

# Objective Justification, Less Discriminatory Alternatives, and the ‘Great Repeal Bill’

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## Abstract

On the 13<sup>th</sup> July of this year, the UK Government published the European Union (Withdrawal) Bill,<sup>1</sup> more commonly called the ‘Great Repeal Bill’. Aside from the repeal of the European Communities Act 1972 (and with it the proposed ousting of the jurisdiction of the Court of Justice), the Bill’s purpose is to ‘convert the *acquis*’ of EU law and preserve any UK law implementing EU law.<sup>2</sup> This will include ‘workers’ rights’ and with it their employment discrimination rights.<sup>3</sup>

The efficacy of such a move will be limited if the British judges fail to adopt the same interpretations of these rights as their counterparts in the Court of Justice in Luxembourg. Over the years of Britain’s membership, there have been many references to Luxembourg to clarify the meaning of particular aspects of the discrimination provisions, with the Court generally giving a more liberal interpretation than the domestic courts had suggested would be their preference. One element of the law largely untouched by this process is the objective justification defence to claims of indirect discrimination. This is because the domestic courts have maintained a fiction that their interpretation is consistent with the EU formula. For no apparent reason, the domestic courts have reworded the EU formula whilst labelling it as being no different. This presents a major challenge for the Bill. It would be all too easy for Parliament to assume all is well with the this aspect of workers’ rights, especially when the judges tell them so.

Using a handful of cases, this paper exposes the shortfalls within the domestic law and suggests some solutions. It is not the purpose of this paper to discuss the Bill (which no doubt is due for many amendments), but to focus on one important aspect of discrimination law, both pre- and post-Brexit.

## Keywords

Objective Justification, Less-discriminatory Alternatives, Alternative Practice, Banding, reasonably necessary, *Enderby*, *Hampson*, *Harrod*, *Benson*, *Barry v Midland Bank*, *Bilka*, *Bridgeport Guardians*, *Albermarle v Moody*, *Griggs v Duke Power*

## Introduction

EU lawyers in general, and discrimination lawyers in particular, will be familiar with the ‘*Bilka* test’ of objective justification,<sup>4</sup> which is the expression of the Court of Justice’s general principle of proportionality<sup>5</sup> in the context of (employment) discrimination law. Many will know also that this represents the ‘business necessity defense’ devised by the United States’ Supreme Court, which developed the notion of indirect discrimination (‘disparate impact’),

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beginning with *Griggs v Duke Power*.<sup>6</sup> It is unfortunate (for many) that for decades British courts have been proffering a diluted version of the defence while asserting this is consistent with *Bilka* and its progenies. This article explores these cases, their decisions, reasoning, and language, to expose these shortcomings as inconstant with EU law, as well as principle and policy. It concludes that the only realistic solution is a forthright legislative restatement of the test, and post-Brexit, the introduction of a statutory rule of interpretation mandating a liberal and purposive interpretation of all equality law, which will align more closely British and EU interpretations and applications of this law, whilst remaining beyond the jurisdiction of the Court of Justice.

### *The concept of indirect discrimination*

Statistics reveal a racially unbalanced workforce, or gender pay gap; yet there is no evidence of any facially discriminatory cause. What to do? The concept of indirect discrimination was developed to address such scenarios. If claimants can lay a cause at the employer's door, say, word of mouth hiring, an entrance exam favouring whites, or a pay regime favouring predominantly male occupations, then a prima facie case of discrimination can be established. This is so where the employer had no discriminatory intent and there were many causes beyond the employer's control. For instance, an employer may not be responsible for the inferior education of minorities, who are now disfavoured by its (unnecessary) entrance exam,<sup>7</sup> nor for women choosing lower paid (but equally skilled) occupations according to cultural norms.<sup>8</sup> Nonetheless, the law provides the victims with a cause of action against the employer.

But the employer has a defence. If it can show that the cause is an employment practice appropriate and necessary to achieve a legitimate employment goal, then there is no liability. This is key. Without the defence, employers would be obliged to hire by quota, politically and economically unthinkable in any western economy. But the precise application of the defence is key to resolving any unnecessary pay gaps and other workplace imbalances. Thus, the focus of this law is on discriminatory *effects* and responsibility, rather than cultural norms and culpability. A consequence of this is that there should be no margins or leeway to the defence. Such margins are margins for the identified discriminatory effects to perpetuate. Not only is this contrary to principle and policy, it is economically inefficient.<sup>9</sup>

This notion of necessity was inherent in the development of the law of indirect discrimination, which began in the United States Supreme Court. In *Griggs v Duke Power*, the US Supreme Court ruled, 'The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity.'<sup>10</sup> In other words, once the claimant has made out a prima facie case (that the employer's practice adversely affects a protected group) the burden shifts to the employer to show that 'the challenged practice is job related for the position in question and consistent with business necessity.'<sup>11</sup>

One consequence of this 'necessity' aspect is that a claimant may prevail if there exists a less discriminatory alternative means to achieve the same legitimate goal. Even small adjustments to the means can make a significant difference. One such practice is 'banding'. This can be useful for entrance and promotion exams, and is used in the United States (an example is provided below). Here, strict ranking scores can be placed into bands, and selection then made from these bands, where that would reduce the discriminatory impact. At first sight, this might seem to offend the symmetrical principle of direct discrimination law, by deliberately *disfavouring* the advantaged, but protected group, say men, or whites. As such, this would not be a less discriminatory alternative.<sup>12</sup> But this need not be so, as explained in the American case law:

Banding is premised on the belief that minor differences in test scores do not reliably predict differences in job performance. It also recognizes that an individual is unlikely to achieve an identical score on consecutive administrations of the same examination. Because some measurement error is inevitable, strict rank order promotions will not necessarily reflect the correct comparative abilities of the candidates. The smaller the difference between observed scores, the more likely it is a result of measurement error, and not a variance in job-related skills and abilities.<sup>13</sup>

Similarly, the jurist and judge Posner J rejected an argument that banding amounted to unlawful discrimination with the assertion that, 'In fact it's a universal and normally an unquestioned method of simplifying scoring by eliminating meaningless gradations.'<sup>14</sup> Banding has become well enough known in the US jurisprudence, that a defendant refusing to adopt it where appropriate would be liable.

