

**THE *BERVIDI* CASE: A CRITICAL ANALYSIS AND
REFLECTIONS ON THE FUTURE OF WORK-LIFE BALANCE
PROTECTION**

***EL CASO BERVIDI: ANÁLISIS CRÍTICO Y REFLEXIONES SOBRE
EL RUMBO DE LA PROTECCIÓN DE LA CONCILIACIÓN
LABORAL Y FAMILIAR***

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Abstract

This paper focuses on the *Bervidi* judgment of the Court of Justice (Case C-38/24, 11 September 2025), which addresses discrimination on the grounds of disability, prohibited by Council Directive 2000/78/EC. According to this judicial ruling, it can be concluded that, where the caregiver of a person with a disability is concerned, the failure to provide reconciliation measures in their favour constitutes discrimination based on that very ground, which is qualified as indirect discrimination by association.

One of the questions immediately raised by the judgment is how the employer's conduct would be characterized in a hypothetical scenario where the care recipient does not possess any disability. In such an event, the failure to implement measures facilitating the reconciliation of work and family life would trigger the application

of Directive 2019/1158. In the light of the latter, could this give rise to a claim of discrimination? If so, on the basis of which protected ground?

Consequently, taking the *Bervidi* ruling as its analytical departure point, this paper reflects upon the dichotomy established between caregivers of persons with disabilities and those caring for individuals without such conditions. In doing so, it revisits the long-standing ambiguities surrounding Directive 2019/1158, ultimately proposing potential avenues to overcome them.

Keywords: discrimination by association; indirect discrimination, disability; work-family balance, reasonable accommodation.

Resumen

El artículo presentado se centra en la sentencia *Bervidi*, del Tribunal de Justicia (asunto C-38/24, de 11 de septiembre de 2025), que aborda la discriminación por motivos de discapacidad, prohibida por la Directiva 2000/78/CE, del Consejo. Según esta decisión judicial, estando en juego el cuidador de una persona con discapacidad, la omisión de medidas de conciliación en su favor constituye una discriminación basada en ese mismo factor, que se califica como discriminación indirecta, por asociación.

Una de las cuestiones inmediatamente postuladas por la decisión es la de determinar cómo se calificaría dicha conducta del empleador en caso de que la persona cuidada no presentara discapacidad alguna. En ese supuesto, la omisión de medidas facilitadoras de la conciliación de la vida laboral y familiar remitiría a la Directiva 2019/1158. A la luz de esta, ¿podría hablarse de discriminación? ¿Sobre la base de qué factor?

Así, este texto, tomando como punto de partida la sentencia *Bervidi*, ofrece una reflexión sobre la dicotomía por ella creada entre cuidadores de personas con discapacidad y cuidadores de personas sin dicha condición, reencuentra las dudas ya preexistentes suscitadas por la Directiva 2019/1158 y propone algunas vías para su superación.

Palabras clave: discriminación por asociación; discriminación indirecta; discapacidad; conciliación de la vida laboral y familiar; ajustes razonables.

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Introduction

The evolutionary vocation and flexibility of anti-discrimination law are beyond doubt. It is, indeed, “necessarily a response to particular manifestations of inequality, which are themselves deeply embedded in the historical and political context of a given society” and is only truly effective “if moulded to deal with the types of inequalities which have developed in the society to which they refer”¹. On the other hand, and with particular regard to European Union law and, consequently, to the work of the Court of Justice (CJEU), the centrality of the jurisprudential contribution to the maturation and substantiation of this legal field is evident.

The promising concept of discrimination by association, fashioned within the context of the *Coleman* judgment², exemplifies this remarkable judicial creativity. This category has once again assumed a central position in the recent *Bervidi* judgment. While both cases share the commonality of concerning female workers who are also mothers of children with disabilities, they differ fundamentally in their facts. Whereas in the former case the worker was the victim of blatant harassing conduct qualified as direct discrimination, the latter concerns an employer’s failure to adapt working conditions to facilitate an adequate balance between professional and caregiving responsibilities. The CJEU explicitly states that such an omission constitutes indirect discrimination by association on the grounds of

¹ Sandra Fredman, *Discrimination Law*, Oxford University Press, Oxford, 2022, 3rd edition, p. 52.

² Case C-303/06; judgment of 17 July 2008.

disability. Previously, asserting that such omissive conduct amounted to a discriminatory act was far from unequivocal, and significant doubts persisted regarding its qualification as indirect discrimination.

While the *Bervidi* decision provides great clarity on these points, it nonetheless leaves unresolved a question that any rigorous analysis of the case must confront: what if the child cared for by the worker did not have a disability, and the issue arose simply within the framework of the obligation to adopt work-life balance measures, as mandated by Directive 2019/1158, *maxime* by Article 9? This question is entirely legitimate, first because the Directive does not explicitly state that non-compliance with such measures constitutes a discriminatory act, nor does it clarify whether an act of retaliation against a worker exercising work-life balance rights would be so characterized. Furthermore, it remains to be determined which ground of discrimination would be engaged if disability could not be invoked: sex — as some legal scholars argued in relation to the *Coleman* case itself — or, alternatively, a distinct and novel ground, namely one's status as a holder of work-life balance rights? We shall dedicate some reflections to this compelling and complex question following the analysis and contextualization of the *Bervidi* decision, which serves as our point of departure.

From a methodological standpoint, this paper relies on a dual approach: jurisprudential analysis – centering, as noted, on the *Bervidi* case and anchoring it within the broader framework of previous CJEU judgments – and doctrinal examination, through a dialogue with specialized literature in the fields under review, namely anti-discrimination and work-life balance. Notwithstanding occasional references to national legal experiences, the analysis focuses on the European Union legal order, particularly concerning equality and non-discrimination, while comprehensively integrating Directive 2019/1158.

I. The case – relevant facts and the Court's decision

The judgment of the CJEU regarding the *Bervidi* case arose from a request for a preliminary ruling submitted by the *Corte Suprema di Cassazione*, the Italian supreme court, which was faced with an appeal lodged by a certain worker who had already received two unfavorable judicial decisions in the lower courts. G.L., an employee of *AB SpA* and, furthermore, the mother and caregiver of a child with a disability resulting in a medically certified total incapacity, requested that her employer adjust her working hours so that she could work on a fixed schedule, exclusively during the morning period. This would allow her to provide necessary assistance and care to her son in the afternoon, specifically accompanying him to various therapies suited to his condition. She even proposed her assignment to lower-level duties, by agreement, to facilitate the adaptation of her working conditions to her needs. Since the employer only offered a provisional solution, the employee initiated legal action, invoking discrimination – due to the omission of the requested measures and considering the different position adopted regarding other workers who, for health reasons, had been deemed unfit, temporarily or permanently, to perform their activities under normal conditions. She sought a court order for *AB SpA* to permanently assign her to a fixed-schedule post between 8:30 and 15:00,

or at least one compatible with her son's needs, as well as to adopt a plan to eliminate discrimination and to pay her compensation for damages.

In the first instance, G.L. was unsuccessful because the court held that she lacked standing to bring an action for employment discrimination, as she was not herself a person with a disability and thus not entitled to the relevant adjustment measures. On appeal, the *Corte d'Appello di Roma*, although invoking the CJEU's *Coleman* case-law and considering, based on the concept of discrimination by association, that the employee could indeed rely on the protective provisions against discrimination as a caregiver of someone with a disability, nonetheless stated that the employer had not engaged in any discriminatory conduct, having implemented some reasonable accommodations, albeit provisional ones.

G.L. appealed once more to the *Corte di Cassazione*, which decided to refer a set of questions to the CJEU. In summary, it became necessary to clarify the following: considering that the obligation for an employer to adapt working conditions to the situation of the employee concerned, up to the limit of not imposing a disproportionate burden, derives from the principle of prohibition of discrimination on the grounds of disability; and, on the other hand, that this principle can be said to be violated regarding an employee even if they are not the person with the disability, but rather someone *associated* with them, namely by being dependent on their care – considering these two premises, could one go further and affirm the potential occurrence of discrimination by association on the grounds of disability due to the omission of the relevant reasonable accommodation measures? It should be noted that such a conclusion implies that the disability of a third party, rather than the employee, is the *grounds* for that obligation of reasonable accommodation, but also, albeit indirectly, the *parameter* for defining its scope, given that the employee's specific needs will depend on the particularities of that associated third party. Identifying precisely the crucial point of the issue – to determine whether, since the *Coleman* judgment aimed expressly and solely at direct discrimination, it would be conceivable to apply the concept of discrimination by association likewise to cases of indirect discrimination – the *Cassazione* addressed the following questions to the CJEU³: (i) *Should European Law be interpreted – where applicable on the basis also of the [UN Convention] – 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 [Directive 2000/78]? and (ii) If the answer to [the first question] is in the affirmative, should European Law be interpreted – where applicable on the basis also of the [UN Convention] – as meaning that it is incumbent of the employer of the aforementioned caregiver to make reasonable accommodation to guarantee compliance*

³ A third question was also referred, which will be disregarded as it is of little relevance to the analysis undertaken here. In any event, it was deemed inadmissible by the Court.

