

**Case C-38/24 [Bervidi] <sup>i</sup>**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

19 January 2024

**Referring court:**

Corte suprema di cassazione (Italy)

**Date of the decision to refer:**

17 January 2024

**Appellant:**

G.L.

**Respondent:**

AB SpA

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**Subject matter of the main proceedings**

In her capacity as caregiver of her minor son, who lives with her and is severely disabled (classified with 100% invalidity), the appellant sought a declaration of the discriminatory nature of her employer's conduct towards her, an order that the employer permanently assign her to a work shift compatible with her son's needs, the adoption of a plan to eliminate the discrimination, and compensation for damages.

**Subject matter and legal basis of the request**

Article 267 TFEU

<sup>i</sup> The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

### **Questions referred for a preliminary ruling**

a) Should European Union law be interpreted – where applicable on the basis also of the United Nations Convention on the Rights of Persons with Disabilities – as meaning that a family caregiver of a severely disabled child who claims to have suffered indirect discrimination in an employment context as a result of the care provided by that individual is entitled to rely on the anti-discrimination protection that would be afforded to that disabled person, if they were the worker, by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation?

b) If the answer to question (a) is in the affirmative, should European Union law be interpreted – where applicable on the basis also of the United Nations Convention on the Rights of Persons with Disabilities – as meaning that it is incumbent on the employer of the abovementioned caregiver to make reasonable accommodation to guarantee compliance – also in favour of that caregiver – with the principle of equal treatment in relation to other workers, modelled on the provisions laid down in relation to persons with disabilities in Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation?

c) If the answer to questions (a) and/or (b) is in the affirmative, should European Union law be interpreted – where applicable also on the basis of the United Nations Convention on the Rights of Persons with Disabilities – as meaning that the relevant caregiver for the purposes of Council Directive 2000/78/EC of 27 November 2000 should be understood as any person, whether a member of the family or a de facto cohabiting partner, who cares in a domestic setting, even informally, free of charge, for a significant number of hours, on an exclusive, continuous and long-term basis, for a person who, by reason of their severe disability, is not absolutely self-sufficient in the performance of the daily activities of living, or should European Union law be interpreted as meaning that the definition of caregiver in question is broader or even narrower than as stated above?

### **Provisions of European Union law and case-law relied on**

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, specifically Articles 2 and 5

Judgments of the Court of Justice of 17 July 2008, C-303/06; of 11 July 2006, C-13/05; of 11 April 2013, C-335/11 and C-337/11; of 10 February 2022, C-485/2020; of 21 October 2021, C-824/19; and of 15 July 2021, C-795/19

### **Provisions of international law relied on**

United Nations Convention on the Rights of Persons with Disabilities, ratified by the European Union through Council Decision 2010/48/EC of 26 November 2009

### **Provisions of national law relied on**

Decreto legislativo n. 216/2003 (Legislative Decree No 216/2003) – Implementation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

#### Article 2

‘For the purposes of this decree and without prejudice to Article 3(3) to (6), the principle of equal treatment means the absence of any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation. This principle means that direct or indirect discrimination, as defined below, shall be prohibited:

- a) direct discrimination [shall be taken to occur where] one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of religion, belief, disability, age or sexual orientation;
- b) indirect discrimination [shall be taken to occur where] an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons having a particular religion or belief, disabled persons or persons of a certain age or sexual orientation at a particular disadvantage compared with other persons.’

#### Article 3(3-bis)

‘In order to guarantee compliance with the principle of equal treatment of persons with disabilities, public and private employers are required to make reasonable accommodation, as defined by the UN Convention on the Rights of Persons with Disabilities, ratified under Law No 18 of 3 March 2009, in the workplace to ensure that persons with disabilities are fully equal with other workers. Public employers must make provision for the implementation of this subparagraph without introducing or increasing burdens on public finance, using the human, financial and operational resources available under current legislation.’

Legge n. 205/2017 (Law No 205/2017)

#### Article 1(255)

‘A family caregiver shall be defined as a person who assists and cares for a spouse, the other party to a same-sex civil partnership or a de facto cohabiting partner ..., a family member or a relative up to the second degree [or] a family member up to the third degree who, because of illness, invalidity or disability,

including chronic or degenerative illness, is not self-sufficient and cannot take care of themselves, is recognised as being disabled because they are in need of long-term, continuous and comprehensive care ...’