More generally though, how would a court, or claimants, evaluate the employer's testimony that it had considered (and evaluated) all alternatives, when the requisite knowledge, expertise, and resources, are likely to be in the hands of the employer? An employer could omit a less discriminatory, but 'inconvenient', alternative without the claimant or the court becoming any wiser. Some class actions, and/or union-funded actions may well have the resources to evaluate the employer's assertions and practices. But that is an element of fortune, not law. The US Supreme Court has offered a partial solution, which again finds a place on the procedural landscape of shifting burdens. The requirement for business necessity is augmented with the Alternative Practice doctrine. Here, should a prima facie case be met with an apparently good business necessity defence, the plaintiff may still prevail by proposing an alternative business practice with a less discriminatory effect.<sup>15</sup> The rubric generally used was set in *Albermarle Paper Co v Moody*<sup>16</sup> where the Court stated that the alternative should 'also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'<sup>17</sup> Again, without the expertise or funding, a claimant may find this too difficult a burden to discharge,<sup>18</sup> but it increases the chances of an employer having to adopt a less discriminatory alternative, and once some alternatives (such as banding) are discussed in litigation, they will become common knowledge, enabling better-informed courts to evaluate the employer's defence.

An example of a successful demonstration of an alternative practice (of banding) arose in *Bridgeport Guardians v City of Bridgeport*<sup>19</sup> where tests used in the promotion of police officers to the rank of sergeant were challenged. One hundred and seventy persons applied for nineteen posts and the results showed that the tests had a disparate impact on blacks and Hispanics, with only 30 per cent and 46 per cent respectively passing in comparison with 68 per cent of whites. But the real impact was worse than that because the nineteen best performers were selected, leaving *no* minorities with promotion. The employer successfully justified the tests as a reliable and accurate predictor of job performance. However, what these figures did not reveal was that, of all those passing, the marks were extremely close. The plaintiffs put forward evidence that the difference between a few marks was insignificant. Accordingly the plaintiffs suggested that the marks should be banded: that is, marks within, say, eight per cent of each other, placed in a single band. Then the successful candidates could be selected from those bands, using other (non-discriminatory) factors for selection. In this way the best performers were selected without a disparate impact. The Court found that the use of banding would alleviate the disparate racial effect of the examination without imposing any significant burden on the defendants whilst serving their legitimate interests.<sup>20</sup>

This Alternative Practice doctrine has not been adopted by the EU or British schemes. This places an even stronger emphasis on a strict scrutiny of the employer's defence. Thus, if

the anti-discrimination legislation is to address properly the gender pay gap and other discriminatory patterns, the judiciary must demand the least discriminatory alternative.

### *The legislation*

The discrimination Directives nowadays state that a defendant may ‘objectively justify’ a challenged practice by showing a *legitimate aim*, and that *the means of achieving that aim are appropriate and necessary*.<sup>21</sup> This formula codifies Court of Justice case law, originally formulated in *Bilka-Kaufhaus v Weber von Hartz*, which held that a challenged practice is justified if,

the means chosen ... correspond to a genuine need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end...<sup>22</sup>

It would seem that for an aim to be legitimate, it must ‘correspond to a genuine [or “real”<sup>23</sup>] need of the undertaking’. The test was then transposed into the British legislation, nowadays the Equality Act 2010, as ‘a proportionate means of achieving a legitimate aim’.<sup>24</sup> Although the expression ‘proportionate’ compresses the *Bilka* elements of ‘appropriate’ and ‘necessary’, the formula was intended to implement the EU formula.<sup>25</sup>

The British *judicial* dilution of this defence has stemmed from two of its features. First, and almost universally, the domestic courts perpetuated a notion that ‘necessary’, means ‘*reasonably* necessary’, which provides some leeway to discriminate. Second, on occasions, there has been some confusion between aims and means, which again, has provided some leeway. Allied to both of these issues is a balancing test, which, rather perversely provides a similar leeway while having the *potential* to vitiate even legitimate aims.

### *Necessary and reasonably necessary*

At first sight, the addition of ‘reasonable’ might be just a way of denoting the test as an objective one.<sup>26</sup> But that has not how the phrase has been used. Instead, it has been used to qualify ‘necessary’ with a notion of reasonableness, and in doing so provided employers with some leeway, which is leeway for unnecessary discrimination.

A short history is required to understand how this has come about. The original British discrimination legislation used the rather open-ended phrase, ‘justifiable irrespective of sex [or race]’.<sup>27</sup> In the early years, tribunals (influenced by *Griggs*), equated this with ‘necessity’; in other words, the challenged practice had to be no more than necessary to achieve the aim. For example, in *Steel v Union of Post Office Workers*<sup>28</sup> the President of the EAT, Phillips J, citing *Griggs*,<sup>29</sup> wrote of the defendant’s ‘heavy’ onus of justification, which included showing that the challenged practice was ‘genuine’ and ‘necessary’. Among other things, the tribunal should weigh the need for the practice against the discriminatory effect, and ‘distinguish between a [practice] which is necessary and one which is merely convenient, and for this purpose it is relevant to consider whether the employer can find some other and non-discriminatory method of achieving his object’.<sup>30</sup>

In 1982, however, the Court of Appeal in *Ojutiku v Manpower Services Commission*<sup>31</sup> contrasted ‘necessity’ with the statutory word *justifiable*. Kerr LJ stated that ‘justifiable ... clearly applies a lower standard than ... necessary’.<sup>32</sup> Eveleigh LJ considered it to mean ‘something...acceptable to right-thinking people as sound and tolerable’.<sup>33</sup> Following this,

Balcombe LJ, in *Hampson v Department of Education*,<sup>34</sup> conflated the justification process to a single ‘balancing’ test, which weighs the discriminatory effect of the challenged practice against the *reasonable* needs of the employer.<sup>35</sup>

In the meantime, the Court of Justice was developing a differently formulated justification test, expressed in *Bilka*, which gradually found its way into the domestic legislation. As the influence of EU law grew, domestic courts were forced to reconcile the *Hampson* test with this formula. If there were a pivotal point in this process, leading to today’s position, it came in the Court of Appeal’s (re)formulation in *Barry v Midland Bank*.<sup>36</sup> After citing the *Bilka* and *Hampson* tests, Peter Gibson LJ, speaking for the Court, said,

In our judgment it would be wrong to extrapolate from those words written in that context that an employer can never justify indirect discrimination in a redundancy payment scheme unless the form of the scheme is shown to be necessary as the only possible scheme.