See §§ 20 *et seq.* (in particular, § 22) of the Opinion of Advocate General Athanasios Rantos, delivered on 13 March 2025.

– also in favor of said caregiver – with the principle of equal treatment in relation to other, modelled on the provisions laid down in relation to persons with disabilities in Article 5 of [Directive 2000/78]⁴?

As will be seen in more detail, the Court, following the Opinion of the Advocate General, affirmed that Articles 1, 2(1) and (2)(b) of Directive 2000/78/EC must be interpreted as meaning that “the prohibition of indirect discrimination on grounds of disability applies to an employee who does not himself or herself have a disability but who is subject to such discrimination because of the assistance that that person provides to his or her child who has a disability, which enables that child to receive the primary care required by virtue of his or her condition”⁵. In other words, the CJEU judges considered that the omission of the required reasonable accommodation measures – which is unequivocally stated to constitute indirect discrimination – can occur not only when justified by the employee’s disability but also when its origin lies in another person with that condition who is associated with them, specifically a child in their care. Therefore, the Court adds, to avoid indirect discrimination, the employer is required “to make reasonable accommodation, within the meaning of Article 5 of that directive, in respect of an employee who does not himself or herself have a disability but who provides, to his or her child who has a disability, the assistance which enables that child to receive the primary care required by virtue of his or her condition, provided that that accommodation does not impose an unreasonable burden”⁶.

It is important to emphasize that, throughout the reasoning provided to support these conclusions, the CJEU relied not only on the Directive but also on Article 21 of the Charter of Fundamental Rights of the European Union (CFREU), as well as Articles 24 and 26 on the protection of children, and also on the United Nations Convention on the Rights of Persons with Disabilities. The latter, approved by the EU in 2009⁷, pays special attention to the protection of children with disabilities – such as the employee’s son – and its Article 2(3) states that discrimination on the basis of disability includes all forms of discrimination, *including the denial of reasonable accommodation*.

II. Observations on the judgment

1. The prior *acquis*

1.1. The obligation of reasonable accommodation as the *punctum crucis* of the prohibition of discrimination on grounds of disability

The key idea emerging from the prohibition of discrimination on grounds of disability is, evidently, that no one should be subject to disadvantageous treatment due to that condition. This is the core imperative arising from the aforementioned Directive

⁴ Regarding the case in Italian case-law, see Mariavittoria Biondo, “Caregiver, chi era costui? Il modello italiano avanti alla Corte di Giustizia”, *EQUAL – Rivista di Diritto Antidiscriminatorio*, No. 2, 2024, pp. 240-258.

⁵ § 66.

⁶ § 80.

⁷ Council Decision 2010/48/EC of 26 November 2009.

2000/78/EC, which, as is well known, prohibits all forms of discrimination, notably direct and indirect: pursuant to Article 2, direct discrimination is prohibited – that is, any act of less favourable treatment of one person compared to another in a comparable situation on the grounds of disability – as is indirect discrimination, which results from a provision, criterion, or practice that, although apparently neutral, is liable to put persons with a disability at a particular disadvantage compared with other persons.

At the same time, however, it is important to highlight the provisions of Article 5, which require Member States to ensure that employers take “appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer”.

This provision is linked, as evident from its wording, to the very concept of discrimination – namely indirect discrimination – or, more precisely, to the terms under which the qualification of a discriminatory act as such may be neutralized or justified. Article 4(1) of the Directive allows Member States to provide that a difference of treatment based on one of the aforementioned grounds, including disability, shall not constitute discrimination where, “*by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate*”. This refers to the frequently mentioned *occupational requirement* criterion. Regarding indirect discrimination, on the other hand, Article 2(2)(b)(i) provides that it shall not be deemed as such if the provision, criterion, or practice in question is objectively justified by a legitimate aim and the means of achieving that aim is appropriate and necessary. However, Article 2(2) provides for a distinct possibility of justification applicable only to indirect discrimination specifically on the grounds of disability. According to point (b)(ii), it is justified if the employer (or any person or organisation to whom the Directive applies) is obliged, under national legislation, to take appropriate measures in line with the principles set out in Article 5, in order to eliminate the disadvantages entailed by a potentially discriminatory provision, criterion, or practice. As can be seen, therefore, the imperative to adopt reasonable measures to adjust working conditions to the specific needs of a person with a disability is closely related to the very concept of indirect discrimination; one of the ways – a specific way for this particular ground of discrimination – to neutralize the discriminatory nature of an act is, precisely, the fulfillment of such an obligation.

Legal literature has emphasized the particular importance of this form of justification within the scope of discrimination on grounds of disability. Indeed, as Sandra Fredman⁸ points out, even when invoking the first segment of Article 2(2)(b) – namely subparagraph (i) – the employer must demonstrate not only the legitimacy of the objective to be achieved but also the appropriateness and necessity of the means used to achieve it. This would, naturally, entail proving the unsuitability, unfeasibility, or the lack of

⁸ *Discrimination Law, cit.*, pp. 42-43 and 305-306.

reasonable expectation (*inexigibility*) of measures to adapt working conditions to the individual with a disability. Moreover, identical considerations would also apply to the aforementioned occupational requirement as a means of justifying direct discrimination on grounds of disability; the fulfillment of the requirements regarding the legitimacy of the objective pursued and the proportionality of the potentially discriminatory measure adopted must be carefully assessed.

Indeed, in the case of disability, the crucial importance of the imperative to adopt measures to adjust external conditions to the situation of the employee concerned is easily understood, in pursuit of the objective of substantive equality⁹ – an imperative that, despite emerging relatively late in the European Union, was already established in legal systems such as the American, Canadian, or the British¹⁰. The fact is that, given identical conditions for a worker with a disability and a worker without any limitations, the latter will more easily demonstrate greater efficiency and productivity. In this regard, the formulation by Bob Hepple¹¹ is particularly expressive: “*The differences between men and women (...), Black and White people, persons with different sexual orientations, or of different faiths or age groups are generally treated as irrelevant. But the law does not expect disabled people to be treated in exactly the same way as those who are not disabled. The reason for this is that formal equality, comparing a disabled person with others, would not result in genuinely equal treatment (...)*”.

Consequently, the conclusion has prevailed that any disadvantageous act targeting an employee with a disability must, at the risk of being considered discriminatory, be preceded by the adoption of appropriate reasonable accommodation measures. Indeed, despite the narrowness of the concept of disability adopted in the *Chacón Navas* case¹², the CJEU took that opportunity to clarify that “the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78/EC precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post”¹³.

In the landmark case *HK Danmark*¹⁴, of pivotal importance for this purpose, the Court addressed whether an employer could legitimately dismiss the workers concerned even if it were demonstrated that their absences resulted from the failure to adopt proper

⁹ See, for example, Agustina Palacios, “El derecho a la igualdad de las personas con discapacidad y la obligación de realizar ajustes razonables”, in AA.VV. (ed. Ignacio Campoy Cervera), *Los derechos de las personas con discapacidad: perspectivas sociales, políticas, jurídicas y filosóficas*, Dykinson 2004, pp.187-203 [esp 192 *et seq.*].

¹⁰ Dagmar Schiek/Lisa Waddington/Mark Bell (coord. Dimitri Droshout), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart Publishing, Oxford and Portland, Oregon, 2007, p. 630.

¹¹ *Equality – the legal framework*, Hart Publishing, 2014, 2nd edition, p. 91. See, also, Dagmar Schiek/Lisa Waddington/Mark Bell (coord. Dimitri Droshout), *Cases, Materials...*, *cit.*, pp. 631 *et seq.*

¹² Case C-13/05; judgment of 11 July 2006.

¹³ § 52.

¹⁴ Joint cases C-335/11 and C-337/11; judgment of 11 April 2013.

measures to enable their performance, given their disabilities. The Court ruled that such a procedure would violate the Directive. The judgment states: “the circumstance that an employer has failed to take those measures may have the consequence, *having regard to the obligation under Article 5 of Directive 2000/78*, that the absences of a worker with a disability are attributable to the employer’s failure to act, not to the worker’s disability”. Thus, “should the national court find that the absences of the workers are attributable, in the present cases, to the employer’s failure to adopt appropriate accommodation measures, Directive 2000/78 would preclude the application of a provision of national law such as that at issue in the main proceedings”¹⁵. Furthermore, the Court answered in the affirmative regarding whether such a provision, when applied to workers whose absences were caused by a condition qualifying as a disability, would violate the Directive¹⁶. It would be considered indirectly discriminatory – “it is thus apparent that the 120-day rule in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78” – unless it could be considered justified by legitimate aims and limited to what is indispensable to achieve them (an assessment which it referred to the referring court)¹⁷.

