adequate protection for those carers particularly in light of the ruling in

[1] Carers (Recognition and Services) Act 1995; Carers and Disabled Children Act 2000; Carers (Equal Opportunities) Act 2004
[2] Census 2001; Office for National Statistics (ONS) 2003
[3] Berthoud 2006, p.7 – this study uses much the same criteria as the DDA 1995 to establish disability.
[4] Office of Health Economics (2007)
[5] Based on ONS Population Estimates (2008)
[6] ONS (2002)

Coleman, including a consideration of the practicalities of such rights for employers where clearly there will be an increasing demand for such protections. The rights of parents of non-disabled children will not be considered in depth as these have minimal impact on the rights of the majority of carers and in particular, on those who care for people who have a qualifying disability under the Disability Discrimination Act 1995 (DDA 1995).

Current Legal Provision for Carers in Employment

Carer Specific Provisions

The Employment Rights Act 1996 (ERA 1996) as amended by the Employment Relations Act 1999 (ERA 1999), and the Employment Act 2002, set out an early form of carer rights in employment which related initially to the caring responsibilities for disabled children. The ERA 1999 was amended in part to implement the European Parental Leave Directive (96/34/EC) and these rights were set out in the Maternity and Paternity Leave etc. Regulations 1999 (MPLR 1999) amended by the Maternity and Paternity (Amendment) Regulations 2002 (MPL(A)R 2002).[7] This was however extremely limited but gave additional leave for the parents of children who were in receipt of Disability Living Allowance (DLA) over those for non-DLA recipients and appears to have started the process for the recognition of the caring role. The ERA 1999 also amended the ERA 1996 by inserting s.57A which provided for reasonable time off to deal with domestic emergencies concerning a dependent. This allows for leave (this does not have to be paid) to *'take action which is necessary'* in circumstances including '*where a dependent falls ill, gives birth or is*

[7] Mooneeram and Whitters 2008, p. 234

injured, or assaulted' or where there is '*unexpected disruption or termination of arrangements for the care of a dependent'*, so long as quite reasonable conditions about informing the employer are met; it is worth noting that this does not have to be as a crisis occurs, it has been shown to be applicable for such leave to be taken when the problem had been identified two weeks before it was needed[8]. It is likely however that such leave will normally be for one or two days[9] which, while useful for dealing with a crisis, does not provide significant time for caring responsibilities. This was further confirmed at Employment Appeal Tribunal[10] where it was stated:

> *'The right to time off to '... provide assistance' etc in subsection (1)(a) does not in our view enable employees to take time off in order themselves to provide care for a sick child, beyond the reasonable amount necessary to enable them to deal with the immediate crisis.'*

Unreasonable refusal to permit such time off can be pursued in Employment Tribunal[11] as could a claim for unfair dismissal if this was the employer's reason for the dismissal. S.57(a)(3)(4) also provides the definition of dependant in relation to the role as employee as *'a spouse [or civil partner], a child, a parent, a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or border'* so long as these people reasonably rely upon the employee for help in illness, injury or after an

[8] Royal Bank of Scotland Plc v. Harrison [2009] IRLR 28 EAT
[9] O'Toole v Cortest Ltd. [2008] All ER (D) 220 (May) EAT
[10] Qua v. John Ford Morrison Solicitors [2003] IRLR 184 EAT
[11] S.57B ERA 1996

assault or to arrange care for an illness or injury. S.57(a)(5) also allows for a dependent to be *'any person who reasonably relies on the employee to make arrangements for the provision of care'* which would open up rights for many carers who are depended upon by more distant relatives.

The Work and Families Act 2006 was the next major step in providing rights for carers in employment. This Act extends parental leave but very significantly extends the right to request flexible working from parents to carers. S.12 amends s.80F of the ERA 1996 by providing a statutory right to request contract variation to enable an employee to care for a disabled adult in addition to the right already present for the carer of a disabled child. The definition of disabled for this purpose is set out in the Flexible Working (Eligibility, Complaints and Remedies)(Amendment) Regulations 2006 which again use the criteria of DLA. This right is again however somewhat limited as it relates only to a partner or relative (including in-laws) and thus excludes non-familial carers from the right to make a request, thereby excluding neighbours who provide care.