Thus, he surmised, the ‘true position’ was that the objective must be legitimate and ‘the means used are appropriate to achieve that objective and are *reasonably* necessary for that end.’<sup>37</sup> Peter Gibson LJ cited in support the House of Lords authority, *Rainey v Greater Glasgow Health Board*.<sup>38</sup> In *Rainey*, Lord Keith in fact had to decide whether the defence was subjective or objective (or both).<sup>39</sup> Citing the recently decided *Bilka*, he concluded it must be objective, and in this context, labelled *Bilka*’s requirement accordingly as ‘reasonably necessary’.<sup>40</sup> Thus, Peter Gibson’s LJ reformulation, giving employers some leeway, had no basis in precedent. There is nothing in the Court of Justice language or jurisprudence to support such an approach.<sup>41</sup> In fact, his judgment reconciled *Hampson* and a test of *reasonable* necessity with *Bilka* for no other reason than he said it was so. The rubric has gained traction through nothing more than repetition, with even the Supreme Court culpable. In *Ministry of Justice v O’Brien*<sup>42</sup> for instance, the Supreme Court quoted the familiar EU justification ‘*Bilka*’ test provided by the Court of Justice for the case in hand,<sup>43</sup> and in the next summarising paragraph added the qualifier ‘reasonably’ for no given reason.<sup>44</sup>

It is no surprise then, that the fiction of conformity continued in the Court of Appeal, with an unabashed Maurice Kay LJ asserting that this leeway can only be afforded with the qualified formula: ‘The test does not require the employer to establish that the measure complained of was “necessary” in the sense of being the only course open to him.’<sup>45</sup> More recently, Slade J in the EAT asserted, ‘neither domestic nor European jurisprudence regard the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy to be determinative against justifying a discriminatory PCP’.<sup>46</sup>

This is a looser test than one requiring that the means used discriminate no more than necessary, and provides a similar leeway to the *Hampson* test. There are boundaries of course, albeit somewhat more generous to the employer: ‘*Reasonably* necessary’ did not mean that a defendant could justify a measure simply by showing it was one of a band of reasonable responses which a reasonable defendant (e.g. an employer) would adopt, as in unfair dismissal;<sup>47</sup> in one rare instance Sedley LJ suggested that tribunals should consider ‘fairly obvious alternatives’.<sup>48</sup> But the leeway remained. In contrast to a strict necessity test, defendants were not bound to show that the practice was the only possible one available.<sup>49</sup> As Maurice Kay LJ reminded tribunals in *Cadman v Health and Safety Executive*, ‘The difference between “necessary” and “reasonably necessary” is a significant one...’<sup>50</sup>

Indeed, a few examples will illustrate the significance of the distinction between the original and modified tests. First, two cases pre-dating the *Ojutiku* pronouncements. In *Steel v Union of Post Office Workers*,<sup>51</sup> preferable postal rounds were awarded according to length of service as a ‘permanent status’ employee. As women historically had been prevented from

acquiring permanent status, they were disadvantaged. Phillips J held that the justification would include a consideration of whether it was necessary to allot postal walks by seniority and, if so, whether the seniority rule could be revised so that women would be given credit for their temporary service. In other words, if there existed a less discriminatory alternative, it should be adopted.

In *Bohon-Mitchell v Common Professional Examination Board*,<sup>52</sup> the Board maintained that persons with a degree in a non-law subject should to take a twelve month course in academic law before being able to sit the Bar Finals. But those with a non-British or non-Irish degree were required to complete a 21 month course. Save for one year, Ms Bohon-Mitchell had been living in England since 1972 and was married to an Englishman. In 1978 she applied to take her Bar Finals and as an American graduate, she was required to sit the 21-month course. Upon her complaint for indirect discrimination on grounds of nationality or national origin, the Board tried to justify that requirement on the ground that barristers needed a wide knowledge of the English way of life (the aim), and the simplest way of identifying those without such experience was by their degrees (the means). Applying the standards set by *Steel*, an industrial tribunal held that the requirement to sit a 21-month course was not justified because it was not *necessary* to achieve the aim. Instead, each candidate's familiarity with the English way of life could be assessed on a case by case basis.<sup>53</sup> If the tribunal had applied the *Hampson* test, or asked if the means were *reasonably* necessary, it may well have concluded that the requirement was justified. The evidence was that just eight out of 191 applicants with a non-law degree had overseas degrees. Probably fewer than that eight had been resident in Britain and were therefore 'familiar with the English way of life'. In any case, in terms of numbers, the discriminatory effect was relatively minor. If this discriminatory effect were weighed against the inconvenience of changing the system, a court may well find that defendant's administrative needs justified the practice, or was a reasonable way to achieve the aim. In other words discrimination would persist because that would be more convenient for the Board.

Finally, a more recent Court of Justice decision nicely exposes the difference In *Enderby v Frenchay Health Authority*,<sup>54</sup> the defendant Health Authority was trying to justify a 40 per cent difference in pay between speech therapists (98 per cent female) and pharmacists (63 per cent female). As women were over-represented in the lower paid group, the Health Authority was obliged to justify the difference. It argued that market forces caused the difference. But the evidence was that only an extra ten per cent pay was needed to recruit a sufficient number of pharmacists. Thus, there existed a less discriminatory alternative of paying the pharmacists a ten per cent premium. In the UK, the EAT<sup>55</sup> applied the *Hampson* test and weighed the 40 per cent difference in pay against the need for sufficient pharmacists. Given that stark choice, the EAT held that the difference in pay was justified. In other words, the leeway provided by the less strict *Hampson* approach meant that employers were not bound to use the least discriminatory practice available. The ECJ held that the pay difference could only be justified to the proportion that market forces required (ten per cent). The existence of the less discriminatory alternative meant that the practice (a 40 per cent pay difference) could not be justified. For the ECJ, proportionality meant *no more than* necessary.

If, as the question referred seems to suggest, the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality.<sup>56</sup>

The cases demonstrate that the application of a strict test enables courts to demand equally effective (if inconvenient) alternatives and dictate that there is no more discrimination than necessary.

### *Confusing aims and means*

The *Bilka* test distinguishes between aims and means. It seems that once an aim is considered 'legitimate' it is untouchable (save for the balancing test, explained above). This permits employers a certain amount of latitude and discretion on how to run their affairs, although of course, there are limits. As seen above, the aim should correspond to a genuine need.<sup>57</sup> Once this legitimacy is established, the analysis turns to the *means* of achieving the aim, and this is where most cases on justification are decided. As *Enderby* in particular demonstrated, the means must be suitable and the least discriminatory method of achieving the aim. Here, employers have a lot less latitude, and arguably, none at all. Thus, it is vital to distinguish the aim(s) and means in any one case.