The relationship between the (non-)fulfillment of the obligation of reasonable accommodation and the occurrence of discrimination was also clearly demonstrated in the *Nobel Plásticos Ibérica* case¹⁸. Pertaining to the Spanish legal system, the case concerned an employee with a condition qualifying as a disability who was dismissed for “objective reasons” – specifically due to levels of productivity, attendance, and versatility below the desired standard, according to the employer’s criteria. The CJEU declared that: “Article 2(2)(b)(ii) of Directive 2000/78 must be interpreted as meaning that the dismissal for ‘objective reasons’ of a worker with a disability, on the ground that he or she meets the selection criteria taken into account to determine the persons to be dismissed, namely having a productivity rate below a certain level, less versatility in the company’s workstations and a high rate of absenteeism, *constitutes indirect discrimination on grounds of disability, within the meaning of that provision, unless the employer has previously provided reasonable accommodation, within the meaning of Article 5 of that directive*, in respect of that worker, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, which it is for the national court to verify”¹⁹.

¹⁵ Emphasis added.

¹⁶ §§ 69 *et seq.*

¹⁷ The Danish Government argued that the legal framework in question was suitable for promoting the recruitment and retention of individuals liable to incur such absences. The companies involved alleged that this regime allowed them to maintain the employment relationship for a longer period with workers who incurred such absences.

¹⁸ Case C-397/18; judgment of 11 September 2019.

¹⁹ § 75.

In this regard, reference should finally be made to the *Tartu Vangla* case²⁰, in which the CJEU stated that the Directive precluded a regime that established an absolute impossibility for a worker to perform a certain function due to their disability, without allowing for a verification of whether the worker would be able to perform those functions once the relevant reasonable accommodation measures had been adopted. At issue was a prison guard with auditory acuity below the level set by Estonian legislation, which provided that, in such a case, it was absolutely impossible to maintain the worker in their post. A similar decision was reached in the *Komisija* case²¹, regarding which the CJEU ruled that the Directive is incompatible with the denial of a blind person's right to serve as a juror in criminal proceedings solely on the basis of their blindness²².

The case law of this Court is further relevant as it provides remarkable assistance in determining which measures may be considered included in the general obligation of reasonable accommodation – a concept that is, evidently, indeterminate²³. As stated in the *HK Danmark* judgment²⁴, it is a broad concept, to be understood “as referring to the elimination of the barriers to full and effective participation of persons with disabilities in professional life on an equal basis with other workers”. The ruling made it clear, in particular, that measures involving the readjustment of working hours are included within that open-ended concept – which, moreover, could already be inferred from Recital 20 of Directive 2000/78²⁵.

Other potential measures would include adaptations to the workstation and work tools, the provision of vocational training, transfer to a different place of work²⁶, transitioning

²⁰ Case C-795/19; judgment of 15 July 2021.

²¹ Case C-824/19; judgment of 21 October 2021.

²² An analysis of these judgments can be found in Tamás Gyulavári, “Recent CJEU case law on ‘reasonable accommodation’ at work: towards the recognition of a new discrimination form”, ERA Forum, 2023, pp. 1-17 [9].

²³ For example, Maurizio Cinelli, “Insufficiente per la Corte di Giustizia la tutela che l’Italia assicura ai lavoratori disabili: una condanna realmente meritata?”, *Rivista Italiana di Diritto del Lavoro*, year XXXII, 2013, pp. 935-938

²⁴ § 53, which refers to the United Nations Convention, and § 54.

²⁵ § 64.

²⁶ Joana Nunes Vicente (“V – Igualdade e não discriminação nas relações laborais”, in João Leal Amado /Milena da Silva Rouxinol /Joana Nunes Vicente /Catarina Gomes Santos /Teresa Coelho Moreira, *Direito do Trabalho – Relação Individual*, Almedina, Coimbra, 2023, 2nd edition, p. 340) notes a decision of 27 July 2022 by the Supreme Court of the Czech Republic, which held that a request for a transfer of the workplace constituted a reasonable accommodation measure. The case involved a prison service employee with a physical disability who requested a transfer to a prison facility closer to his residence to avoid traveling 300 kilometers per week; the request was refused, leading the worker to resign. The court considered the rejection of the transfer request to be an unjustified refusal to provide reasonable accommodation.

The decision is further significant for asserting that a worker's request for their working conditions to be adjusted does not necessarily presuppose the presentation of a corresponding medical certificate.

Referring to an Italian case, decided by the Court of Pistoia on 30 September 2005 – which held that the employer had breached the duty of reasonable accommodation by failing to keep the worker at her usual location and transferring her to another, less suited to her situation –, Dagmar Schiek/Lisa Waddington/Mark Bell (coord. Dimitri Droshout), *Cases, Materials...*, cit., p. 692.

to a remote work model²⁷, the guarantee of a parking space close to the workplace²⁸, the redistribution of tasks, or even reassignment to a different post²⁹.

Regarding this latter point, the aforementioned *HR Rail* case³⁰ must be highlighted. Although some legal scholars³¹ already argued that the reassignment of the employee should be considered a possible reasonable accommodation measure – and even that the alternative post should be adjusted to the employee's condition before being offered to them –, the ruling of the CJEU in this case was decisive. At issue was a worker who had been fitted with a pacemaker. Since the device was sensitive to electromagnetic fields, such as those emitted by the railway tracks with which the employee came into contact in the exercise of his usual duties, it was concluded that he could no longer perform them and that: “Article 5 of Directive 2000/78 must be interpreted as meaning that the concept of ‘reasonable accommodation’ for disabled persons, within the meaning of that article requires that a worker, including someone undertaking a traineeship following his or her recruitment, who, owing to his or her disability, has been declared incapable of performing the essential functions of the post that he or she occupies, be assigned to another position for which he or she has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer”³².

It also follows from the Directive that such measures are only required if they do not impose a disproportionate burden on the employer, provided that, where State support exists for their adoption, they should not be considered as imposing such an excessive burden. Although the latter is also an indeterminate and permeable concept, subject to

²⁷ In the Italian legal system, provision is made for *lavoro agile* (smart working) for workers with disabilities, although legal scholarship notes that such a solution could always be derived from the general obligation of reasonable accommodation. *Vide* Marco Peruzzi, “La protezione dei lavoratori disabili nel contratto di lavoro”, *Variazioni su Temi di Diritto del Lavoro*, No. 4, 2020, pp. 945-965. See, also, M. D. West/J. Anderson, “Telework and employees with disabilities: accommodation and funding options”, *Journal of Vocational Rehabilitation*, No. 23, 2005, pp. 115-122.

²⁸ In Dagmar Schiek/Lisa Waddington/Mark Bell ((coord. Dimitri Droshout), *Cases, Materials...*, *cit.*, p. 638), reference is made to an Irish case, dated 23 January 2002, in which the court held that such a measure was required, alongside a change in the tasks assigned to the worker.

²⁹ Interesting examples may be found in Bob Hepple, *Equality...*, *cit.*, pp. 94-95.

³⁰ Case C-485/20; judgment of 10 February 2022.

See Tamás Gyulavári, “Recent CJEU...”, *cit.*, p. 12.

³¹ Regarding the French legal system, see Michel Miné/Daniel Marchand, *Le Droit du Travail en pratique*, Eyrolles, 2014, 26th edition, p. 238. According to the authors, “when the employee is recognized as a disabled worker, the proposal for reassignment must take into account the requirement of ‘reasonable accommodation’ of a workstation to enable the maintenance of employment”.