The referring court then refers, by way of comparison, to the new Article 25(2-bis) of decreto legislativo n. 198/2006 (Codice delle pari opportunità) (Legislative Decree No 198/2006, the Equal Opportunities Code), which is not applicable to the present case for reasons of timing: this provision, unlike the legislation applicable in the present case, also recognises protection for persons who suffer discrimination ‘on the grounds of ... personal or family care needs’.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The appellant claimed at first instance that the company in which she was employed was not flexible in its working hours and that it did not grant her requests, made as a family ‘caregiver’, and thus assign her a fixed morning shift, or even – with her consent – lower-level duties, so as to enable her to care for her disabled son.
- 2 Among the conduct alleged by the employee, the following facts are of particular importance:
  - a) the employer treated the appellant differently from other colleagues who, for health reasons, were considered to be temporarily or permanently unfit to perform their work in the normal manner. Whereas those colleagues were temporarily assigned to other tasks pending retraining in different duties, the appellant was not given that opportunity, since the assessment of fitness was made on the basis not of the health status of the severely disabled child in her care and the need to care for that child, but of the appellant’s own health status;
  - b) the employer adopted measures of a temporary and non-definitive nature over an unreasonably long period of time in order to resolve the difficulties the appellant was experiencing in continuing her working life;
  - c) the employer failed to take any action in respect of the appellant’s request to be potentially assigned to lower-level duties in order to resolve the abovementioned difficulties.
- 3 The Tribunale di Roma (District Court of Rome), which was the court of first instance, dismissed the action.
- 4 The appellant lodged an appeal, which the Corte d’appello di Roma (Rome Court of Appeal) dismissed on the merits, on the grounds that no discriminatory conduct had been proven and that, in any case, the employer had made ‘reasonable accommodation’.

- 5 In particular, the Court of Appeal held that the company had in any case sufficiently facilitated the employee's work and that, with regard to the treatment of workers who were unfit to work in the ordinary way and were temporarily assigned to other tasks pending retraining in different duties, the company had rightly not granted her this possibility, given that the recipients of the medical prescriptions indicated in the certificates produced were her colleagues.
- 6 The appellant lodged an appeal before the Corte di Cassazione (Supreme Court of Cassation), alleging that she was dismissed on 10 October 2022.

### **The essential arguments of the parties in the main proceedings**

- 7 The appellant asserts that she meets the legal requirements for the protection of her right to non-discrimination on grounds of disability in the workplace, denies that the company has made 'reasonable accommodation', maintains that the application of temporary measures limited to a few months for discontinuous periods and not applied in written form does not rule out the alleged discrimination, and finally alleges an infringement of the rules on proving discrimination.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 8 A family caregiver, which was defined in law for the first time in Italy by the abovementioned Article 1(255) of Law No 205/2017, is the person responsible for another dependent person, whether disabled or elderly, who is not self-sufficient in the performance of the daily acts of living, and for whom they care in a domestic setting. Generally, a family caregiver is a member of the family of the person being cared for, who performs, even informally, a free-of-charge, continuous, long-term care activity for a significant number of hours.
- 9 The family caregiver of a disabled person does not, however, enjoy general protection in the Italian legal system against discrimination and harassment in the workplace as a result of the care duties incumbent on them. Such caregivers are only covered by specific institutions recognised by particular legal provisions that, moreover, are often limited simply to extending to such caregivers protections that are not their own but rather apply to the disabled persons under their care.
- 10 In particular, caregivers can enjoy certain employment benefits, including:
  - a) monthly paid leave of absence from work;
  - b) paid leave;
  - c) where possible, the right to choose the place of work closest to their domiciles;
  - d) a prohibition on transfer to another location without their consent.

- 11 However, there was no national provision at the time of the facts of the case that recognised a right to protection for a caregiver in cases of ‘discrimination by association’, namely situations where such individuals had suffered direct or indirect discrimination in the workplace as a result of their care-related responsibilities.
- 12 For this reason, the court of first instance did not accept that the appellant had a right to take action against the alleged discriminatory conduct, holding that it was not the appellant herself but rather the disabled person who had the right to take action against employment discrimination.
- 13 Conversely, the Court of Appeal, while rejecting the appeal on the merits, stating that the existence of discriminatory conduct had not been proven, held that the caregiver was fully entitled to rely on the national provisions protecting the disabled person against employment discrimination.
- 14 To support its argument, the Court of Appeal cited the judgment of the Court of Justice of 17 July 2008, Case C-303/06, *Coleman*, which extended the subjective scope of Directive 2000/78/EC – which protects people against discrimination on the grounds of disability in the workplace – to include persons closely associated with disabled persons who provide them with an essential part of the care they need (primary providers).
- 15 However, the referring court points out that the abovementioned *Coleman* judgment actually stated that Directive 2000/78, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, should be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled.
- 16 That judgment therefore expressly refers only to cases of direct discrimination and, therefore, does not seem to extend the application of Directive 2000/78/EC to caregivers of disabled persons who allege indirect discrimination in the workplace.
- 17 A formal interpretation of Directive 2000/78/EC and of the *Coleman* judgment of 17 July 2008 would undoubtedly be supported by the literal wording of the relevant texts and by the consideration that European Union law, in the present case, might have wished, for reasons associated with balancing the various interests involved, to identify a precise and limited list of beneficiaries of anti-discrimination protection in the workplace.
- 18 However, a broad interpretation of Directive 2000/78/EC would also be possible, based on consideration of the objectives it pursues, on logical and structural reasons and on the changes in current legislation and economic and social dynamics.
- 19 Such an interpretation could be based, first, on the fact that, as the *Coleman* judgment pointed out, the principle of equal treatment and the scope *ratione*

*personae* of Directive 2000/78/EC should not be interpreted restrictively by reference to the grounds laid down in Article 1 of that directive, since the directive applies not in relation to a particular category of persons, but rather on the basis of the grounds laid down in Article 1 thereof.