The latitude afforded with the aim has enabled appeal courts to reject claims on the basis that a tribunal cannot substitute its own (less discriminatory) aim for that of the employer. This is apparent from three important cases on this matter. First, in *Barry v Midland Bank*,<sup>58</sup> a severance payment based on two criteria - the salary at the time of termination *and* length of service - was challenged for adversely affecting women, who were more likely to have moved to part-time status and whose salary-related payment was therefore lower, despite having worked full-time for a period in the past. Ms Barry herself had worked full-time for eleven years, moving to part-time for a further two years following the birth of her child. Her (equal pay) claim of indirect sex discrimination failed at every stage of the appeal process. The House of Lords dismissed her appeal on the basis (4-1) that the scheme did not discriminate and so did not warrant justification. Only Lord Nicholls decided that the practice required justification. The aims of the scheme were to compensate for the loss of job and recognise loyalty, which tallied respectively with the two criteria (the means). The claimant's suggestion that the bank could have calculated the payment according to hours worked was rejected. Lord Nicholls reasoned,

To decide otherwise would be to compel the bank to abandon its scheme and substitute a scheme where severance pay is treated and calculated, not as compensation for loss of a job, but as additional pay for past work. That could not be right.<sup>59</sup>

This dicta has been taken as a principle to reverse some first instance decisions for substituting the employer's aim for another of the tribunal's choosing. In *Land Registry v Benson*,<sup>60</sup> the employer, a self-financing government body, decided to merge two offices and reduce staff following a considerable operational loss (nearly £80m). It devised a scheme offering voluntary early retirement to employees aged over 50, and (less generous) redundancy to those under 50. It allocated a £12m budget for the scheme. More volunteered than the budget could afford, and so the employer selected only from those under 50 for redundancy, as that was cheaper. Those aged over 50 claimed for indirect age discrimination, in that they were denied the opportunity to benefit from the scheme, in comparison to the younger workers (the claimants were later dubbed the 'unfairly non-dismissed'<sup>61</sup>). The employment tribunal found that reducing staff costs was a legitimate aim, but that the employer not shown that it was necessary to limit its spending on the scheme to £12m: it had the resources to accept all the applications. The EAT (Underhill J) reversed, holding that fixing the budget to £12m was a legitimate aim: 'Like any business, it was entitled to make decisions about the allocation of its resources'.<sup>62</sup> In effect, the

tribunal had substituted the employer's scheme for one of its own.<sup>63</sup>

The most recent instance, *Harrod v Chief Constable of West Midlands Police*,<sup>64</sup> reached the Court of Appeal (Elias, Underhill, and Bean LJ). Following the 2010 general election, police forces were required to make budget cuts of 20 per cent over four years. Five police forces opted to retire all officers eligible for compulsory retirement under regulation A19 of the Police Pensions Regulations 1987.<sup>65</sup> This provided that a police force may, 'in the general interests of efficiency', require the compulsory retirement of an officer who would be entitled to receive a pension of at least two-thirds of his average pensionable pay. Such a pension entitlement could be acquired only with at least 30 years of service. This meant only those aged 48 or more could be retired. Although a 'substantial majority' of officers retire voluntarily after 30 years,<sup>66</sup> regulation A19 was applied to all eligible officers, forcing some into compulsory retirement. This blanket application of regulation A19 made more savings than was required.

Officers aged 48 and over brought a claim of indirect age discrimination. It was agreed that the dismissals adversely affected those aged 48 and over, and so the case turned on the element of justification. An employment tribunal found the dismissals were not justified, as the forces could have made the required savings by a less discriminatory means, such as identifying those willing to take voluntary retirement, career breaks, part-time working. The EAT reversed, with Langstaff J holding that these 'entirely speculative' alternatives could not provide the required certainty, as officers could change their minds about any of those three options.<sup>67</sup> The Court of Appeal upheld the EAT reversal, holding that it was not for the tribunal to substitute an alternative scheme.

So far, so clear. It seems straightforward: once an aim is identified as 'legitimate' it becomes unassailable. But a common difficulty in coming to these decisions was distinguishing between aims and means. As Underhill J confessed in *Benson*: 'The truth is that the distinction between means and aim is not always easy to draw.'<sup>68</sup> But this did not seem to matter for the judges in these cases. Elias J once noted that that the distinction was 'a matter of semantics'.<sup>69</sup> Underhill J has observed more than once that, '... the dichotomy of "aim" and "means" is not always clear cut and the two elements can sometimes reasonably be formulated in more than one way'.<sup>70</sup> Thus, he advised with a flourish, 'Tribunals need not cudgel their brains with metaphysical inquiries about what count as aims and what count as means as long as the underlying balancing exercise is carried out'.<sup>71</sup>

Rather than provide a solution to tribunals (and other interested parties), this presents a problem. If it matters little, or is impossible to classify, which features of a defence are aims and which are means, how is a tribunal supposed analyse them, when according to *Bilka*, the aims must be legitimate but the means proportionate (or appropriate and necessary)? In *Benson* and *Harrod*, all the forums pondered at length over which was which. It is inevitable that this will lead to confusion. In *Harrod*, for instance, Langstaff J, considered the aim to be 'at least that of achieving efficiency...'<sup>72</sup> In the Court of Appeal, Elias LJ appeared to agree, declaring: 'The dismissals are on grounds of efficiency'.<sup>73</sup> Meanwhile, Underhill LJ stated, 'In my view the right way to characterise the forces' aim is that they wished to achieve the maximum practicable reduction in the numbers of their officers.'<sup>74</sup> Bean LJ was less specific. His leading judgment did not expressly identify an aim. The closest he came was when he said,

The decision to reduce officer headcount to the fullest extent available was taken in the interests of achieving certainty of costs reduction and it was not for the Tribunal to devise an alternative scheme involving the loss of fewer posts.<sup>75</sup>

Given that it was held a mistake for the tribunal to devise another scheme (as it is not for the tribunal to substitute the defendant's aim for its own), it is implicit here that Bean LJ considered

the aims to be the ‘fullest’ possible reduction in officer headcount in the interests of achieving ‘certainty of costs reduction’.

Not only is this speculation producing a variety of views confusing for interested parties, it can incorporate mistakes. For instance, Underhill and Bean LJ both assumed that it was an aim to achieve to maximum possible reduction of staff. This was not the case. The forces were under instruction to make a 20 per cent saving. There was no edict to achieve this with staff cuts, and certainly not to reduce the staff beyond that necessary to achieve the saving. Quite the opposite, one would imagine. Hence, a reduction of officers was just one of many cutbacks, including spending on buildings, IT equipment and vehicles; this was in addition to the dismissal of some civilian staff. Clearly, the ‘aim’ was to save money, and arguably to do so with certainty. Yet, the evidence was that more than the necessary numbers of officers were dismissed. By characterising the ‘maximum reduction’ as an ‘aim’, Underhill and Bean LJ detached this action from the required question of proportionality. With some clarity around the means and aims, the Court of Appeal may have realised that it was necessary to select only the number of ‘A 19’ officers needed to meet the required savings and certainty. The two-thirds pension entitlement laid down in regulation A19 was a threshold, not an absolute rule. Thus, depending on the calculations, the forces could have selected all those with say, at least three-quarters pension entitlement.