A coincident opinion is held, within the Italian legal order, by Stefano Giubboni (“Sopravvenuta inidoneità alla mansione e licenziamento. Note per una interpretazione ‘adeguatrice’”, *Rivista Italiana di Diritto del Lavoro*, year XXXI, No. 2, 2012, pp. 289-309 [303–306]), and by Davide Casale, “Malattia, inidoneità psicofisica e handicap nella novella del 2012 sui licenziamenti” (2014) 19(2) *Argomenti di Diritto del Lavoro*, year XIX 19, No. 2, 2014, pp. 401-423, [410]), for whom, since the failure to implement accommodation measures is, in itself, a discriminatory act, denying a disabled worker the possibility of redeployment should lead the court to conclude that the alleged incapacity for work was not, after all, the true cause for terminating the contract, which would, in fact, stem from the disability itself. References to other legal systems can be found in Dagmar Schiek/Lisa Waddington/Mark Bell (coord. Dimitri Droshout), *Cases, Materials...*, *cit.*, pp. 687 *et seq.*

³² § 49.

different interpretations³³, we would highlight the following aspects: first, the fact that there is no public support for the adoption of a specific accommodation measure does not lead, directly and necessarily, to the conclusion that it is not required for imposing a disproportionate burden; second, as follows from the regime of the burden of proof in discrimination matters, it is the employer who must demonstrate that the omitted measures would have imposed a disproportionate burden; third, as Vanessa Cordero Gordillo³⁴ points out, the invocation of the excessive cost of the measure can only be seen as an exceptional possibility, otherwise the duty in question – the true cornerstone of the protection owed to workers with disabilities – would ultimately prove to be very timid, as if requiring no more than minor adjustments; it is crucial to ensure that the duty of reasonable accommodation does not turn into a mere programmatic principle³⁵...

Notwithstanding the remarkable contribution of the CJEU to defining the relationship between the obligation of reasonable accommodation and the principle of the prohibition of discrimination on grounds of disability – given that the wording of Article 2(2)(b)(ii) of the Directive is not particularly clear –, its case law prior to the *Bervidi* judgment does not seem to contain an unequivocal statement that the mere omission of the measures required by that obligation constitutes, in itself, discriminatory behavior. Evidently, there was also no discernible answer to the question of whether such omissive conduct would constitute direct or indirect discrimination. It must be emphasized, in any case, that at least since the ratification of the aforementioned United Nations Convention by the European Union, the Court should have been bound to recognize such a failure as a form of discrimination on the grounds of disability. Indeed, it should be reiterated that, according to Article 2, paragraph 3, of that Convention, discrimination includes the denial of reasonable accommodation. As will be further discussed, the *Bervidi* decision took this step forward in clarifying the legal significance of the failure to comply with the obligation of reasonable accommodation within the framework of equality and non-discrimination on grounds of disability.

³³ For a comparative law overview, see Dagmar Schiek/Lisa Waddington/Mark Bell (coord. Dimitri Droshout), *Cases, Materials...*, *cit.*, pp. 629 *et seq.*

³⁴ *Igualdad y no discriminación de las personas con discapacidad en el mercado de trabajo*, Tirant lo Blanch, Valencia, 2011, pp. 150-151.

³⁵ In a similar vein, see Milagros Alonso Bravo/Azucena Escudero Prieto, “Integración laboral de las personas con discapacidad y crisis económica”, *Revista Universitaria de Ciencias del Trabajo*, No. 15, 2014, pp. 237-264 [III-2].

In Denmark, it has already been ruled that an employer failed to provide proof of a disproportionate burden in the case of a social worker employed in a prison facility. Having suffered from post-traumatic stress disorder following a violent assault, the worker began performing duties within the community service team. However, due to a reorganization of services, she was reassigned to work with inmates, including those with psychiatric disorders. Following the refusal of the worker – who had, in the meantime, requested assignment to a different type of duty—the employer terminated the employment relationship. The body responsible for equality and non-discrimination, in a decision dated 11 August 2020, concluded that the employer could have assigned the worker duties that did not involve contact with mentally ill inmates, as it had previously done with another social worker; it also stated that there was no evidence of the worker's inability to perform the essential functions of her post. This case is noted by Joana Nunes Vicente (V – Igualdade e não discriminação nas relações laborais, *cit.*, pp. 342-343, footnote 198).

1.2. Discrimination by association – the seminal *Coleman* judgment (and other projections)

Although not expressly recognized in the Directives – we refer to the triad of core Directives in this field: 2000/43/EC; 2000/78/EC; 2006/54/EC –, discrimination by association must be mentioned as an integral part of the *acquis* of European Union anti-discrimination law. According to Yolanda Maneiro Vázquez³⁶, the recognition of this concept by the CJEU illustrates the role of this jurisdictional body in ensuring an increasingly extensive and versatile anti-discriminatory protection, capable of fulfilling its protective purpose despite a certain restrictive nature of the Directives.

This concept was recognized beyond any doubt in the aforementioned *Coleman* case, concerning discrimination on grounds of disability³⁷. In this case, a worker agreed to the termination of her contract by mutual agreement following a proposal from the employer. She later claimed to have been the victim of discrimination in the form of harassment, arguing that the termination of the contract should be attributed to the employer. She invoked discrimination on grounds of disability, not because she herself had a condition qualifying as such, but because she was the primary caregiver for a young son who suffered from apnea attacks, as well as congenital laryngomalacia and bronchomalacia. The child's pathologies were framed within the concept of disability, and the Court ruled that, although the employee herself did not suffer from these pathologies, she had indeed been discriminated against on grounds of disability – that of the son in her care, with whom she was, *hoc sensu, associated*³⁸.

The CJEU further confirmed the concept of discrimination by association in the later *Chez* case³⁹, concerning racial/ethnic discrimination. In this case – regarding

³⁶ *La discriminación por asociación: desafíos sustantivos y procesales*, Aranzadi, Navarra, 2021, pp. 23 and 37.

³⁷ Nevertheless, we would argue that the concept is applicable in other domains. By virtue of the principle of conforming interpretation, national legal practitioners must recognize this type of discrimination regarding disability, as well as all other grounds to which the set of considerations put forward in that judgment are applicable, *mutatis mutandis*. Moreover, as will be seen below, the CJEU has applied similar reasoning in other cases concerning different discriminatory grounds.

Regarding the Spanish legal system, Cristóbal Molina Navarrete (*La doctrina jurisprudencial por discriminación de género en el orden social*, Wolters Kluwer, 2020, pp. 261 *et seq*) notes a case where the concept was applied to a situation not based on disability: the decision of the *Tribunal Superior de Justicia de Galicia* of 13 April 2018 appealed to this concept in a situation involving the workplace bullying (*mobbing*) of the husband of a worker who had previously been a victim of sexual harassment within the company; the court considered the conduct directed at the husband as discriminatory on grounds of sex, by association. He further refers to the decision of the *Tribunal Superior de Justicia de Las Palmas* of 29 August 2019, which reportedly considered the dismissal of a worker – allegedly due to a decrease in performance – to be discriminatory by association, as she was in a relationship with a trade unionist worker and the dismissal followed a series of demands he had submitted to the employer in that capacity.

³⁸ On this, Bruno Mestre, “Discrimination by association: protected by EU Law but limiting the scope of Mangold”, *European Law Reporter*, 2008, pp. 300-305.

³⁹ Case C-83/14; judgment of 16 July 2015.

According to Yolanda Maneiro Vázquez (*La discriminación por asociación...*, *cit.*, pp. 24, 68 *et seq.*, and 83 *et seq.*), this was also confirmed in the *Hakelbracht* case, concerning discrimination on grounds of sex (case C-404/18; judgment of 20 June 2019). In *Hakelbracht*, the idea of association, although not phrased in those exact terms, resulted from an act of retaliation – considered discrimination under Directive

which Advocate General Kokott, unlike the judges of the Court, repeatedly and expressly referred to the concept of discrimination by association –, Ms. Nikolova, the owner of a small business in a district where the majority of the population was of Roma origin, invoked ethnic discrimination despite not belonging to that group herself. This was due to the fact that the company responsible for installing electricity meters placed them in that district at an inaccessible height, making it impossible to consult them, a practice not found in areas not predominantly inhabited by Roma people. The Court concluded that Directive 2000/43/EC applied, as its scope should be defined according to the discriminatory ground in question rather than depending on the actual membership of the alleged victim in the corresponding category. Ms. Nikolova had suffered discriminatory treatment based on ethnicity (of the majority of the district's inhabitants)⁴⁰ and the effects of their stigmatization. Although in less crystal-clear terms, the judgment clarified in this context, in line with the position of Advocate General Kokott⁴¹, that indirect discrimination, and not only direct discrimination, can take the form of discrimination by association⁴². Indeed, in his Opinion, Advocate General Athanasios Rantos recalls precisely this to support an identical conclusion regarding the *Bervidi* case⁴³. The Court, which, as we shall see, confirmed this, also recalled the *Chez* decision⁴⁴.