In order to be eligible to make a request, the Regulations stipulate that the employee must also have worked for 26 weeks for the employer. The request relates to specific variations in the terms and conditions of employment[12] namely the hours of work, times of work, and whether this could include working from home, and should state that it is an application for such a variation, specify the change requested and the date it would apply, the effect it might have on the employer and how this might be addressed, and how the employee meets the qualification under the ERA 1996. This is very much focussed on the employee having not just to prove they are eligible, but the requirement to identify how the request could be

[12] S.80F ERA 1996

accommodated does appear to set obstacles and processes including meetings and deadlines that many carers might shy away from and thus not take up their right of request. In addition, an employee may only make one request in any twelve months and, in any case, there is no requirement on the employer to agree to the request and there are a raft of general grounds for refusal which although they are appealable, an employer who does not wish to grant a request should be able to find scope in the grounds to avoid breaching the duty.[13] Should the employer fail to address such requests appropriately or fail to make suitable consideration of the request, the employee may seek redress at Employment Tribunal. The importance of providing reasonable grounds for rejection was identified in Commotion Ltd. v. Rutty [2006] IRLR 171 where the appeal Tribunal supported the earlier judgment that:

> *'There has not been a shred of evidence that proper enquiry and proper investigation was carried out by the respondents when dealing with this request.'*

This does however remain a **right to request** rather than **a duty on the employer** such as that under the DDA 1995 where the duty to make reasonable adjustments is on the employer. This will be discussed in more detail later.

General Employment Provisions

Carers may rely on some protection in their employment through existing legislation such as the Sex Discrimination Act 1975 where claims of discrimination might be considered if the caring responsibilities of a female employee (it is well recognised that women bear greater

[13] S.80G ERA 1996

caring responsibilities) are either directly or indirectly used to subject the woman to a detriment. For example, if an employer chose not to employ women because it was believed they may need to take more time off to deal with their caring responsibilities this could be direct discrimination based on sex; if the employer places requirements on all staff but these have a disproportionate effect on women as carers, the Employment Appeal Tribunal and the Court of Appeal have both held this is indirect discrimination under s.1 as women generally have greater caring responsibilities.[14]

In 2005 the DDA 1995 was amended to implement the Equal Treatment Framework Directive 2000/78 EC (itself implementing EC Treaty Article 13); these amendments included a new definition of harassment, a new form of discrimination and the widening of the employers' duty to make reasonable adjustments.[15] The Disability Discrimination Act 1995 will be discussed in detail in relation to the case below. Article 12 of the Framework Directive prohibits discrimination or harassment in employment '*based on religion or belief, disability, age or sexual orientation'*. This prohibition is key in understanding the view of the ECJ in the Coleman and the impact this will have on the protection of carers in employment.

Coleman v. Attridge Law

This case rests upon the argument that while the DDA 1995 (as amended) prohibits discrimination and harassment against people who qualify as disabled for the purposes of the Act, it should also prevent discrimination or harassment in employment **based** on disability. From the judgment it is noted that Sharon Coleman was employed by Attridge Law; she had a disabled son *'who required specialised and particular care'*. (This disability if assessed is

[14] London Underground Ltd. v. Edwards (No.2) [1998] IRLR 364;Aviance UK Ltd. v. Garcia-Bello [2007] WL 4735493 EAT
[15] Painter and Holmes 2008, p.341

likely to have met the qualifications in the DDA 1995 to be considered as disabled for the purposes in the Act in that he had a physical impairment which had a substantial adverse effect on normal day-to-day activities and it had lasted more than 12 months).[16]

Sharon Coleman was made redundant following a period of employment during which she contested she had been subjected to unfair treatment by her employers on the grounds she had a disabled son. Her case to the Employment Tribunal centred on the meaning of the prohibition of discrimination provided for by the Equal Treatment Framework Directive 2000/78 EC. As noted earlier, this itself was clear in that the prohibition related to discrimination or harassment in employment '*based on religion or belief, disability, age or sexual orientation',* and Ms Coleman argued that this meant any such discrimination, based on (in her case) disability, was covered by the directive and should therefore be prohibited in any implementing national legislation. As noted in Litster v. Forth Dry Dock and Engineering Company Ltd.[17] it was stated that:

> *'UK courts are under a duty to give a purposive construction to Directives and to Regulations issued for the purpose of complying with Directives.'*

Ms Coleman was therefore arguing that the DDA 1995 should be interpreted purposively to ensure it complied with the Directive. The Tribunal decided (and the subsequent Appeal Tribunal concurred) that this matter should be referred to the ECJ for a preliminary ruling. The four questions asked of the ECJ were to establish whether the Directive was intended

[16] Schedule 1 DDA 1995 as cited in Painter and Holmes (2008), p.341-343
[17] Litster v. Forth Dry Dock and Engineering Company Ltd. (in receivership) and another 1989 IRLR 161 HL

only to protect individuals who were disabled themselves and if not, would that mean that the Directive protected employees who were harassed or directly discriminated against on the grounds of their *association* with a person who is disabled and that any such action by an employer was a breach of the principle of equal treatment established by the Directive? The ECJ[18] (in support of the Advocate General who had given an opinion in January 2008), ruled that:

> *'The prohibition of direct discrimination on the ground of disability is not limited only to people who are themselves disabled.'*

It noted that the Directive was based on Article 13 of the EC Treaty which sought to *'combat discrimination based on, amongst other things, disability',* and *'...the fact remains that it is the disability which is the ground for the allegedly less favourable treatment',* and thus any legislation based on the Article must comply with the principles of the Article and cannot therefore fail to protect against discriminatory treatment for any reason associated with disability. The ECJ therefore ruled that direct discrimination or harassment based on disability includes discrimination or harassment by association. For carers this could be seen to be the disability of the person for whom they care. While the Court did not rule on whether indirect discrimination by association was prohibited by the Directive it is possible to see a similar challenge as that made by Coleman against employers who implement practices which indirectly have a more disproportionate adverse effect on carers; such indirect discrimination is prohibited on grounds of gender or race and if the language used in the

[18] Coleman v. Attridge Law [2008] IRLR 722ECJ

judgment is taken to a natural conclusion, the Directive **must** prohibit indirect discrimination by association on grounds of disability otherwise it is failing to achieve the aims of Article 13.

The Employment Tribunal case into whether Ms Coleman's employers did constructively dismiss her has yet to be concluded but it is the judgment in the matter referred to the ECJ by the Tribunal which is of major significance both to public sector carer employees where the ruling has direct effect[19] and for all other carer employees who may have recourse to legal action against the UK Government for failing to implement the Directive correctly[20] if the Tribunal believes the implementing legislation is faulty and the DDA 1995, even when read purposively, does not comply with the Directive.

Implications

While the decision of the Tribunal is awaited, there is now a right, enforceable in law for employees who work in the public sector (or for an emanation of the state[21]) not to be directly discriminated against or harassed by their employer on the basis of the disability of the person for whom they care. This means that an employee who believes they have been subjected to a detriment by their employer because of their association with a person with a disability can challenge this through the national Courts as either the DDA 1995 can be purposively interpreted in that way, or the Directive has direct effect. In practice, this is likely to result in employers taking requests to allow flexible working to accommodate caring responsibilities in much more earnest, and carers possibly feeling more empowered to make such requests. For those carers in employment with private employers, there is still not a clear

[19] *Van Duyn v Home Office C- 41/74 [1974]ECR 1337 ECJ; Pubbilico Ministero v Ratti C- 148/78 [1979] ECR 1629, ECJ; Marshall v Southampton Area Health Authority C- 152/84 [1986] ECR 723 ECJ*
[20] Francovich v Italy: C-479/93 [1996] IRLR 355 ECJ
[21] *Foster v British Gas C-188/89 [1990]ECR 1-3133 ECJ*

route to follow until the Tribunal (and possibly higher Courts) have disposed of the matter as this will either be through a DDA 1995 claim or a claim against the state for failure to protect them as per the Directive. In the meantime however it is clear that there **will** be a way to assert that right at some point and as such employers must now take appropriate action to prevent direct discrimination or harassment of carers in their employ.