Meanwhile, in *Benson*, after considering the features of the need to break even (at least), including the office merger scheme, staffing costs reduction, £12m budget, and method of selection, Underhill J said, ‘The uncertainty about how to characterise them ... does not, fortunately, matter since in our view all the various potential elements are plainly legitimate.’<sup>76</sup> The error here, albeit of the same flavour, was slightly different. Instead of wrongly classifying the features of the case, Underhill LJ measured them all by the standard required for aims, again detaching them from the question of proportionality.

The irony here is of course, after criticising the tribunal below for devising an alternative aim, these judges fare only a little better in speculating themselves as what were the aims. Thus, as well as being more diligent in identifying the aims and means, further clarity would be achieved by expecting defendants to identify their own aims. The indeterminable speculation on the defendant’s aim(s) has not only led to confusion and errors, it is wrong in principle. The tribunals’ task is to scrutinise the defence provided, not to help draft a party’s pleadings.

### *The continued use of the balancing test*

Assiduous readers of the law reports (concerning discrimination) would have noticed judges occasionally reverting to the *Hampson* ‘balancing’ test rather than, or alongside, the ‘reasonably necessary’ rubric. It seems they consider these expressions to mean one of the same thing.<sup>77</sup> It is arguable, that the *Hampson* formula perhaps betrays another departure from *Bilka*, because it requires only that the employer’s needs are ‘reasonable’, and not ‘real’ or ‘genuine’. This is hard to sustain though, as ‘fake’, spurious or ‘non-real’ needs are hardly likely to be accepted as ‘reasonable’, no matter what the discretion. But the unnecessary exchange of ‘real’ for ‘reasonable’ can only add to the confusion by the British judiciary’s rewriting of *Bilka*.

In relation to *Bilka*’s requirement regarding the means, the language used in either (domestic) test shares the same feature of discretion, or ‘leeway’. As such, it should make little difference which test is used, save in one way. The *Hampson* test permits tribunals to vitiate the employer’s aim by another route. Where the aim is legitimate, but the only means to achieve the aim ‘outweighs’ it because of its overwhelming discriminatory effect, then the aim itself is vitiated.

In *Allen v GMB*,<sup>78</sup> when negotiating with their employer, the claimants' trade union prioritised pay protection and future pay for all its members over compensation (back pay) for unequal pay in the past, affecting just the female members, who were the claimants. The reason was that the union did not wish to antagonise the employer in its aim to achieve the best possible deal overall. In pursuit of their goal, the union persuaded the claimants to agree to the negotiated deal. In doing so, the union wrongly told the claimants that no better deal could have been achieved for them by litigation. The claimants sued their union for indirect discrimination.<sup>79</sup> Reversing the employment tribunal's decision for the claimants, the EAT (Elias J) found that although the union's priorities were legitimate aims,<sup>80</sup> the means used, albeit dishonest, were the only way to achieve the goal. Hence, there was no less discriminatory alternative. To hold otherwise would be substituting the union's aims for its own,<sup>81</sup> violating a seemingly cardinal rule.<sup>82</sup> The Court of Appeal restored the tribunal's decision holding that if the means are disproportionate, then they cannot be justified. Maurice Kay LJ said '...although the objective was a legitimate one, it was not the only possible legitimate one. If it were achievable only by disproportionate means, then it would not be susceptible to justification. To conclude otherwise would be to license disproportionality.'<sup>83</sup> The Court of Appeal came to this decision without citing *Hampson* or the balancing test. But in effect, that is what it used. Elias's J decision was perfectly logical on the wording of *Bilka*, but clearly unpalatable for the Court of Appeal. Of course, the decision could readily be explained as one hostile to trade unions, and Elias's J holding may have stuck otherwise. Nonetheless, it does show the utility of a balancing test and distinguishing it from *any* notion of necessity, which is confined to the means.

It is inconceivable that in such a situation, where a relatively modest aim inevitably creates a considerable adverse impact, that the Court of Justice would adhere to the semantics of the *Bilka* test in preference to its more general principle of proportionality. The nearest case to this scenario arose *Rinke*.<sup>84</sup> Here, the requirement for some full-time work by two Council Directives<sup>85</sup> on the training of doctors, was claimed to offend the EU's general principle of (sex) equality. The Court weighed the policy (harmonising training across the EU, thus facilitating free movement of doctors, as well as better preparation to fulfil the particular function) against the discriminatory impact. Although it concluded that the Directives were justified, it showed a willingness of the Court to take this approach.<sup>86</sup>

This shows that the balancing test is distinguishable from the 'reasonably necessary' approach, in that it has some utility in addressing the gender pay gap and other discriminatory patterns. Hence the suggestion made back in 1978 by Phillips J,<sup>87</sup> and more recently by the Supreme Court<sup>88</sup> that the courts should use *both* tests would seem to be the most effective way to satisfy the policy of addressing all discrimination.

Such a dual approach ought to have jarred Lord Nicholls's reasoning in *Barry v Midland Bank*,<sup>89</sup> especially when scrutinising a scheme under a 'fundamental' rule of EU law, such as sex discrimination.<sup>90</sup> When invoking the 'substitution' rule, Lord Nicholls speculated that the claimant's suggested alternative (of severance payments calculated by hours worked) would be more discriminatory, as women were more likely to have worked fewer hours over the same time period.<sup>91</sup> Yet, although Lord Nicholls recited a balancing test, in deference to the substitution rule he failed to apply it. Had he done so, he may have considered that the discriminatory impact of the Bank's scheme outweighed its aims (of compensation for loss of job and rewarding loyalty). As such, he may have asked the (well-resourced multi-national) bank to calculate and compare the adverse impact of alternative aims, such as paring down to original aim to a reward of loyalty calculated on the length of service.