2. The contribution of the judgment

2.1. The concept of disability

While not the most significant contribution of the *Bervidi* decision, it may be noted as a contribution to clarifying the concept of disability within the framework of Anti-Discrimination Law on one particular point. As it exceeds the scope of this study to detail the entire path already traversed by the CJEU regarding this category⁴⁵, in this context, it is sufficient to mention that, notwithstanding the breadth of the notion adopted following

2006/54/EC – directed at a person other than the one who was originally discriminated against on grounds of sex (due to pregnancy) and who had taken legal action. The retaliation was exercised against a worker who had provided informal support to the victim on several occasions, namely within the context of the legal proceedings. In this regard, the CJEU stated that “the effectiveness of the protection required by Directive 2006/54/EC against discrimination on grounds of sex would not be assured if that protection did not cover measures which an employer might be led to take against employees who have, formally or informally, defended the protected person or testified in his or her favour. Indeed, those employees, who are ideally placed to support that person and to be aware of cases of discrimination committed by their employer, might then be discouraged from acting in that person’s interest for fear of being deprived of protection if they do not meet certain formal requirements, such as those at issue in the main proceedings, which could seriously compromise the objective pursued by Directive 2006/54 by reducing the likelihood that cases of discrimination on grounds of sex will be detected and resolved”. Therefore, Article 24 must be interpreted “as meaning that the employees referred to (...) other than the person who has been the victim of discrimination on grounds of sex, must be protected in so far as they may be disadvantaged by their employer because of the support they have, formally or informally, given to the person who has been the victim of that discrimination” (§§ 34 and 35).

⁴⁰ §§ 59 and 60 of the Opinion.

⁴¹ §§ 102 *et seq* of the Opinion.

⁴² Yolanda Maneiro Vázquez, *La discriminación por asociación...*, *cit.*, pp. 79 *et seq*.

⁴³ §§ 36 *et seq* of the Opinion.

⁴⁴ § 56.

⁴⁵ On the issue, Milena da Silva Rouxinol, *Direito Antidiscriminação nas relações laborais*, Almedina, Coimbra, 2023, pp. 181 *et seq*.

the *Chacón Navas* case⁴⁶ and, naturally, after the ratification of the United Nations Convention, an overview of the Court's case law suggests it has remained confined to the idea that a "disability" exists, for the purposes of the Directive, when the person concerned presents limitations in interaction with the external environment that manifest in their professional life. That is to say, even if a certain condition had a severe impact on their life – *v. g.*, in terms of affective relationships or reproductive capacity – it would not qualify as a disability for the purposes of the Directive if it were indifferent within the labor sphere⁴⁷. In this regard, the notion of disability within the European Union framework would be narrower than that established in the aforementioned United Nations Convention which, naturally and primarily because it is not limited to the field of employment relations, takes into account all sorts of limitations, professional or otherwise, arising from the particular condition of the person deemed to have a disability.

The truth, however, is that when it becomes necessary to extrapolate beyond the worker's personal sphere to identify a situation of disability – as occurs in cases of discrimination by association – the focus is no longer directed at the professional limitations it entails. In this way, it might be said that the *Bervidi* decision, like its precursor in the *Coleman* case, distances itself from that more circumscribed vision of the concept of disability: Ms. Bervidi's son is not even a worker, nor was Ms. Coleman's son. To affirm the existence of disability, the Court does not look at the impact of the children's condition on the mother's professional life – although, in the more recent case, it is this effect that is relevant when defining the pertinent accommodation measures; it attends solely to the child's own sphere, who is referred to in both rulings as a "person with a disability" (*Bervidi*) or a "disabled son" (*Coleman*).

2.2. The omission of reasonable accommodation measures as an act of (i) discrimination, (ii) that is indirect and (iii) capable of being committed by association

As previously mentioned, the CJEU had not yet stated, expressly and unequivocally, that the mere omission of appropriate reasonable accommodation measures would constitute discriminatory treatment. In fact, until the *Bervidi* case was brought up before it, the

⁴⁶ Case C-13/05; judgment of 11 July 2006.

⁴⁷ The point is highlighted by Joana Nunes Vicente (*op. cit.*, p. 332-333; also, Joana Nunes Vicente/Milena da Silva Rouxinol, "Sobre a readaptação do (conceito de) trabalhador seropositivo (inadaptado?)", in AA.VV. (coord. João Carlos Loureiro/André Dias Pereira/Carla Barbosa), *Direito da Saúde V – Saúde e Direito: entre a tradição e a novidade*, Almedina, Coimbra, 2016, pp. 137-168 [150-156]). The author refers, in particular, to the *Z* case (case C-363/12; judgment of 18 March 2014), in which the CJ declared that a woman who lacked a uterus and whose employer had refused her maternity leave following the birth of her daughter through surrogacy did not suffer from a disability within the meaning of the Directive. Or also in the celebrated *Kaltoft* judgment (case C-354/13; judgment of 18 December 2014), which was based on a dispute between a childminder and a municipality in Denmark, the former alleging that he had been dismissed due to his obesity. In the latter case, the Court, while not ruling out the possibility that obesity could be considered a disability, noted that this will only be the case if the worker's obesity hinders their full and effective participation in professional life on an equal basis with other workers, due to reduced mobility or the onset of pathologies that prevent them from performing their work or that entail difficulties in the exercise of their professional activity.

Court had never been directly called upon to address such a question. However, not only does this result from the broad scope of the concept of discrimination set out in the *United Nations Convention*, ratified by the Union, but it can also be said to be a natural corollary of the Directive itself. The latter aims to establish a general framework for ensuring equal treatment in employment and occupation for all persons and, specifically, of Article 5, which — before clarifying the meaning of the reasonable accommodation imperative — stipulates that, *in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided*. In other words, the adoption of these measures is both an expression and a requirement of the principle of equality. Recall the evocative words of Bob Hepple, reproduced *supra*.

In any case, we believe it can be affirmed that, following the *Bervidi* decision, it has become clear within the Court's case law that the failure to observe required measures for adjusting working conditions in light of a disability situation constitutes discrimination on that ground. Indeed, the Court seems to have taken this as self-evident — and not only that, but also that such omissive conduct constitutes *indirect* discrimination.

On this last point, however, Advocate General Athanasios Rantos explored the matter in greater depth. After recalling the concept of indirect discrimination, he explains, with the present case in mind: “In my view, the typical example of such discrimination is the introduction by the employer, in a general manner, of inflexible patterns of working time. That rule is formulated in neutral terms in that it applies to all employees but it is particularly disadvantageous for family caregivers of disabled children, who need more flexible working hours in order to be able to provide the care and assistance which such children require in view of their health status”⁴⁸. He further adds that “the provision of reasonable accommodation makes it possible to remedy a situation of indirect discrimination”⁴⁹. We would argue that he is correct. In fact, the omission of accommodation measures appropriate to the situation of the person concerned can be viewed as the application of standard working conditions to that person, which are designed in a neutral manner; however, despite their apparent neutrality and their *a priori* harmlessness, they have a particularly unfavorable impact on a specific category of workers — those who, on grounds of disability, require accommodations. It may be argued that classifying this omissive conduct as indirect discrimination opens the door to a potentially overbroad possibility of justification, which would not occur within the framework of direct discrimination. But the truth is that, since the essential parameter for the justification of indirect discrimination is the principle of proportionality, it is already inherent in the very formulation of the obligation of reasonable accommodation⁵⁰...

⁴⁸ § 46 of the Opinion.

⁴⁹ § 52 of the Opinion.

⁵⁰ With interest, regarding the criteria for delimiting the required measures and the relevance, in this respect, of the proportionality parameter, see Dagmar Schiek/Lisa Waddington/Mark Bell (coord. Dimitri Droshout), *Cases, Materials...*, *cit.*, pp. 635 *et seq.*, 665 and 666.

The aspect to which the Court devotes the greatest attention is, undoubtedly, the question of whether indirect discrimination – or, at least, this form of indirect discrimination – can be accepted as occurring *by association*⁵¹. On this point, although the judgment reveals a carefully reasoned and relatively dense foundation, the Court’s conclusion is almost syllogistic: *if* the Directive precludes discriminatory practices in both direct and indirect forms, *and* if “the principle of equal (...) applies not to a particular category of person but by reference to the grounds mentioned in Article 1 thereof, so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless are subject to less favourable treatment or a particular disadvantage on one of those grounds”⁵², then “the principle of non-discrimination laid down in Article 21(1) of the Charter and given concrete expression by Directive 2000/78 also covers indirect discrimination ‘by association’ on grounds of disability”⁵³.

Following the considerations already put forward by the Advocate General, the Court invokes in favor of this interpretation, in addition to the instruments already mentioned, the decision of the European Court of Human Rights in the case of *Guberina v. Croatia* (22 March 2016). In that case, the Court precisely held that the unfavorable treatment of a person on account of the disability of a child for whom they provide care constitutes discrimination on grounds of disability for the purposes of Article 14 of the European Convention on Human Rights, regardless of whether it is characterized as direct or indirect discrimination⁵⁴. In the present case, the applicant had invoked the non-application of a protective tax regime in light of the dependent’s disability.