- 20 Indeed, with regard to employment and occupation, Directive 2000/78/EC aims to lay down a general framework for combating discrimination based on any of the grounds stated in Article 1 – which include disability – with a view to putting into effect in the Member States the principle of equal treatment and, as is clear from recital 37 of that directive, to create a level playing field within the Union as regards equality in employment and occupation.
- 21 Above all, recital 11 of Directive 2000/78/EC makes it clear that discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
- 22 The abovementioned objectives and, therefore, the effectiveness of Directive 2000/78/EC would, however, be undermined if a worker in the appellant's situation could only benefit from protection against direct employment discrimination and not against indirect discrimination, given that direct discrimination is less widespread than indirect discrimination, which emerges primarily at the point when an employee is dismissed and not during the course of the employment relationship: this would delay protection of workers to an excessive degree.
- 23 Second, logical and structural reasons could support a broad interpretation of Directive 2000/78/EC that is favourable for family caregivers of severely disabled persons, since protection against direct discrimination and protection against indirect discrimination are closely linked, as there can be no real anti-discrimination protection in the workplace that does not address both in all cases.
- 24 Finally, the regulatory and socio-economic changes of recent years should be taken into account.
- 25 In fact, following the *Coleman* judgment of 17 July 2008, the United Nations General Assembly adopted the UN Convention on the Rights of Persons with Disabilities, which entered into force internationally on 3 May 2008 and was also ratified by the European Union (through Council Decision 2010/48/EC of 26 November 2009), entering into force on 22 January 2011.
- 26 This Convention is important, given that it led the Court of Justice to revise its previous guidance on the concept of disability, going so far as to state in its judgment of 11 April 2013, Cases C-335/11 and C-337/11, that the concept of disability also includes a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in

particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.

- 27 The principle that the provisions of the abovementioned UN Convention may be relied upon in order to interpret those of Directive 2000/78 should therefore be regarded as established, and that directive should therefore be interpreted, as far as possible, in line with that Convention (judgments of the Court of Justice of 10 February 2022, C-485/2020, paragraph 38; of 21 October 2021, C-824/19, paragraph 59; and of 15 July 2021, C-795/19, paragraph 49).
- 28 Article 2 of the UN Convention on the Rights of Persons with Disabilities, which contains definitions relevant to the Convention, states that ‘discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.
- 29 The Convention being examined does not, therefore, seem to attach importance to the distinction between direct and indirect discrimination.
- 30 It should be pointed out, in this regard, that in its decision of 3 October 2022, the UN Committee on the Rights of Persons with Disabilities recognised, with reference to the Italian legal system, the serious consequences for persons with disabilities who are cared for that derive from a failure to recognise the figure of the caregiver and effective social protection measures for such figures (such as access to incentives, funds and the pension system, and flexibility in working hours and in the proximity of their homes).
- 31 It seems reasonable to ask, therefore, whether an interpretation of European Union law formed on the basis of Directive 2000/78/EC and the *Coleman* judgment of 17 July 2008 that does not allow the family caregiver of a severely disabled child to obtain protection in the event of indirect discrimination in the workplace caused by the need to provide the necessary care for that disabled person, by limiting any protection to cases of direct discrimination, takes proper account of the Union’s ratification of the UN Convention on the Rights of Persons with Disabilities – in particular Articles 19, 23 and 28(2)(c) thereof, read in conjunction with Article 5 – in accordance with which Directive 2000/78/EC should be interpreted as far as possible.
- 32 If an expansive interpretation of the European Union legislation were to be accepted, recognising the right of the family caregiver of a disabled child to take action also against indirect discrimination suffered in the workplace by reason of the care provided to that disabled person, it would also be necessary to clarify

whether the protection thus recognised entails the creation an obligation on the part of the employer of that caregiver to make reasonable accommodation to guarantee compliance – also in favour of that caregiver – with the principle of equal treatment in relation to other workers, along the lines of that laid down for disabled persons in Article 5 of Council Directive 2000/78/EC of 27 November 2000.

- 33 Lastly, if the family caregiver of a disabled child were to be granted the right to take action also against indirect discrimination suffered in the workplace by reason of the care provided to that disabled person, the concept of caregiver relevant to the application of Council Directive 2000/78/EC of 27 November 2000 would have to be defined.
- 34 In particular, the question arises as to whether such a caregiver is any person, whether a member of the family or a de facto cohabiting partner, who cares in a domestic setting, even informally, free of charge, for a significant number of hours, on an exclusive, continuous and long-term basis, for a person who, by reason of their severe disability, is not absolutely self-sufficient in the performance of the daily activities of living, or whether, conversely, the definition of caregiver in question is broader or even narrower.

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