*A UK referral to the Court of Justice?*

The only referral close to the matter came back in 1999, which provided a similar narrative of a domestic court diluting the EU guidance. The case was distinguishable as it concerned a social policy justification where the Court of Justice can provide defendants with some leeway. A social policy justification is used normally by Governments defending a domestic measure against superior EU discrimination law. Where a defence is based on social policy, the *Bilka* test is modified. Defendants must still show that the practice reflects a necessary aim of its social policy and is suitable and necessary for achieving that aim, but at the same time, they are afforded a broad margin of discretion in choosing the appropriate means to achieve that policy. In *R v Secretary of State for Employment, ex p Seymour-Smith*,<sup>92</sup> the extension of the qualification period for Unfair Dismissal rights from one to two years was challenged as indirectly discriminating against women, who are more transient in the workforce.<sup>93</sup> Upon referral from the House of Lords, the Court of Justice recited the *Bilka* test and the margin of discretion, but added, with an allusion to the defence proffered by the Government, the margin of discretion is not so broad to have the effect of frustrating the implementation of the fundamental principle of equal treatment: ‘Mere generalisations ... are not enough’.<sup>94</sup>

The Government’s argument was that the legislation would encourage recruitment, although it offered no evidence that, after six years, it had made any impact. Upon return, the House of Lords held that the Government had justified the legislation. Lord Nicholls cited the Court of Justice ruling on the margin of discretion, but omitted its reference to *Bilka*, necessity, and the counsel against ‘mere generalisations’. This selective interpretation was enough for Lord Nicholls to conclude that the burden on the Government was not ‘as heavy as previously thought.’<sup>95</sup> Read as a whole the ECJ’s judgment clearly envisaged that the measure must be ‘necessary’ to achieve an aim.<sup>96</sup> Even on Lord Nicholls’s less stringent test, the decision was surprising. After all, the Government offered no evidence to support its assertion of increasing employment. The decision might be explained by the marginal adverse effect of the legislation (about eight per cent less women than men qualified for unfair dismissal rights). But on a national scale, it meant that for no good reason, for some fourteen years, hundreds of thousands of British women worked without the protection of Unfair Dismissal rights. Of course, the ultimate beneficiary in this case was not the defendant (the UK Government), as there was no evidence of improved employment nationally, but Britain’s employers, who were given more leeway to dismiss more conveniently and cheaply, a process already proven to adversely affect women.

Although this was not a singular employment case where an unabated *Bilka* test should apply, the signal sent out by Lord Nicholls’s judgment chimed with the diluted approach already growing in the British courts.

## Conclusion

As well as preserving the fiction of compliance, this language of compromise puts an unnecessary judicial gloss on the statutory words and Court of Justice jurisprudence. ‘Proportionate’ and ‘necessary’ do not mean *nearly* proportionate, or *reasonably* necessary. A strict approach does not mean that businesses would be forced to spend great sums for a marginal reduction in a discriminatory impact: economic reasons are acceptable as a legitimate aim.<sup>97</sup> These cases demonstrate that the British judiciary’s interpretation of the notion of objective justification falls short of principle, policy, and the overriding EU jurisprudence. They also show an unexplained makeshift (and not very adept) sleight of language employed to disguise this.

The American ‘banding’ and Alternative Practice cases, in addition to *Enderby*, demonstrate that even marginal or subtle adjustments can make a significant impact in reducing discrimination, without damaging the employer’s business. The British approach at best rules out all but ‘fairly obvious alternatives’.<sup>98</sup> At its worst it happily speculates over the employer’s aims to find a justification, and steadfastly refuses to interfere with them should that produce a less discriminatory alternative. The only adventurous decision here was to give the otherwise permissive *Hampson* balancing test its full potential against a trade union,<sup>99</sup> raising suspicions that employer’s costs or inconvenience are weighing heavily in the court’s thinking, if not their expressions.

Despite dicta to the contrary,<sup>100</sup> it is arguable that cases such as *Benson*, *Barry*,<sup>101</sup> *Harrod* and *Enderby* (in the EAT), as well as *Seymour-Smith*, were in fact decided on a notion of reasonableness rather than proportionality. If allowed to carry on this way post-Brexit, there is a danger of the courts drifting past the already-loose boundaries expressed and assuming the ‘band of reasonable responses’ test from unfair dismissal, in line with the common law tradition of *Wednesbury* reasonableness,<sup>102</sup> rather than the civil law practice of proportionality.

Within the remaining time that the UK maintains EU membership, there is a remote possibility of a reference to Luxembourg, where the Court of Justice could restate in forthright terms the formula directed at these shortfalls. As *Seymour-Smith* demonstrated, even forthright terms may not be enough. Further, this possibility depends upon the fortune of a suitable case arriving in the courts, and the wilfully blinkered judiciary making a referral. In any case, assuming the European Union (Withdrawal) Bill, when enacted, ousts the Luxembourg jurisdiction, this cannot occur post-Brexit.

Given that one cannot rely on reference to the Luxembourg Court even pre-Brexit, one solution would seem to be a codicil to the Bill that its interpretation should continue post-Brexit to follow that provided by the Court of Justice. But that would be relying on the chance that the matter comes before the Court (from another member state) to be addressed directly, which is unlikely once references to the Court from the UK cease. It would also be a heresy to the Brexiteers championing the return of ‘judicial sovereignty’. More obviously, the existing British legislation, in particular the Equality Act 2010, section 19, requires redrafting, with *both* aspects (*Hampson* and *Bilka*) of the justification defence included as mandatory steps in the process. The requirement of *strict* necessity should be included, and a procedural requirement that the ‘legitimate aims can only be those pleaded by the defendant.

Short of such specific legislative amendments, the Bill should contain a rule of interpretation mandating a liberal and purposive approach, which happens to coincide with Luxembourg practice, but which is not unknown to the common law.

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<sup>1</sup> HC Bill (2017-2019). Progress of the Bill and all its documents can be found here < <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html> > accessed 13 July 2017.

<sup>2</sup> *ibid*, clause 3.

<sup>3</sup> See e.g. HC Deb 29 March 2017, vol 624, cols 252-253; HM Government *The United Kingdom’s exit from and new partnership with the European Union* (White Paper, Cm 9417, 2017) pp 9 (‘acquis’), 31-33 (workers’ rights), 13 (jurisdiction).

<sup>4</sup> Case 170/84 *Bilka-Kaufhaus v Weber von Hartz* [1984] ECR 1607, para 36.

<sup>5</sup> See the *Cassis de Dijon* case, C-120/78 (*Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*) [1979] ECR 649.

<sup>6</sup> 401 US 424 (1971).

<sup>7</sup> See e.g. *Griggs v Duke Power* 401 US 424 (US Sup Ct, 1971).

<sup>8</sup> See e.g. *Enderby v Frenchay HA* Case C-127/92, [1994] ICR 112.