On the other hand, and once again in agreement with the Advocate General, it refers to the position already conveyed by the Committee on the Rights of Persons with Disabilities, established within the United Nations and created by the Optional Protocol to the United Nations Convention. In its General Comment No. 6 of 26 April 2018, the Committee stated that the prohibition of discrimination on this ground aims to protect persons presenting that condition as well as those in their immediate circle, starting with parents; it employed the term *discrimination by association* and did not distinguish, in this context, between direct and indirect discrimination⁵⁵.

In the subsequent part of the ruling, regarding the second question raised, the Court takes the conclusion of the aforementioned syllogism as a premise for analysis and, coupling it with another assumption, induces a new logical assertion: *if* the principle of non-

⁵¹ Highlighting this aspect as well, see Milena Anna Impicciatore, “La discriminazione per associazione del prestatore di cura nel recente dialogo ‘creativo’ tra le Corti”, *Diritto della Sicurezza sul Lavoro*, No. 2, 2025, pp. 35-47.

⁵² § 56.

⁵³ § 65.

⁵⁴ § 60. See § 42 of the Advocate General’s Opinion.

⁵⁵ § 64. See §§ 38 e 39 of the Advocate General’s Opinion. Rantos points out that the Committee’s position was reiterated in 2022 (Communication No. 51/2018 of 26 August 2022) regarding the Italian legal system, which, by failing to adequately protect caregivers of persons with disabilities, would expose them to discriminatory conduct by association.

discrimination enshrined in Article 21(1) of the Charter and given concrete expression in Directive 2000/78 also covers indirect discrimination ‘by association’ on grounds of disability, *and* if “under Article 5 of Directive 2000/78, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided”⁵⁶, then “the employer is obliged to provide reasonable accommodation (...), as regards such an employee [who has a child with a disability in their care]”⁵⁷.

To support this conclusion, the CJEU invokes, in addition to Article 2, Article 7 of the United Nations Convention, which refers to the imperative of protecting children with disabilities, and similarly, Articles 24 and 26 of the CFREU as crucial interpretive references for the Directive. Significantly, it recognizes that if this were not the case, “the prohibition of indirect discrimination ‘by association’ of a worker who provides assistance to his or her child with a disability (...) would be deprived of a significant part of its useful effect”⁵⁸. Once again, the Court’s line of reasoning coincides with that traced by Advocate General Rantos, according to whose Opinion the Directive “means that the family caregiver of a disabled child is entitled to rely in legal proceedings, under the prohibition of indirect discrimination by association, on the protection against discrimination which would be afforded to the disabled person himself if that person were the worker, if that directive is not to be deprived of part of its effectiveness”⁵⁹.

It should be observed that, from the moment the obligation of reasonable accommodation is conceived by reference not to the worker's own disability but to the needs experienced by the worker due to the condition of a dependent, a reconfiguration of its object tends to occur. This is despite the fact that some of its potential manifestations (redefinition of working hours, transition to telework, change of workplace, etc.) may make sense in either scenario – that is, whether the person with a disability is the worker themselves or whether it is another person under their care. Consequently, the adjustments are no longer intended to tailor working conditions to the physical, psychological, or similar limitations of the person performing the work, but rather to adjust them to the needs of reconciling professional obligations with the duties of care toward their dependent. In the words of the Advocate General⁶⁰, the employer's obligation will emerge “in the form of accommodation provided to the worker as a caregiver”.

2.3. Reasonable accommodation measures or work-life balance mechanisms?

What has just been said brings us closer to a conclusion that, in light of this judgment, seems inescapable. Although the Court does not mention the word *reconciliation*, or similar, at any point, the connection between the parameters within which it operates and

⁵⁶ § 75.

⁵⁷ § 75.

⁵⁸ § 74.

⁵⁹ § 43 of the Opinion. See also §§ 53 and 60.

⁶⁰ § 53 of the Opinion.

the field of work-family balance is unequivocal⁶¹. Moreover, symptomatically, the word *caregiver*, applied to the worker, is used in thirteen passages of the ruling and over forty times in the Advocate General’s Opinion⁶². We would tend to suggest that the sense of both this Opinion and the decision would remain identical if, instead of G. L.’s status [as a caregiver], her status as the *mother* of the child with a disability were highlighted, since, in this case, the employee held both.

As is well known, the protection of work-family balance within the European Union framework has evolved in the relatively recent past to cover not only the worker’s children but also other persons under their care. With Directive 2019/1158, reconciliation rights are now held not only by parents (of children up to a certain age or with health conditions representing greater dependency) but also by those who assume the status of a caregiver – that is, those providing “personal care or support to a relative, or to a person who lives in the same household (...) and who is in need of significant care or support for a serious medical reason, as defined by each Member State” (Article 3(1)(d)). Furthermore, as Yolanda Maneiro Vázquez⁶³ points out, while in precursor Directives the protective measures were based on the idea that workers were either working or absent while providing family care, those that stand out in the 2019 Directive reflect models for combining such care with professional life. Indeed, this instrument provides not only for the right to periods of absence – parental leave, carers' leave, time off from work on grounds of *force majeure* for urgent family reasons – but also for the use of flexible working arrangements, that is, models that grant the *possibility for workers to adjust their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced working hours* (Article 3(1)(f)). Member States are thus obliged to provide reconciliation tools – these and/or others, provided they fulfill the described purpose – aimed at working parents and also at caregivers, as set forth in Article 9.

It seems to us, however, that no violation of the Directive occurs if these reconciliation mechanisms, provided for in national legal systems, take the form of a specific set of tools – flexible time slots, part-time work, compressed hours, continuous workdays, remote work, etc. – with defined contours. In contrast, the obligation of reasonable accommodation, as a projection of the principle of equality and non-discrimination on grounds of disability, is characterized – and it could not be otherwise, given the diversity of situations falling under that concept – by its openness, indeterminacy, and inevitable case-by-case analysis. The obligation is configured as a general clause that will have as many manifestations or concretizations as there are nuances in the situation of need. It may happen that a given measure to adapt to the worker's needs is conceivable within the framework of reconciliation mechanisms, but also as a reflection of the

⁶¹ Also establishing this dialogue, Milena Anna Impicciatore, “La discriminazione...”, *cit.*, pp. 42-43.

⁶² In the *Coleman* decision, this specific term does not appear; however, various similar expressions are employed, consistently viewing the mother as the person providing care to her son with a disability.

⁶³ *Cuidadores, igualdad y no discriminación y corresponsabilidad: la (r)evolución de los derechos de conciliación de la mano de la Directiva (UE) 2019/1158*, Editorial Bomarzo, Albacete, 2023, pp. 25 *et seq.*

obligation of reasonable accommodation. However, while in the context of the former, the legal system tends to offer only a circumscribed set of solutions, within the scope of the latter, there is an elasticity that is only limited by the parameter of disproportionate burden referred to in Article 5 of Directive 2000/78/EC. In this sense, a worker who provides care to a dependent whose condition qualifies as a disability holds a right to have the employer adjust their working conditions by adopting measures that, in essence, fulfill a reconciliation purpose, but which – because they simultaneously fall within the framework of disability protection and the inherent obligation of reasonable accommodation – may go beyond those that would be due to a different worker caring for a child or another dependent person who does not have a disability. The *Bervidi* judgment thus allows us to affirm that there are two distinct universes of reconciliation measures: one inhabited by workers who are parents or caregivers of dependents – dependents *per se*, without further epithet – and another where workers caring for dependents with a disability operate. In this second universe, the employer's obligation assumes a significant breadth, arising from the ductility characteristic of reasonable accommodation, which, in the first universe, will not generally exist (although, in the abstract, nothing prevents Member State legislators from designing reconciliation mechanisms applicable outside the domain of disability with the same degree of openness).

2.4. The omission of work-life measures when the dependent does not have a disability – discrimination? on what grounds?

There is yet another, perhaps more important, aspect in which the position of a worker providing assistance to someone with a disability and that of a parent or caregiver of a third party who does not present such a condition differ. Indeed, while in the former case the omission of proper accommodation measures is considered indirect discrimination on grounds of disability, in the latter, it is highly questionable whether discrimination can be affirmed at all, and the identification of the grounds on which it would rest is even more dubious.