This does not mean that carers have acquired rights as carers; they continue as in the past to rely upon anti-discrimination legislation as they have done with the Sex Discrimination Act 1975 rather than having rights being applied to them as carers. An employer may still refuse to agree to flexible working under the ERA 1996 and using a 'non-disabled by association' comparator[22] be able to demonstrate that such a decision was non-discriminatory even though it may be needed by the employee and be achievable for the employer with some reasonableness of approach.

This is where a judgment on the purposive interpretation of the DDA 1995 may have greater impact. Should it be agreed that the DDA 1995 can be interpreted to include carers by association, there is the opportunity for carers to seek reasonable adjustments under s.4 in recruitment, employment and redundancy. Such a right would enable them to require the employer to consider such requests and rather than the duty being on the carer to demonstrate what these adjustments might be, unlike that in a request for flexible working under the ERA 1996, the duty passes to the employer. While s.4 of the DDA 1995 recognises there can be no duty on an employer to make reasonable adjustments if they were unaware of the need for such adjustments,[23] there might also be an additional burden on employers to anticipate the

[22] London Borough of Lewisham v. Malcolm [2008] IRLR 700 HL as affirmed by Child Support Agency (Dudley) v. Truman [2009] IRLR 277 EAT

[23] Grey v Eastern and Costal Kent Plc [2009] All Er (D) 171 (Jan) EAT

need for reasonable adjustments for carers as well as people with a disability and indeed to consult with existing staff to establish how many have such responsibilities.

Conclusion

It appears that in general terms, there is little legislative protection for carers in employment; that which does exist relates to other areas of discrimination. Carers are not recognised in their own right for protection in employment; they have a right to request flexible working but that process is convoluted and potentially confrontational; when flexibility is desired, many carers may choose not to raise issues in case they lose any existing goodwill. The judgment in Coleman has added somewhat to the protection of carers in employment through the identification of direct discrimination and harassment by association as a breach of the purpose of the Framework Employment Directive; but again carers cannot now be directly discriminated against based on the disability of the person they care for rather than because they are carers. The DDA 1995 was intended to implement the directive and as such legislation must be interpreted with a purposive approach. This is likely to lead to a number of test cases where these interpretations will be examined unless the UK Government moves quickly to amend the faulty legislation. The decision of the Tribunal in Coleman may also be challenged in a higher Court and may place a liability of the UK Government to compensate carers who cannot bring a case under the DDA 1995 because it has failed to correctly implement the Directive. This will be a costly and unpredictable time for both employee and employer, and Government, and while the common law has evolved in this way for centuries, this is not the only option available to government. It appears essential to amend the legislation to ensure it complies, but in any case it would seem sensible to further review, by either secondary legislation or substitution, the DDA 1995 in light of Coleman, and set out

using the same methodology as the current act: who is a carer for the purposes of the act, the rights of such carers, the duties on their employers, and the remedies for failure. This could also address specifically the issue of indirect discrimination and employers' duty to ensure carers are not indirectly discriminated against by association before the considerable potential for an ECJ referral and ruling on indirect discrimination is realised and a judgment made that it too is prohibited by the Directive; such a decision while totally in keeping with the principles established and surely not an unreasonable proposition in a compassionate society could result in employment chaos without clear legislation to manage the situation.

The Government has the opportunity to address this in the development of the Equalities Bill which is due to be brought forward this year with the intention of codifying existing equalities and anti-discrimination legislation. This could provide an improved framework for the law to function and prevent disputes and uncertainty for a group already stretched for time and support. Employers will clearly have to comply with the interpretation of the DDA 1995 post Coleman and this may become a significant burden on smaller organisations, particularly those who have a more disproportionate number of potential carers as employees such as those industries where part-time work has previously proved useful to both carer and employer. As noted earlier, there are around one million disabled people but over one and a half million carers in employment; whilst any adjustments would have to be reasonable, unless there was a clear, streamlined approach to such matters employers may find themselves swamped by potential requests. This is not an argument for failing to provide rights for carers but it does perhaps argue for the development of support for carers along the same lines as the access to work services for disabled employees, to advise, support and financially assist employers rather than simply adding a burden and potentially leading to conflict. At a time of rising unemployment, well written and intentioned law with protection

for employees against unfair treatment is clearly preferable to a state of confusion through inadequate and poorly drafted legislation and litigation.

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