<sup>9</sup> See e.g., P Caldwell, ‘Reaffirming the disproportionate effects standard liability in Title VII Litigation’ 46 U Pitt L Rev 555 (1985); S Greenberger, ‘A Productivity approach to Disparate Impact and the Civil Rights Act of 1991’ 72 Oregon Law Rev 253 (1993). Cf R. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge: Harvard University Press 1992), esp pp 226-229.

<sup>10</sup> 401 US 424 (1971) 431.

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- <sup>11</sup> See now, Civil Rights Act 1991, s 703(K)(1)(A); 42 USC 2000e-2.
- <sup>12</sup> See the controversial 5-4 holding by the US Supreme Court in *Ricci v DeStefano* 557 US 557 (2009), where test results were abandoned because of their discriminatory impact on minorities; this was direct discrimination against the now-disfavoured whites.
- <sup>13</sup> *Officers for Justice v San Francisco* 979 F 2d 721 (9<sup>th</sup> Cir, 1992) 723-724.
- <sup>14</sup> *Chicago Firefighters Local 2 v City of Chicago* 249 F 3d 649 (7<sup>th</sup> Cir, 2001) 656.
- <sup>15</sup> Since recognised in the Civil Rights Act 1991, s 105; codified as 42 USC s 2000e-2(k)(1)(ii).
- <sup>16</sup> 422 US 405 (1975).
- <sup>17</sup> *ibid*, 425 citing *McDonnell Douglas Corp v Green* 411 US 792, 802 (Sup Ct, 1973).
- <sup>18</sup> See e.g. *Allen v City of Chicago* 351 F 3d 306 (7<sup>th</sup> Cir, 2003).
- <sup>19</sup> 933 F 2d 1140 (2<sup>nd</sup> Cir 1991).
- <sup>20</sup> *ibid*, 1145 and 1148.
- <sup>21</sup> See e.g. Council Directive 2000/43/EC, art 2(2)(b).
- <sup>22</sup> Case 170/84, [1984] ECR 1607 para 36. See also [1986] CMLR 701; [1987] ICR 110.
- <sup>23</sup> Some reports translate this passage as ‘the measures chosen ... correspond to a real need ...’. See the official transcript (< curia.europa.eu/juris >) and [1986] IRLR 317. Presumably, ‘genuine’ and ‘real’, and ‘measures’ and ‘means’, are interchangeable terms in this context.
- <sup>24</sup> EA 2010, s 19(2)(d).
- <sup>25</sup> Explanatory Note to EA 2010, para 81.
- <sup>26</sup> In a case predating *Bilka*, Browne-Wilkinson J reasoned that EU law outlawed only *intentional* indirect discrimination: *Jenkins v Kingsgate* [1981] ICR 715 (EAT) 725-727, thus suggesting that the test was subjective. It has since been held to be objective, allowing ‘after-the-event’ justifications: Joined Cases C-4/02 and C-5/02 *Schönheit v Stadt Frankfurt am Main* [2006] CMLR 51, paras 86–87. But see the caution in *Ministry of Defence v O’Brien* [2013] UKSC 6, [48] (Lord Hope and Baroness Hale): ‘in this as in any other human rights context, this court is likely to treat with greater respect a justification for a policy which was carefully thought through by reference to the relevant principles at the time when it was adopted...’
- <sup>27</sup> SDA 1975, s.1(1)(b); RRA 1976, s1(1)(b).
- <sup>28</sup> [1978] ICR 181 (EAT).
- <sup>29</sup> 401 US 424 (1971). See above, text to n 000.
- <sup>30</sup> [1978] ICR 181 (EAT) 187-188.
- <sup>31</sup> [1982] ICR 661 (CA). In Parliament, the Government resisted amendments to the Sex Discrimination Bill that would have replaced ‘justifiable’ with ‘necessary’. Lord Harris stated that where a body offered reduced fares for pensioners, the policy might be justifiable, but not necessary (362 HL Deb 14 July 1975 cols 10116-17).
- <sup>32</sup> *ibid*, 670.
- <sup>33</sup> *ibid*, 668.
- <sup>34</sup> [1989] ICR 179 (CA).
- <sup>35</sup> *Hampson v Department of Education* [1989] ICR 179 (CA) 196.
- <sup>36</sup> [1999] ICR 319 (CA), affirmed on different grounds [1999] ICR 859 (HL).
- <sup>37</sup> *ibid*, 336. Emphasis supplied. The House of Lords dismissed an appeal on the basis (4-1) that the scheme did not discriminate and so did not consider justification, or (Lord Nicholls) it was justified under the principle that ‘The more serious the disparate impact ... the more cogent must be the objective justification’: [1999] ICR 859 (HL) 870-871. The principle ‘reasonably necessary’ was not discussed.
- <sup>38</sup> [1987] AC 224 (HL).
- <sup>39</sup> As had been queried by Browne-Wilkinson in *Jenkins v Kingsgate* (EAT) [1981] ICR 715 (EAT) 725-727. See n 26 above.
- <sup>40</sup> [1987] AC 224, 235-239.
- <sup>41</sup> A search of EU case law (30 June 2017), using the terms ‘reasonably necessary’ and ‘discrimination’ produced four cases, none of which concerned employment or the discrimination directives. The cases were, C-61/77; C-218/11; C-86/82 (Opinion); C-524/04 (Opinion).
- <sup>42</sup> [2013] UKSC 6. See also *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15 [23] (Baroness Hale).
- <sup>43</sup> Case C-393/10, [2012] ICR 955 [64].
- <sup>44</sup> [2013] UKSC 6 [45] (Lord Hope and Baroness Hale, writing the Court’s judgment).
- <sup>45</sup> *Cadman v Health and Safety Executive* [2004] EWCA 1317 (CA) (Maurice Kay LJ) [30]-[31]. See also, *Hardys v Lax* [2005] ICR 1565 (CA) (Pill LJ) [32];; *Ladele v Islington LB* [2010] IRLR 211 (CA) [47]-[48] (Lord Neuberger MR). For a view that it is ‘impossible’ to gauge the seriousness of the discriminatory effect under the *Hampson* test, see *British Airways v Grundy (No 2)* [2008] IRLR 815 (CA), [4] (Sedley LJ).
- <sup>46</sup> *Kapenova v Department of Health* [2014] ICR 884 (EAT) [83].
- <sup>47</sup> *Hardys v Lax* [2005] ICR 1565 (CA) (Pill LJ) [31]-[32].
- <sup>48</sup> *Allonby v Accrington and Rossendale College* [2001] ICR 1189 (CA), [28].
- <sup>49</sup> *Hardys v Lax* [2005] ICR 1565 (CA) [32].