This issue relates to a point that legal literature has already been highlighting regarding Directive 2019/1158. In fact, despite the clear statement of the connection between the objective of promoting equality between men and women and the promotion of work-life balance⁶⁴, nowhere in the normative part of the Directive is the violation of

⁶⁴ Reference should be made, in particular, to Recitals 6 and 10. The former states that “work-life balance policies should (...) contribute to the achievement of gender equality by promoting the participation of women in the labour market, the equal sharing of caring responsibilities between women and men and the reduction of the gender income and pay gaps”. The latter reveals the premise imposed by reality: that women tend to be more burdened by this challenge of reconciling the professional sphere with family demands (“work-life balance remains a considerable challenge for many parents and workers with caring responsibilities, in particular because of the increasing prevalence of extended working hours and changing work schedules, which has a negative impact on female employment. (...) When they have children, women are likely to work fewer hours in paid employment and to spend more time fulfilling unpaid caring responsibilities. Having a sick or dependent relative has also been shown to have a negative impact on female employment, with some women leaving the labour market entirely”).

work-life balance rights presented as a discriminatory act. In truth, not even retaliation against the exercise of such rights is linearly configured as such – whether based on sex (as might be expected, given the reasoning in the *Dekker* or *Webb* decisions⁶⁵, later codified in Directive 2006/54/EC (Article 2(2)(c)), that discrimination based on pregnancy and maternity should be considered, *per se*, as direct sex discrimination⁶⁶ – or as discrimination on the grounds of a new and autonomous factor: reconciliation⁶⁷.

It is true that Article 11, under the heading *Discrimination*, provides that “Member States shall take the necessary measures to prohibit less favourable treatment of workers on the ground that they have applied for, or have taken, leave as referred to in Articles 4, 5 or 6, or time off from work as referred to in Article 7, or on the ground that they have exercised the rights provided for in Article 9”. However, its wording does not result in the qualification of these acts as discriminatory, except perhaps through a skillful interpretation centered more on the heading than on the provision itself. Even less can it be inferred from that Article that the mere refusal to adopt work-life balance measures constitutes discrimination. Article 12 is also ambiguous; dealing with *Protection from dismissal and burden of proof*, it determines that Member States must protect workers against the possibility of being dismissed for having exercised certain rights provided for in the Directive and, namely, provide that they may benefit from the presumption that a dismissal following such exercise is based on that motive, with the employer bearing the burden of proving it was motivated by a different reason⁶⁸.

In the words of Jaime Cabeza Pereiro⁶⁹, the Directive “very deliberately” omits the answer to the question of the “place of reconciliation between family and professional

⁶⁵ Case C-32/93; judgment of 14 July 1994; and case C-179/88; judgment of 8 November 1990.

⁶⁶ See Jaime Cabeza Pereiro, “La directiva de conciliación de la vida familiar y profesional”, *Revista de Derecho Social*, No. 92, 2020, pp. 41-80 [41 *et seq.*], and María Antonia Castro Argüelles (“Conciliación de la vida familiar y laboral de progenitores y cuidadores: la transposición de la directiva (UE) 2019/1158 por el Real Decreto-Ley 5/2023”, *Revista Española de Derecho del Trabajo*, No. 271, 2024, pp. 83-120 [90]).

⁶⁷ Suggesting, seemingly, the identification of this autonomous factor, viewed as a clear ground of vulnerability and with high discriminatory potential, Carmen Delgado Garrido, “Cuidar y trabajar sin ser discriminada: la STJUE C-38/24 Bervidi y la protección del cuidador informal en el Derecho antidiscriminatorio europeo y español”, *Revista de Derecho Social*, No. 112, 2025, pp. 119-144 [123-133]. Curiously, the most recent Directive 2023/970 appears, precisely, to take for granted that less favourable treatment due to the exercise of reconciliation rights constitutes discrimination on grounds of sex. Indeed, within the definition of the concept of discrimination for the purposes therein, the instrument clarifies, in Article 3(2)(d), that discrimination includes “any less favourable treatment, within the meaning of Directive 2019/1158 (...), based on sex, including with regard to paternity leave, parental leave or carers’ leave”.

⁶⁸ Yolanda Maneiro Vázquez, *Cuidadores...*, *cit.*, pp. 39 and 52 *et seq.*

⁶⁹ “La Directiva de conciliación...”, *cit.*, pp. 76-78.

Vide, as well, Molina Navarrete, *La doctrina jurisprudencial...*, *cit.*, pp. 248 *et seq.* The Author emphasizes the concept of *multiple discrimination*: a female caregiver combines two conditions – being a woman and being a caregiver – which make her a primary target for discrimination; she would be at a disadvantage not only in relation to men who are not caregivers but also in comparison to women who are not caregivers and men who are caregivers. See, as well, Elena García Testal, “Conciliación entre la vida profesional y la vida familiar: un análisis de la no discriminación, la corresponsabilidad y la flexibilidad como elementos para la igualdad laboral de las mujeres en la Directiva (UE) 2019/1158 y en su transposición al ordenamiento español”, *Lan Harremanak*, No. 51, 2024, pp. 151-178 [156].

life in the context of Anti-Discrimination Law”. In the author's view, this is the most criticizable aspect of the instrument. The Author considers that decoupling the goal of reconciliation from sex discrimination is, in fact, "hiding history," the social evolution of the roles of women and men, and the objectives behind fostering female co-responsibility.

María Amparo Ballester Pastor⁷⁰ shares this opinion. The author suggests that the decision not to configure disadvantageous acts related to the exercise of reconciliation rights as sex discrimination could result from the following: if a man intended to exercise such a right and were subject to disadvantageous treatment for that reason, there would be something spurious about qualifying such conduct as sex discrimination. Indeed, the appeal to this discriminatory ground in the field of reconciliation is admittedly based on the idea of the structural disadvantage of women compared to men; precisely, the promotion of work-life balance aims to suppress this disadvantageous position. The author, however, counters that, in the final analysis, if a man is prejudiced by the exercise of those rights, it still makes sense to speak of sex discrimination, as that discriminatory act will be associated with rights traditionally exercised by women and intrinsically linked to gender stereotypes. She adds that one only needs to consider the concept of indirect discrimination to understand that the fact that some men are also harmed by conduct tending to negatively affect women above all does not invalidate their qualification as discriminatory on the grounds of sex. This was, indeed, the reasoning adopted by the CJEU in the *Praxair MRC* case⁷¹, in which a male employee, having been dismissed while on part-time parental leave, received compensation calculated on the reduced salary paid during the part-time work period. The Court recognized that, in the vast majority of cases, such leaves are taken by women; therefore, this method of calculating the compensation – prejudicial due to taking parental leave – is, if not justified, indirectly discriminatory on grounds of sex, to the detriment of women. This conclusion was not overturned by the fact that the case involved a male worker.

In this regard, Yolanda Maneiro Vázquez⁷² stresses that the CJEU had already had the opportunity to establish the link between the exercise of work-life balance rights and the principle of non-discrimination on grounds of sex – and, specifically, to attempt to qualify disadvantageous conduct due to the exercise of those rights as discriminatory on that ground – precisely regarding the *Coleman* case. According to the author, as an alternative to framing the problem within the scope of disability discrimination, it could have been viewed as sex discrimination; it could certainly have been concluded that acts of belittling resulting from the individual providing care to someone with the characteristics of the worker's son are likely to fall, in the great majority, upon female workers, those who almost always fulfill family care roles.

⁷⁰ “De los permisos parentales a la conciliación: Expectativas creadas por la Directiva 2019/1158 y su transposición al ordenamiento español”, *Derecho de las relaciones laborales*, No. 11, 2019, pp. 1109-1132 [1112 *et seq.*].

⁷¹ Case C-486/18; judgment of 8 May 2019.

⁷² *Cuidadores...*, *cit.*, pp. 49 *et seq.* and 56 *et seq.*

Now, it seems to us that, regardless of the enormous relevance and social value of the *Bervidi* decision, the CJEU may have deepened the cluster of doubts we have just enunciated. Given the specific contours of the situation, it was possible to appeal to disability as a discriminatory ground and, given that framework, the Court assumed that the omission of pertinent reasonable accommodation measures constituted indirect discrimination – in this case, of the worker caring for the person with a disability. But would the sense of the decision have been identical if the situation had been viewed through the lens of Directive 2019/1158 – *rectius*, if the child did not suffer from any condition qualifying as a disability and it were therefore unfeasible to frame the case within that domain? In a word: if the measures required of the employer were an expression not of the obligation of reasonable accommodation, as conceived by Article 5 of Directive (EU) 2000/78, but of the obligation to protect work-life balance under Directive 2019/1158, would their non-observance have been considered an (indirectly) discriminatory act? And if it were, based on what ground would it be discriminatory? Once again – symptomatically, as in the *Coleman* case – the person who claimed the adoption of adjustment measures was female. But it is, evidently, plausible to think that the father could have been in the mother's place. And then, even if the step were taken to deem the omission of those adaptations as discriminatory conduct, basing it on sex would represent a less obvious logical step, although – as Amparo Ballester Pastor highlights, and as we have seen above – the fact that, in a given case, the holder of work-life balance rights is male does not obliterate the fact that, historically, traditionally, and predominantly, the lack of protection for this legal interest primarily harms women. Moreover, as the author emphasizes, that logical step – the association of discriminatory conduct related to reconciliation rights with the discriminatory ground of sex – is more easily conceivable within the framework of indirect discrimination. From this perspective, in parallel with what was stated in the *Bervidi* decision regarding the omission of reasonable accommodation measures – there having disability as its reference – it would be conceivable that the failure to apply the reconciliation tools that should have been in place be viewed as indirect discrimination on grounds of sex, without this, naturally, implying a failure to recognize a male worker as being affected by it⁷³.