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<sup>50</sup> [2004] EWCA 1317 (CA) [31].

<sup>51</sup> [1978] ICR 181 (EAT).

<sup>52</sup> [1978] IRLR 525 (IT).

<sup>53</sup> *ibid* [29].

<sup>54</sup> Case C-127/92, [1994] ICR 112.

<sup>55</sup> [1991] ICR 382.

<sup>56</sup> Case C-127/92, [1994] ICR 112, para 27.

<sup>57</sup> [1984] ECR 1607, para 36. See also [1986] CMLR 701; [1987] ICR 110.

<sup>58</sup> [1997] ICR 192 (EAT); [1999] ICR 319 (CA); [1999] ICR 859 (HL).

<sup>59</sup> *ibid*, 872.

<sup>60</sup> [2012] ICR 627 (EAT). See also *Chief Constable of West Midlands Police v Blackburn* [2008] ICR 505 (EAT) (Elias J).

<sup>61</sup> Cavanagh QC, as counsel in *Harrod v Chief Constable of West Midlands Police* [2017] EWCA 191, cited [25].

<sup>62</sup> [2012] ICR 627 [34].

<sup>63</sup> *ibid* [39].

<sup>64</sup> [2017] EWCA 191.

<sup>65</sup> SI 1987/257.

<sup>66</sup> Cited [2015] ICR 1311 (EAT) [37].

<sup>67</sup> [2015] ICR 1311 [46].

<sup>68</sup> [2012] ICR 627 [33].

<sup>69</sup> *Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] ICR 1348 [37].

<sup>70</sup> *Land Registry v Benson* [2012] ICR 627 (EAT) [36], citing *Pulham v Barking and Dagenham LBC* [2010] ICR 133 (EAT) [15]. Cited with approval by Bean LJ, *Harrod v Chief Constable of West Midlands Police* [2017] EWCA 191, cited [26].

<sup>71</sup> *ibid Pulham* [2010] ICR 133 (EAT) [15].

<sup>72</sup> [2015] ICR 1311 [9].

<sup>73</sup> [2017] EWCA 191 [44].

<sup>74</sup> *ibid* [38].

<sup>75</sup> *ibid* [30].

<sup>76</sup> [2012] ICR 627 (EAT) [34].

<sup>77</sup> In *Barry v Midland Bank* [1999] ICR 859 (HL) 870, Lord Nicholls assumed the *Bilka* test to mean, ‘The more serious the disparate impact on women ..., the more cogent must be the objective justification’,<sup>77</sup> thus conflating *Bilka* and *Hampson*. When *Barry* was in the Court of Appeal, Gibson LJ assumed that *Hampson* and ‘reasonably necessary’ both correctly reflected the *Bilka* test: [1999] ICR 319 (CA) [43]. The most direct of these opinions came from Gage LJ in *Hardys v Lax* [2005] ICR 1565 (CA) [59], ‘In my view the reasonably necessary test is much the same as a test of proportionality and rather different to a margin of appreciation.’ See also *Benson* [2012] ICR 627 (EAT) [37] (Underhill J); *Harrod v Chief Constable of West Midlands Police* [2015] ICR 1311 (EAT) [34] (Langstaff J); *British Airways Plc v Grundy* [2008] EWCA Civ 875 [28] (Sedley LJ); *Allonby v Accrington and Rossendale College* [2001] ICR 1189 (CA), [27]-[28] (Sedley LJ).

<sup>78</sup> [2008] EWCA Civ 810.

<sup>79</sup> The ET rejected a direct discrimination claim on the basis that the ‘reason why’ was ‘was not the genders of the people in those groups. It was an attempt to keep the peace and to appear to as many people as possible to have done a “good job” as a Union in representing the interests of all members’ (para 3.181, cited [2007] IRLR 752 (EAT), [25]). Surely this should have been appealed, as it is no defence to treat a protected group less favourably to placate others: see e.g. *James v Eastleigh BC* [1990] 2 AC 751 (HL); *R v CRE ex parte Westminster City Council* [1985] ICR 827 (CA); and for a virtually identical situation in the context of race, see the US case, *Goodman v Lukens Steel* 482 US 656 (Sup Ct, 1987).

<sup>80</sup> [2007] IRLR 752 [18]-[19].

<sup>81</sup> *ibid* [83].

<sup>82</sup> See e.g. *Barry v Midland Bank* [1999] ICR 859 (HL); *Land Registry v Benson* [2012] ICR 627 (EAT); *Chief Constable of West Midlands v Blackburn* [2008] ICR 505 (EAT); *Harrod v Chief Constable of West Midlands Police* [2015] ICR 1311 (EAT), all discussed above, p 000 et al.

<sup>83</sup> [2008] EWCA Civ 810 [33].

<sup>84</sup> Case C-25/02 *Rinke v Ärztekammer Hamburg* [2003] ECR I-8349.

<sup>85</sup> Council Directives 86/457 and 93/16.

<sup>86</sup> Case C-25/02, paras 37-38.

<sup>87</sup> *Steel v Union of Post Office Workers* [1978] ICR 181 (EAT) 187-188.

<sup>88</sup> *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15 (Baroness Hale) [19], [24] and the cases cited within.

<sup>89</sup> [1999] ICR 859 (HL). See above, text to n000.

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<sup>90</sup> See e.g. Joined Cases C-4/02 and C-5/02 *Schönheit v Stadt Frankfurt am Main* [2006] 1 CMLR 51 [85] and the cases cited therein.

<sup>91</sup> *ibid*, 871. See also [1999] ICR 319 (CA) 329-330 (Peter Gibson LJ).

<sup>92</sup> Case C-167/97, [1999] ICR 447.

<sup>93</sup> It was reduced to one year in 1999 (SI 1999/1436), and restored to two years in 2015 (SI 2012/989).

<sup>94</sup> Case C-167/97, paras 69-77.

<sup>95</sup> [2000] ICR 244, 261

<sup>96</sup> See e.g. Case C-167/97, [1999] ICR 447, para 65.

<sup>97</sup> See e.g. *Bilka* Case 170/84, [1984] ECR 1607, para 36.

<sup>98</sup> *Allonby v Accrington and Rossendale College* [2001] ICR 1189 (CA), [28].

<sup>99</sup> *Allen v GMB* [2008] EWCA Civ 810.

<sup>100</sup> *Hardys v Lax* [2005] ICR 1565 (CA) (Pill LJ) [31]-[32].

<sup>101</sup> Assuming a prima facie case were established. The House of Lords (4-1) reversed the Court of Appeal on this point.

<sup>102</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).