⁷³ A similar interpretation has already been rejected, according to María Antonia Castro Argüelles (“Conciliación...”, *cit.*, p. 90), by the Spanish Constitutional Court in Judgment No. 26/2011 of 14 March, a position it has approached again more recently (Judgments Nos. 310/2023 of 26 April and 379/2023 of 25 May). In that case, a male worker faced with a refusal to apply a measure facilitating work-family reconciliation (adjustment of working hours) was considered a victim of direct discrimination based on family situation – a factor that can be treated autonomously in the Spanish legal system, given the non-exhaustive list of discriminatory grounds set out in Article 14 of the Constitution. However, *Real Decreto-Ley 5/2023*, which transposed Directive 2019/1158, reportedly clarified that discrimination associated with the exercise of reconciliation rights is considered to be on grounds of sex.

Within the framework of European Union law, given the exhaustive nature of the discriminatory grounds listed in the Directives and the resistance the CJEU has shown toward the autonomization of others – notwithstanding the clear openness of Article 21 of the Charter –, a perspective such as that adopted by the Spanish Constitutional Court appears, at least at present, hardly feasible.

However, such an approach would be possible in the Portuguese legal system, also characterized – both under Article 12 of the Constitution of the Portuguese Republic and Article 24 of the Labour Code – by the fact that the principle of the prohibition of discrimination is accompanied by a merely illustrative list of

Concluding notes

The judgment in question constitutes, in our view, an essential piece of the anti-discrimination normative framework that the EU – primarily through the CJEU – has been developing. In the view of Carmen Delgado Garrido⁷⁴, which we consider correct, the Court has contributed significantly to the consolidation of a *relational and substantive* vision of the principle of equality and non-discrimination – a process that, particularly regarding disability, the United Nations had already unquestionably initiated. The Court provides legal protection, Delgado Garrido⁷⁵ continues, “to a social reality traditionally marginalized: that of informal care within the family context as a factor of labour vulnerability and, therefore, potentially discriminatory”.

There are, however, significant issues raised and left open by the judgment; these issues relate precisely to the shaping of this legal protection, conceived through the category of disability and the concept of discrimination by association. Evidently, the CJEU has taken a major step by affirming that the failure to provide reasonable accommodation constitutes discriminatory conduct. In the case at hand, this affirmation referred to an employee merely associated with a person with a disability, but it seems irrefragable to us that it also applies when the worker themselves has that condition. Indeed, had the Court not reached this conclusion, it would have departed from the United Nations’ conception regarding the scope of the principle of non-discrimination against persons with

factors (with "family situation" being included in the extensive list of Article 24(1) of the Labour Code). It should be noted that the Portuguese legislator, unlike the Spanish one, did not establish, when transposing the Reconciliation Directive, that the violation of the rights therein – even in the form of retaliation for their exercise – constitutes discrimination on grounds of sex, although it has not identified a different ground in this regard either. In any case, given the provisions of Article 35-A (*Any form of discrimination based on the exercise by workers of their maternity and paternity rights is prohibited*), which predates the transposition of the Directive, it is plausible to affirm that the violation of parental rights constitutes discrimination based on that very fact – the holding of such rights or the eligibility for them. Regarding other dimensions of reconciliation, an extensive interpretation of the rule would be required...

In Italy, the answer to the question of which discriminatory ground is at stake when an employer adopts a measure that, while apparently neutral, proves particularly burdensome for those caring for children – or the holding of parental rights – is also unclear. On this point, based on case law and noting its ambiguity, see Marco Peruzzi, “Orario di lavoro e discriminazione per genitorialità: la soluzione giurisprudenziale prima della L. N. 162/2021”, *Rivista Italiana di Diritto del Lavoro*, 2022, II, pp. 265-272. The author points out (p. 270 *et seq.*) that, although domestic law was amended following Directive 2019/1158, it remains uncertain which discriminatory ground is at issue when the employer engages in conduct that negatively affects parenthood. Indeed, *Legge* 162 of 5 November 2021, which carried out that amendment by modifying *Decreto Legislativo* 198 of 11 April 2006, shows some ambiguity by establishing as indirectly discriminatory any conduct by the employer resulting in a modification of working conditions or the organization of working time that places or may place the worker at a disadvantage compared to others, by reason of sex, age, family care requirements, pregnancy, or parental rights. It is a fact that it identifies parenthood and care duties as an autonomous potential ground for discrimination; however, in addition to sex also being included in the list of grounds in the provision, it is equally certain that it is part of an instrument whose material scope is the equality between men and women. Also on this point, see Fabiola Lamberti, “Genitorialità e orario di lavoro nella prospettiva della discriminazione indiretta: autonomia della fattispecie, tutela collettiva e funzione dissuasiva del risarcimento”, *EQUAL – Rivista di Diritto Antidiscriminatorio*, No. 5, 2025, pp. 451-466 [454 *et seq.*], who reads the rule as granting autonomy to parenthood as a discriminatory ground.

⁷⁴ “Cuidar y trabajar...”, *cit.*, pp. 123 and 131-133.

⁷⁵ *Idem*, p. 131-132.

disabilities, which, following the ratification of the Convention enshrining it, would be neither acceptable nor comprehensible.

However, precisely because the reasonable accommodation measures to be adopted for a worker such as the one in the case under analysis are, substantively, work-life measures, the question immediately arises as to how the Court would have positioned itself if the path of disability-based discrimination had not been feasible. It might be excessive to say that the judges in Luxembourg missed yet another opportunity to clarify which discriminatory ground is, after all, at stake – if any – when an employer violates the duty to protect work-family reconciliation. It was not, of course, mandatory for them to answer such a question on this occasion. What is certain, in any case, is that it remains unanswered, or at least without an unequivocal answer, just as it remains open whether the CJEU will, at some point, broaden the spectrum of discriminatory grounds it considers relevant beyond the limits of the Directives, and, likewise, what significance it will accord to the concept of intersectional discrimination⁷⁶, which could legitimately be invoked whenever a woman with a disability, or indeed a woman caring for a child with a disability, is the target of unfavorable treatment⁷⁷.

In our estimation, we view with some difficulty – particularly in light of Article 21 of the CFREU – the CJEU’s reluctance to delineate novel grounds of discrimination. Conversely, notwithstanding the sensitive nature of determining what may be deemed a suspect or protected category for such purposes⁷⁸, we would contend that work-life balance – the exercise, but, primarily, the entitlement to, reconciliation rights – exhibits some of the characteristics most frequently identified by legal doctrine in this regard: the inherent dignity⁷⁹; the political marginalization⁸⁰ or history of disadvantage⁸¹; and, undeniably, the social relevance⁸².

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⁷⁶ On this point, the development of which exceeds the scope of this study, see, among others, Raphaële Xenidis, “From Critical Theory to Litigation Strategy: Can Intersectionality Transform EU Equality Law?”, *European Law Journal*, Nos. 1 and 2, vol. 31, 2025, pp. 22-44, and Marta Fernández Prieto, “Conciliación de responsabilidades de progenitores y cuidadores e igualdad de oportunidades en la Directiva (UE) 2019/1158”, *Revista Derecho Social Y Empresa*, No. 12, 2020, pp. 94-121 [117 *et seq.*].

⁷⁷ See Carmen Delgado Garrido, “Cuidar y trabajar...”, *cit.*, p. 133.

⁷⁸ For example, Aileen McColgan, *Discrimination, equality and the law*, Hart Publishing, 2014, pp. 63 *et seq.*

⁷⁹ Sandra Fredman, *Discrimination Law*, *cit.*, p. 214.

⁸⁰ *Idem*, p. 213.

⁸¹ *Idem*, p. 217.

⁸² Michael Foran, “Grounding unlawful discrimination”, *Legal Theory*, 28, 2022, pp. 3-34 [11 *et seq.*].

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